



EMPLOYMENT TRIBUNALS

Claimant: Ms I Eneli

Respondent: MIDSHIRES CARE LTD T/A HELPING HANDS HOME CARE

Heard at: in public in the Central London Tribunal

On: 10 November 2023

Before: Employment Judge Woodhead (sitting alone)

Appearances

For the Claimant: Mr Leonard Ogilvy, (Legal Consultant)

For the Respondent: Ms C Jennings (Counsel)

JUDGMENT

The complaints of direct race discrimination (Equality Act 2010 Section 13) and victimisation (Equality Act 2010 Section 27) were not presented within the applicable time limit. It is not just and equitable to extend the time limit. The claim is therefore dismissed.

THE ISSUES

1. The Claimant was employed by the Respondent, as a Branch Care Manager, from 14 July 2021.
2. The Respondent said that it dismissed the Claimant (acting through Mr Matt Bristow - Regional Care Director) with immediate effect on 11 January 2023 at an in person meeting in a meeting room at the Premier Inn at London Victoria on 11 January 2023 (“**the Meeting**”) and that this was confirmed in writing in an email attaching a letter to that effect the same day (“**the Email**” and “**the Letter**” respectively).
3. It was not in dispute that the Respondent paid the Claimant in lieu of her period of notice.
4. The Claimant did not dispute that the Meeting took place but denied that she was dismissed at it (with or without notice). The Claimant therefore disputed 11 January 2023 as the effective date of termination of her employment and said that her employment ended either:
 - 4.1 on 12 January 2023 (when she said she saw the Email and Letter); or
 - 4.2 at the end of her notice period (she argued that there was no contractual right for the Respondent to pay her in lieu of notice).
5. Early conciliation was concluded in a single day on 11 April 2023 (i.e. the day on which date ACAS received notice and issued a certificate). The claim form was presented on 9 May 2023.
6. The Claimant brought complaints of direct race discrimination and victimisation (sections 13 and 27 of the Equality Act 2020 (the “**EqA**”) respectively) concluding with her dismissal.
7. The issues to be determined in the case were agreed at a preliminary hearing with Employment Judge Adkin on 23 August 2023. He also listed the claim for this public in person preliminary hearing of three hours to determine:
 - 7.1 Whether or not the claim was presented out of time.
 - 7.2 If the claim was presented out of time, whether it would be “just and equitable” to extend time pursuant to section 123 of the EqA.
8. If the effective date of termination of the Claimant’s employment was 11 January 2023 then:
 - 8.1 The last day to initiate early conciliation would have been 10 April 2023;
 - 8.2 As the Claimant did not initiate early conciliation until 11 April 2023 the ordinary time limit for bringing the Claim would not have been extended and would have expired on 10 April 2023.
 - 8.3 The claim form was not presented until 9 May 2023 (28 days later) so the

next questions would be:

- 8.3.1 Why were the complaints not made to the Tribunal in time?
 - 8.3.2 In any event, is it just and equitable in all the circumstances to extend time?
9. If the effective date of termination of the Claimant's employment was 12 January 2023 (or some later date) then the last day for starting ACAS early conciliation would be the day on which the Claimant did in fact contact ACAS for that purpose (or some later date), the deadline for bringing the claim would be extended and the Claim would be brought in the normal permitted time limit under the EqA.

THE HEARING

10. At the hearing I was provided with:
- 10.1 Written submissions/skeleton arguments for the Respondent and the Claimant;
 - 10.2 A witness statement from the Claimant;
 - 10.3 A witness statement of Mr M Bristow (Regional Care Director for the Respondent and the dismissing manager);
 - 10.4 A bundle of documents running to 100 pages.
11. The Claimant said that Mr Bristow's statement had been sent after the date ordered for exchange of witness statements and that exchanged had not been mutual. The Claimant said that I should not admit the statement.
12. EJ Adkin's case management orders provided:
- 21. The claimant and the respondent should prepare witness statements for use at the public preliminary hearing, dealing with whether or not the claim is of time and if so whether it is just and equitable to extend time. The claimant should include the date on which she first met and first instructed the solicitors currently acting for her.*
 - 22. Witnesses will not be allowed to add to their statements unless the Tribunal agrees.*
 - 23. Witness statements should be typed. They must have paragraph numbers and page numbers. They must set out events, usually in the order they happened. If the witness statement refers to a document in the file it should give the page number.*
 - 24. At the hearing, the Employment Judge will read the witness statements. Witnesses may be asked questions about their statements by the other side and the Tribunal.*

25. The claimant and the respondent must send each other copies of all their witness statements by 20 October 2023.

13. The Respondent said that Mr Bristow's evidence should be allowed in the interests of justice and that the statement had not originally been prepared because at the August preliminary hearing the Respondent's understanding had been that the Claimant's position was that she said she was only dismissed when she got the Email and Letter. The Respondent did not understand that the Claimant argued that the Letter was not effective in bringing her employment to an end until she saw it on 12 January 2023. On its original understanding the Respondent said it would not have needed to call Mr Bristow because it understood that there was only a dispute as to the law (and not as to the facts).
14. I concluded that it was in the interests of justice to admit Mr Bristow's witness statement in those circumstances and I did not consider that the Claimant was prejudiced by that because her representative was given the opportunity to elicit further evidence in chief on points raised by Mr Bristow's statement which the Claimant wanted to answer.
15. I therefore heard evidence and cross examination of the Claimant and Mr Bristow. Each party, through their representatives, was able to sum up their case.
16. There was insufficient time for me to reach a decision in the hearing window and so I explained that I would reserve my decision and issue full written reasons to the parties.
17. With the consent of the parties I listed the case for a full merits hearing **on 24 to 26 April 2024** but on the understanding that if I found that the claim had been brought out of time and that it was not just and equitable to extend time then those dates would be vacated.

THE LAW

18. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.
19. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.
20. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).
21. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in ***Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23***, the best approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will

include the length of and reasons for the delay, but might, depending on the circumstances, include some or all of the suggested list from the case of **British Coal Corporation v Keeble [1997] IRLR 36** set out below, as well as other potentially relevant factors:

- 21.1 The extent to which the cogency of the evidence is likely to be affected by the delay.
 - 21.2 The extent to which the party sued had co-operated with any requests for information.
 - 21.3 The promptness with which the Claimant acted once they knew of the possibility of taking action.
 - 21.4 The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action
22. It is for the Claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the rule (**Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576**).
 23. The potential merits of the claim may well be a factor that falls to be considered (**Kumari v Greater Manchester Mental Health Foundation Trust [2022] EAT 132**) although care needs to be taken not to conflate the determination of a time point and the application of the just and equitable test with the tests to be applied when considering an application for a strike out or a deposit order under the tribunal rules.
 24. In **Owen v Network Rail Infrastructure Ltd [2023] EAT 106**, HHJ Auerbach held that when considering whether to grant a just and equitable extension of time in relation to Equality Act 2010 complaints it would be an error of law, if no explanation or reason for the late submission of the tribunal claim could be found in the evidence, to necessarily find that an extension of time should be refused. A failure to explain or give a reason for late submission is a relevant factor, but not necessarily decisive. It is a matter to be weighed in the balance.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

25. Having considered all the evidence, I find the following facts on a balance of probabilities.
26. The parties will note that not all the matters that they told me about are recorded in my findings of fact. That is because I have limited them to points that are relevant to the legal issues.
27. The Claimant's contract of employment provides (page 51 of the bundle):

Notice

Within the first 12 weeks of your employment both the Company and you may terminate your employment with 1 weeks' notice.

Following the first 12 weeks of your employment;

You are required to give the Company one months' notice to terminate your employment.

You are entitled to receive the following periods of notice from the Company:

- Under four years' service - one month.

- Over four years' continuous service - one week for each complete year of service to a maximum of 12 weeks after 12 years.

By mutual agreement, these notice periods may be waived.

The Company has the right to terminate your employment without notice or payment in lieu of notice if you commit an act of gross misconduct.

The Company reserves the right to require you not to carry out your duties or attend your place of work during the period of notice.

Where you have served the company with notice to terminate your employment, the company reserves the right to require you to take all or any part of any remaining accrued untaken holiday leave to which you are entitled during the notice period, the company will provide you with notice of twice the length of the leave period you are required to take in this circumstance.

At the absolute discretion of the Company, payment in lieu of working notice may be made.

28. In light of the final paragraph quoted I find that the Respondent had the contractual right to terminate the Claimant's employment summarily and to pay her in lieu of her notice period.
29. The Email, sent to the Claimant's personal email address by Mr Bristow (bundle page 88) reads "*Dear Ify, Please find attached a letter confirming our conversation today, Yours sincerely*". The subject of the Email is: "*Short Service Dismissal*".
30. The Letter attached to the Email (bundle page 89) reads:

Further to the meeting held on 11/01/2023 to discuss my concerns over your leadership, in particular your performance in Kensington and Chelsea, I am writing to confirm the decision to terminate your contract with immediate effect.

As detailed in your contract, during the first 24 months of your continuous service, the business may terminate your employment without recourse, either in full or part, to the Disciplinary or Appeal Procedures.

Any monies owing to you will be paid in the normal pay cycle and your p45 will be issued as soon as possible.

If you have any company property (e.g. ID badge, customer/company documents, phones, laptops, PPE) you must return them to us in good condition no later than 13th January 2023. We will hold you liable for the full replacement cost of any property supplied to you but not returned by the above date and may make a deduction from your final payment in respect of it.

You are reminded of the very important obligations in respect of confidentiality and post termination activities set out in your contract of employment.

31. The Letter does not reference payment in lieu of notice but it is clear that termination is with immediate effect.
32. The key paragraph in the Claimant's witness statement as regards the meeting on 11 January 2023 says:

29. I asked Matt out right what the purpose of the meeting was and he kept saying he does not think I was the right person for the branch, but would not go any further.

33. Mr Bristow said:

12. I verbally informed the Claimant that I had made the decision to terminate her employment with immediate effect. I explained to the Claimant that I had lost trust and confidence in her as a branch manager and that the performance of the branch has been unacceptable. I confirmed to the Claimant that she would be paid her four weeks' notice and any outstanding holiday pay. I explained the follow up actions that were expected of the Claimant following her dismissal, i.e. returning company property by the end of the week, filing appropriate forms and receipts for company expenses and unregistering her account for the Kensington and Chelsea branch.

13. The Claimant understood that she had been dismissed at this meeting and confirmed that that she had expected that this was the reason why the meeting was being held.

34. On the balance of probabilities I find that the Claimant was verbally and unequivocally dismissed with immediate effect at the Meeting on 11 January 2023 and that this was the effective date of termination of her employment:
 - 34.1 The Claimant's ET1 notes this as the date her employment ended (see box 5.1 (bundle page 9) and paragraphs 6 and 8 of the narrative (bundle page 19).
 - 34.2 The Claimant's position on the effective date of termination only changed when the Respondent raised the question of jurisdiction (time limits).

- 34.3 The minutes of the meeting between Mr Bristow and the Claimant on 11 January 2023 detail that her dismissal was discussed (bundle pages 84-87) and I accept Mr Bristow's explanation that the reason those notes are dated 4 January 2023 is that they were prepared in advance as a script of what Mr Bristow planned to discuss and, subject to the Claimant persuading him otherwise, the message he intended to convey. The significance of 4 January 2023 is that is the day on which the meeting had originally been due to take place. These notes document that dismissal was with immediate effect and notice would be paid in lieu (bundle page 87).
- 34.4 I accept the Respondent's evidence that the Claimant left work immediately after this meeting, having been told of her dismissal, that she did not return and that she then that afternoon (11 January 2023) arranged for collection of her work items which were collected the following day on 12 January 2023 (bundle pages 91-93). I accept the Respondent's submission that it is unlikely that the Claimant would have made those arrangement and that her laptop would have been collected on 12 January 2023 (bundle page 93) had she only found out about her dismissal on the morning of 12 January 2023 and had she only then arranged for collection.
- 34.5 The Email indicates that the Claimant was dismissed verbally at the Meeting.
- 34.6 The dismissal letter was sent on the afternoon of the meeting at which the Respondent notified the Claimant of her dismissal;
- 34.7 Mr Bristow emailed the Respondent's HR team following the meeting on 11 January 2023 to inform them of the Claimant's dismissal and asked that she be processed as a leaver (bundle page 90).
- 34.8 The employee leaver request form for the Claimant confirmed her dismissal date of 11 January 2023 (bundle page 91).
- 34.9 I did not find the Claimant's account of the meeting on 11 January 2023 probable in light of the other evidence.
35. In light of these findings I have needed to consider:
- 35.1 Why were the complaints not made to the Tribunal in time?
- 35.2 In any event, is it just and equitable in all the circumstances to extend time?
36. The Claimant produced a four page witness statement. The paragraphs which are of central relevance say as follows:
- 30. On 12th January when I got up that morning I noticed I had an email from Matt Bristow on my personal email with the subject Short Service Dismissal.*
- 31. I immediately had an anxiety attack and became very light headed and*

distressed. I could not believe what I was seeing and became a bit disoriented.

32. I immediately thought of my work colleagues, my clients and all the plans I had in the pipeline for the branch. My team and I had been planning a belated Christmas / New Year party for the care workers to thank them for all their efforts and dedication through the year.

33. Then I thought of the cost of living and economic downturn and really got stressed out thinking of how I would pay my rent and bills as well as support my family members that depended on me financially.

34. I was so upset and felt so humiliated that I cried and cried for almost two hours. I had to take some Kalms tablets and paracetamol to settle me down.

35. I felt it was so unfair to be treated in this way, the injustice of it all was really too much to bear. I had done nothing wrong and had given my all to the job sometimes putting my health and wellbeing at risk.

36. The days and months that followed were just unbearable; I would have anxiety attacks and palpitations, my blood pressure readings were always high especially when I tried going online job hunting.

37. I would sleep for 16 hours at a time. I lost all motivation and would not get out of bed for days. Finally, I went to my GP and was diagnosed as depressed and put on medication.

38. I could not believe that a company that had not only shown me this level of covert and overt racism and disregard could also blatantly cause me intentional pain and suffering.

39. No day goes by since when I do not think of how I was treated and get a sinking feeling in my chest.

40. This whole traumatic experience has changed me irrevocably as a human being where my confidence has been shot and I am no longer trusting. I do feel like I have been unduly traumatised and have lost my confidence.

37. The Claimant did not provide any medical evidence to support these assertions and did not expressly cite them as a reason for her delay in bringing her claim.
38. The Claimant's representative did not make any material submissions on the reasons for delay in the submission of the Claim or the question of just and equitable extension. He focused in part on circumstances where there is a question of whether there is a continuing course of conduct. That was a misplaced focus in this claim because the dismissal was the last act complained of and the claim was not therefore brought in time by any subsequent alleged discriminatory treatment that might be considered a continuing course of conduct.

39. Although no substantive reasons for the delay were advanced I have nonetheless given the question of whether to grant a just and equitable extension full consideration taking into account the case authorities cited above. I do not consider it just and equitable to extend time and central to this are the following:
- 39.1 The delay in presenting the claim was relatively long (albeit clearly there is no question here about the cogency of the evidence being affected by the delay);
- 39.2 The Claimant confirmed in cross examination that she had first had legal advice in March 2023.
40. The Tribunal does not therefore have jurisdiction to hear the claim and it is dismissed.
41. The full merits hearing listed for **24 to 26 April 2024** shall be vacated.

Employment Judge Woodhead

Date 8 December 2023

Sent to the parties on:

13/12/2023

For the Tribunals Office

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