EMPLOYMENT TRIBUNALS

Claimant: **Mrs P Setlhoke**

Respondent: **Aquarius Nursing Home Ltd**

Heard at: **Exeter by video** **On:** **3 October 2023**

Before: **Employment Judge Smail**

Representation
Claimant: **Mr J Nthini, Lay Representative**
Respondent: **Ms L Whittington, Counsel**

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a Preliminary Hearing designed to explore whether it is possible to extend time for the presentation of these claims. Alternatively, the respondent also applies for a deposit on the merits, if the case goes forward. The simplest thing is to address directly the issue of time limits, first. The claimant was employed by the respondent as a nurse at one of its nursing homes. Her length of service is 9 October 2017 – 15 January 2021, some three and a quarter years. She was dismissed for gross misconduct on 15 January 2021. The claim form was presented two years two months afterwards on 19 March 2023. The ACAS dates were 17 February 2022 – 20 February 2023. Plainly, the claims are presented out of time; is it possible for the Tribunal to extend time?

Factual Background

2. The claimant was subject to a substantial disciplinary event culminating in the dismissal letter of 15 January 2021. There were six issues in the dismissal letter signed by the director, Rohan Hoodha, which is nine pages in length. The first issue resulted in a written warning. The allegation was that the claimant failed to follow the Falls protocol. A resident fell on the floor. It was said that the claimant did not check the resident while they were on the floor despite that being part of protocol. The claimant did not appropriately assess

the resident while they were in their chair despite protocol dictating regular observation following a fall. A carer had to call to say that the resident was bleeding from her leg, indicating that a full medical assessment had not been completed as required in the protocol, which was not completed by the claimant. The claimant had not checked the residents sufficiently or in accordance with the guidance of the falls protocol, it was found Failure to inform the family additionally, who hold power of attorney for health and welfare at the time of the incident, indicating that a duty had not been followed. The claimant states she gave medication to the resident, however, there was no documentation to confirm this. A written warning was issued.

3. Secondly, it was said that the claimant had slept on duty. No further action would be taken in respect of that allegation which was not proved.

4. The third issue was breaching the service user privacy policy, a written warning was issued in respect of that. The summary of the allegation was that as a result of an investigation which was forwarded to the safeguarding team, the claimant admitted that she took her breaks in residents' rooms, which raised concerns with them. The claimant was alleged to go into a resident's room to rest on a break, or sleep, and that was a breach of a resident's privacy. The claimant alleges that she was caring for distressed residents helping to alleviate their concerns, but there was no corresponding documentation to verify that she was doing that. Calming an agitated resident or providing them with clinical support falls under care which needs to be documented. Given this, if she was not providing care then she was using a resident's room for rest, which was inappropriate.

5. Lack of documentation issued for written warning. The summary of the allegation was that this was largely in relation to the lack of documentation associated with the fall. The issues with the allegation do overlap but they are to be addressed separately as this is a separate concern.

6. On the night of the relevant fall, it was alleged that the claimant failed to document the falls protocol adequately. Furthermore, paracetamol was administered but not documented on the relevant sheet. Even following the fall, someone requested that the claimant write a full and formal response about the incident as well as complete a reflective practice for the error. The claimant did not do that despite having a professional responsibility to do so.

7. Failure to supervise care staff resulted in a verbal warning. The summary of the allegation was the claimant stated that staff were sleeping on duty. However, despite being aware that care staff were breaching these rules, no immediate action was taken by her in her capacity as nurse in charge for the shift, given that sleeping on duty was a breach of duty of care and was putting residents at risk of harm, the matter was investigated in detail.

8. The next issue resulted in the summary dismissal of the claimant. Essentially, the allegation was that the claimant, as the nurse in charge, knew that a carer routinely came to work intoxicated and/or smelling of alcohol while the claimant was the nurse on night duty. In that capacity it was her duty to ensure the health and wellbeing of the residents. She took no action to report the relevant carer. That was said to be a matter of gross misconduct.

A serious breach of health and safety rules and she was dismissed summarily from 15 January 2021.

9. No one doubts the distressing impact that event will have had on the claimant. The claimant was sponsored for the purposes of immigration; having lost that job her immigration status was at risk. It seems that within three months of that dismissal, the claimant with the assistance of the Royal College of Nursing, managed first to protect her immigration status by obtaining sponsorship elsewhere, and secondly getting a job. What the claimant did not do was put in a claim to the Employment Tribunal. The claimant was represented at the disciplinary hearing and at all material times by the Royal College of Nursing which is of course the trade union for nurses.

10. The respondent submits with force that if had been desired to consider putting in a claim to the Employment Tribunal it was reasonably feasible that with the assistance or advice of the RCN such a claim could be brought. The claimant tells me that she did not ask at that time whether she could bring a claim in respect of her dismissal. Her focus, she tells, me was on her immigration status and getting an alternative job. That of course is a perfectly laudable aim and a sensible thing to do but it does not preclude bringing a claim to the Employment Tribunal at the same time.

11. The claimant was referred to the NMC for disciplinary purposes. She was assisted from October 2021 by Mr Nthini who was a lay representative. He was also assisting her today. She had conditions on her practice in place prior to the NMC hearing, restrictive ones, and with Mr Nthini's help those conditions were removed. The claimant is now able to practise as a nurse unhindered by any restrictions. No doubt she owes Mr Nthini a debt of gratitude for that.

12. The case before me today is that it was not until the exhaustion of the NMC process that the claimant, assisted by Mr Nthini, felt able to present a claim to the Employment Tribunal. They did that in March 2023, the outcome of the NMC was November 2022.

13. Mr Nthini relies heavily on a passage of cross examination undertaken by him of the respondent's managers. The cross examination was essentially in respect of the alleged failure to follow the falls protocol. Mr Nthini obtained some answers to his questions to the effect that the respondent managers proceeded to a disciplinary in respect of this allegation rather than dealing with it as a capability, providing training to ensure that it did not happen again. He submits that that was material information encouraging him and the claimant to present a claim to the Employment Tribunal. Had a claim been presented to the Employment Tribunal in time, no doubt there would have been some arguments for the Employment Tribunal to consider such as those.

The Law

14. I have to apply the statutory tests to see if it is possible for me to extend time. Turning then to the test for unfair dismissal. This is section 111 of the Employment Rights Act 1996. By subsection (2) of that section an Employment Tribunal shall not consider a complaint under this section unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. We have to assess reasonable practicability. Guidance tells us that it means reasonably feasible. Was it feasible for the claimant to put in a claim to the Employment Tribunal within three months of 15 January 2021?

15. For discrimination claims, s.123(1) of the Equality Act 2010 provides that a claim must brought within 3 months starting with the date of the discriminatory act relied upon. A Tribunal may extend time where it is just an equitable to do so.

Discussion and Conclusions

16. It is the inevitable conclusion that I have to come to that plainly it was reasonably feasible for her to put a claim into the Employment Tribunal. She was at that time advised by the Royal College of Nursing. She does not recall being advised as to employment rights; she tells me she did not ask the question but it was certainly feasible for her to ask the question. It was perfectly possible, although I do not make a finding, that the matter was expressly discussed between her and the Royal College of Nursing. That would certainly be the usual course, but perhaps it did not happen on this occasion. The point is that it was perfectly feasible for the claimant to ask questions as to whether she could challenge legally that dismissal. She chose instead to resolve her immigration status. That did not preclude her from taking steps to challenge the dismissal, legally.

17. It is not immediately obvious to me today that she necessarily would have had a strong case in so challenging. She was dismissed for tolerating and not reporting a carer who routinely came to work intoxicated. It is not clear to me how that would be challenged in an unfair dismissal case. I see from the dismissal letter that the matter had been discussed extensively during the course of the disciplinary hearing. What is submitted to me is that Mr Nthini's effective cross examination at the NMC in respect of the first matter of the failure to follow the falls protocol perhaps being a training issue or capability issue, would mean that elsewhere within this dismissal letter the same points could be made. It is not obvious to me today how far that kind of attack would go in respect of tolerating an intoxicated colleague, but it is clear to me that it was reasonably feasible for the claimant to bring a claim within three months. There has been no smoking gun subsequently discovered of matters which were not capable of discovery at the time which might have meant that it was not reasonably practicable at the time to bring a claim; it was.

18. Turning, then, to the discrimination claim. Mr Nthini describes matters which the claimant claims to be unfavourable treatment as less favourable treatment. I asked him less favourable than whom. There is no actual comparator and he tells me his client would need the assistance of the Tribunal in formulating a hypothetical comparator. The best he could do was to say that the disciplining managers, Miss Kanjanda and Miss Reeman, as I understand it, were black Zimbabweans. The claimant is a black South African. He was suggesting that this would suggest some basis for the defining a hypothetical comparator. Again, it is not clear to me who the comparator is or how one defines the hypothetical comparator, when the reason for the dismissal was that the claimant was tolerating the presence of an intoxicated carer on her shift. I would need an example of some nurse who was responsible for some similar breach who was not the subject of a dismissal. Such comparative information is simply not put before me.

19. The first thing one has to look at is the explanation for not bringing the claim. The explanation is that the claimant did not ask, she tells me, to explore her rights in bringing the claim during the three months immediately following the dismissal. It is submitted that it was not until the outcome of the NMC and the transcript proceedings were typed up, that it was deemed sensible to bring the claim. I do not make criticism of Mr Nthini, but if the claimant wanted to bring a claim for race discrimination she would have made enquiries way earlier than March 2023 when the claim was presented. That was 2 years 2 months after the dismissal. The explanation for not bringing the claim is that the claimant tells me she did not explore her rights. One is surprised the RCN did not discuss her rights with her, if they did not, but I do not make a contradictory finding; I do make the finding that the claimant could have explored those rights at the very beginning, when she was dismissed. There is no good explanation for why the claim was not brought at the beginning. The NMC explanation does not suggest itself as a good explanation to me because what was discovered during that process does not point to race discrimination of a nature that was not arguable right at the beginning. It is not a case of a smoking gun or anything like that. In any event, the fact that the two dismissing officers were black Zimbabweans does not even point to prima facie discrimination; not when there was clear misconduct in the first place.

20. On the other side of the coin, there will be evidential prejudice to the respondent in having to deal with this matter over two years on and I accept that there was a grievance brought by the claimant at a time earlier than the dismissal suggesting possibly that we would have to go back three years already, and by the time of trial possibly four years. There will inevitably be some evidential prejudice but the primary reason I do not extend time is that there is not a good explanation for why a claim was not brought in time and it is far from clear to me that there is a strongly or indeed arguable case of race discrimination in the first place. It has been said to me that the claimant needs the Tribunal's assistance to define a hypothetical comparator. We cannot do that if there is not a prima facie case of some discrimination.

21. Whilst I am grateful for Mr Nthini's explanation today, as to why he has brought the case when he has, together with the claimant saying she awaited the outcome of the NMC documentation and its publication, before exploring her employment rights, I find that it nonetheless was for the purposes of unfair dismissal reasonably feasible to bring the claim in time. In respect of discrimination, it is not just and equitable to extend time. There is after all a time limit which is three months. There is no clear prima facie case of racial discrimination in the first place. There is no good explanation for having awaited researching employment rights for 2 years and 2 months or thereabouts, when a Union had been acting throughout the disciplinary process. The balance of prejudice favours the Respondent.

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Employment Judge Smail
Date 11 December 2023

Reasons sent to the Parties on 04 January 2024

For the Tribunal Office