EMPLOYMENT TRIBUNALS

Claimant: Mrs M Brown

Respondent: South Central Ambulance Service NHS Foundation Trust

Heard at: Southampton (in public by video) **On:** 17 and 18 April 2024

Before: Employment Judge Dawson

Appearances

For the claimant: Representing herself
For the respondent: Ms Dobbie, counsel

JUDGMENTS & ORDERS

1. It is determined that :

    1.1 Claim number 1405808/2023 presented a claim of unfair dismissal in respect of the band 8C role (Head of Research Operations).

    1.2 Claim number 1405808/2023 did not present a claim of unfair dismissal in respect of the band 8A role (Research and Clinical Audit Manager).

2. The claim of unfair dismissal in respect of the band 8C role is dismissed because it was presented out of time and the tribunal has no jurisdiction to decide it.

REASONS

The following reasons are based on the reasons delivered orally and therefore largely in the present tense.

1. At the outset of the hearing I determined, having heard submissions from both sides, that the issues which would be considered at this hearing, and the order in which they would be determined, would be as follows:

    a. whether the claimant has presented claims of unfair dismissal to the tribunal,

    b. if not, whether she should be given permission to amend the claim form to do so,

    c. if there are claims of unfair dismissal before the tribunal, whether they were presented within the correct time limit,

    d. depending on the answer to the above questions, whether, as a matter of fact, the claimant was dismissed by the respondent from the band 8C role (the respondent accepting that the claimant had been dismissed from the band 8A role).

2. I gave oral reasons for that decision and written reasons will not be provided unless either party asks for them within 14 days of this decision being sent to them. In essence I acknowledged that the previous case management order of Employment Judge Self enabled me to vary the issues which he had listed for determination and I accepted Ms Dobbie's submission that before the tribunal could embark upon a consideration of whether the claimant had been dismissed or not, it was necessary to determine that that an unfair dismissal claim (or other relevant claim) was before it.

3. The decision in relation to the application to amend is a case management order and is, therefore, contained in the accompanying Case Management Orders document.

4. The first issue to be decided is whether the claimant in claim number 1405808/2023, has brought two claims of unfair dismissal, one in respect of a dismissal on 14 March 2023 and the other in respect of a dismissal upon the termination of her fixed term contract which ended, according to the Grounds of Resistance on 30 November 2023. A very brief summary of the factual background (which is not intended to be binding on any future tribunal) is that the claimant says that she was originally employed on a band 8A basis in the Research and Clinical Audit Manager role on a three-year fixed term contract. She was employed from 4 September 2020 in that role. She says that she was then promoted to a band 8C role (Head of Research Operations) which would

have paid her £20,000 a year more. However, on 14 March 2023, the respondent purported to "pause" that band 8C role, which the claimant says amounted to a dismissal in law. The respondent says that thereafter she was employed on the band 8A role. The claimant's case is unclear at this point, she says both that she was dismissed from the band 8C role but also that she should have been paid on the basis that she was still engaged in it.

5. The claimant says that the dismissal on 14 March 2023 was a dismissal in law because she was demoted. She is relying upon the principle contained in *Hogg v Dover* [1990] ICR 39 that where an employer unilaterally imposes radically different terms on an employee that may amount to a dismissal.

6. Ms Dobbie has reminded me of the following legal principles:

    a. In *Chandhok v Tirkey* [2015] ICR 527, Langstaff J stated

    ""15. In paragraph 4 of his judgment the judge identified the Claimant's case – saying that it was that she was one of the Adivisi people – not from what was asserted in her claim, lengthy though it was, but from material which could only have come either from her witness statement (which was brief) or what he was told.

    16. I do not think that the case should have been presented to him in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in an ET1. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1".

    b. In *Adebowale v ISBAN UK Limited UKEAT/0068/15* the EAT stated ""In my judgment the construction of an ET1 is influenced by two factors: the readers for whom the ET1 is produced, and whether the drafter is legally qualified or not. The ET1, whether it is drafted by a legal representative, or by a lay person, must be readily understood, at its first reading, by the other party to the proceedings (who may or may not be legally represented), and by the EJ. The EJ is, of course, an expert, but (as this litigation shows) should not be burdened by, or expected by the parties to engage in, a disproportionately complex exercise of interpretation. The EJ has the difficult job of managing a case like this, and the EJ's task will not be made any easier if this Tribunal imposes unrealistic standards of interpretation on him or on her.""

c. In *Baker v Commissioner of Police of the Metropolis*, the EAT held "[54] In our judgment the ET correctly considered the first ET1 as a whole. It came to a conclusion which was open to it. Whilst the particulars given in the ET1 raised a recognisable case of race discrimination, the Claimant did not say that the discrimination alleged had anything to do with his learning difficulties or dyslexia. Neither did the Claimant say that any or any specific adjustments should have been made for him by reason of his disability. Accordingly whilst recognising that a technical approach to the question of whether a particular claim is raised in an ET1 is inappropriate, on the facts of this case the ET did not err in law or come to a perverse conclusion in holding that, read as a whole, the first ET1 did not include a claim of disability discrimination.".

7. The claim form of 8 November 2023 had a document attached to it which set out the grounds of the complaint. It ran to 11 pages and, I mean no discourtesy to Mrs Brown in saying, was difficult to understand. It is apparent that Mrs Brown had done a significant amount of legal research before putting together her claim form but that, in many respects, had simply obfuscated the issues. Rather than setting out, in plain and straightforward language and in a brief form what claims she was bringing, the claim form refers to a wealth of different legislation and uses legal phrases which, in context, do not make a lot of sense. At this hearing, the claimant confirmed that she only intended to bring claims of unfair dismissal in that claim form. There was no claim of deduction from wages, no claim of discrimination under the Equality Act 2010 and no claim of less favourable treatment under the Fixed–Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

8. To the extent that it is relevant, I find that the reason the claim form was presented as it was, was because of an eagerness by Mrs Brown to make sure that she covered everything she needed to rather than any desire to be awkward. Having said that, for anybody reading her claim form the task of establishing which claims were being brought was difficult.

9. The ET1 did not have the box ticked to say that the claimant was bringing a claim of unfair dismissal. Today, the claimant tells me that she ticked that box online but it did not record on the form. However it is clear that she was aware of that at the time and did nothing to clarify that, such as writing to the tribunal immediately afterwards. In those circumstances, even if what Mrs Brown says is true, I do not think it is a relevant factor. Indeed, if anything, it does the opposite of assist Mrs Brown since she knew the claim form was misleading but did nothing to correct the misleading impression.

Did the claim form present a claim of unfair dismissal in relation to the band 8C role?

10. In the course of her submissions the claimant referred me to paragraph 57 of the grounds of complaint. That paragraph states

Further, it appears that the Respondent has breached the ERA 1996, Part X, which regulates the extent to which an employer can unilaterally vary the express terms of the contract of employment concerning the payment of wages and other contractual benefits. It appears that on 13 and 14 March 2023, the Respondent unilaterally decided to demote me and make deductions from my wages, unlawfully. I am appealing with respect to the Respondent's conduct, actions and decision including an unprecedented strong resistance to my discovery of facts surrounding such events in March 2023, which led to my demotion without remuneration. The Respondent have breached my statutory right to know why they have applied such severe sanctions that lawfully permitted them to breached the fundamental terms of the employment contract. This decision was taken entirely unilaterally because:

 I have not been informed, in writing or verbally, about the need for the demotion or that such a decision was made.
 I have not been requested to provide any information in any investigation surrounding the decision to demote me.
 I have not been invited to be involved in any investigation surrounding the decision to demote me.
 I have not been offered a trade union or a colleague representation.
 I have not been involved in any consultation regarding the decision to demoteme.
 I have not been provided with an opportunity to appeal the process or the decision taken.
 I have not been notified about the timeframes within which decisions were made.

11. Part X Employment Rights Act 1996 only deals with unfair dismissal. To any person with knowledge of the law, a claim under part X can only be a claim of unfair dismissal. When read with the statement that part X regulates the extent to which an employer can unilaterally vary the express terms of the contract, the most natural reading of the grounds of complaint is that the claimant is asserting that she was dismissed because of a unilateral variation to her contract. She goes on to explain that she was demoted and deductions were made from her wages. She gives the date as being the 13th and 14 March 2023.

12. The respondent is a large organisation which, no doubt, has its own human resources employees, or consultants and the response was presented by legal representatives.

13. Whilst I have a degree of sympathy for the respondent's employee or agent who, in reading the claim form, may have been somewhat jaded by the time paragraph 57 was reached, when paragraph 57 is read it does present a claim of unfair dismissal in relation to the band 8C role; there is no other way of understanding the reference to Part X of the ERA 1996.

14. Ms Dobbie urges upon me that when the claim form is considered as a whole, it is so impenetrable that the other paragraphs obscure paragraph 57 and, when

considered as a whole, there is no claim of unfair dismissal. She submits, with a degree of justification, that to find the claim form pleads a claim of unfair dismissal would contravene the principle laid down by Laing J that "the tribunal should not be burdened by, or expected by the parties to engage in, a disproportionately complex exercise of interpretation."

15. I have a large degree of sympathy with that submission but, ultimately, I have concluded that the claim is sufficiently pleaded and it would not be proper for me to say, that construing the claim form as a whole, there is no claim unfair dismissal in this respect.

Did the claim form present a claim of unfair dismissal in relation to the band 8A role?

16. My view on this issue is different. The claim form refers to part X Employment Rights Act 1996 at paragraph 41 but at paragraphs 48 and 49 states, in respect of the 8A post, "To avoid doubt, I held this position between 4 September 2020 - 7 March 2023. This employment contract was lawfully terminated, meaning that I was discharged from further performance of obligations under the contract, through a mutual agreement supported by a new employment contract to perform another role within the Respondent and the same team, in particular, the Head of Research Operations (HoRo) role in the 8c pay band. It was mutually agreed that I was not required to work the notice period for the RaCAM Contract due to practicalities, namely that the new role was within the same team and that there was no operational need to back-fill it."

17. The pleading in this respect is clearly one that the band 8A role was terminated lawfully, not unlawfully, and was terminated by agreement. There is no claim of unfair dismissal in this respect. Whilst the claimant and/or the respondent may now say that, factually, the band 8A role continued, that does not mean that a claim of unfair dismissal was made in respect of its termination. Indeed, according to the respondent the contract did not terminate until after this claim form was presented.

18. Even reading the claim form with a view to taking the most favourable interpretation for the claimant, I can discern no claim of unfair dismissal in respect of this role.

19. It is therefore necessary to consider whether permission should be given to the claimant to amend the claim form to add that claim of unfair dismissal and I have decided that permission should be given. The amendment drafted by the claimant is as follows:

> My claim is that the Respondent has unlawfully dismissed me from the RaCAM [Research and Clinical Audit Manager] post on 30 Nov 2023 and made me a payment in lieu of the Notice.

Was the claim in relation to the band 8C role presented in time?

20. The claimant says that the dismissal of her from the band 8C role occurred on 14 March 2023 when she was demoted. The claim was presented on 8 November 2023.

21. The relevant legal principles are as follows.

22. In respect of a claim for unfair dismissal, section 111 ERA 1996 provides

> (2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
>
> > (a) before the end of the period of three months beginning with the effective date of termination, or
> >
> > (b) 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.

23. The leading authority is the decision of the Court of Appeal in *Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945*, *[1984] IRLR 119*, *[1984] ICR 372, CA*. In that case, May LJ stated

> "[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done—different, for instance, from its construction in the context of the legislation relating to factories: compare *Marshall v Gotham Co Ltd [1954] AC 360, HL*. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [*Singh v Post Office [1973] ICR 437, NIRC*] and to ask colloquially and untrammelled by too much legal logic—"was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"—is the best approach to the correct application of the relevant subsection."

24. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'.

25. Lady Smith in *Asda Stores Ltd v Kauser* EAT0165/07 stated: 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on

the facts of the case as found, it was reasonable to expect that which was possible to have been done'.

26. A claimant's complete ignorance of his or her right to claim unfair dismissal may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. As Lord Scarman commented in *Dedman v British Building and Engineering Appliances Ltd* 1974 ICR 53, CA, where a claimant pleads ignorance as to his or her rights, the tribunal must ask further questions: 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?' In *Porter v Bandridge Ltd* 1978 ICR 943,CA, the majority of the Court of Appeal, having referred to Lord Scarman's comments in Dedman, ruled that the correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them. The Court upheld a tribunal decision that P, who took 11 months to present an unfair dismissal claim, ought to have known of his rights earlier, even if in fact he did not.

27. Where the claimant is generally aware of his or her rights, ignorance of the time limit will rarely be acceptable as a reason for delay. A claimant who is aware of his or her rights will generally be taken to have been put on inquiry as to the time limit. In *Trevelyans (Birmingham) Ltd v Norton* 1991 ICR 488, Mr Justice Wood said that, when a claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek information and advice about how to enforce that right.

28. In *Rajabov v FCO*,[2022] EAT 112 the Employment Appeal Tribunal held that "the tribunal was rightly sceptical of the legal proposition that not being sure of the merits of a claim was a sufficient impediment as to make presentation of the claim within time not reasonably practicable. It cited the well-known dictum of Brandon LJ in Wall's Meat Company Limited v Khan [1979] ICR 52, 60 whereby "the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters" may be a sufficient impediment making it not reasonably practicable to present a complaint within the period of three months but only "if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable".

29. In *Cambridge v Crouchman*, the EAT held " ignorance of a crucial or fundamental fact was a circumstance rendering it impracticable for a claimant to present a claim where his ignorance of the fact was reasonable and its discovery genuinely and reasonably changed his belief from believing that he did not have grounds for the claim to believing that he did" (taken from the head note)

Findings

30. The claimant's case is that she was interviewed in respect of the band 8C role on 2 March 2023. She was appointed to it on 8 March 2023. The claimant was, according to her, dismissed by way of unilateral demotion on 14 March 2023. She was never paid the increased salary.

31. The claimant's witness statement, at paragraph 20a states that she was told by "AH" that "some queries were raised with regards to the process and [AH] was advised to pause the recruitment." That is, indeed, the respondent's case. It's case is that the claimant was not demoted but there was a pause on the recruitment process was concerned were considered. I do not need to decide whether that was correct. For the purpose of deciding this point, I take the claimant's case at its highest, namely that she had started the role and that there was thereafter a unilateral demotion on 14 March 2023.

32. The claimant's own chronology within her written submissions provided today states that on 11 May 2023 "Ronke Adewola (band 6, HR people project) wrote to me that ''…the new role offered was being paused until completion of the formal collation of facts process and you would remain in your previous role. You should have been reverted to what your previous role/title was as the decision was made for the offer to be paused".

33. In her grievance, raised on 12 May 2023 the claimant wrote:

> I believe that under Section 98(4) ERA 1996:
>
> - The Trust failed to conduct a reasonable and fair investigation by adhering to the ACAS and the Trust's investigation and dismissal processes, despite the Trust's Size and administrative resources affording to act reasonably.
>
> - The Trust did not have genuine and reasonable grounds for changing my staff record or contract under Section 98 ERA 1996 as the decision to demote/dismiss me did not fall within the definition of a reasonable response by a reasonable employer, and therefore, it is unfair.

34. In the outcome to the grievance sent to the claimant on 7 June 2023 the respondent wrote

> I advised on several occasions during the meeting that the Trust had not made a concerted effort to demote you, but the recruitment process has been paused to ensure the process was fair and equitable, and all factors will be considered as part of the current collation of facts. Following a review of the facts a decision will be made on how to proceed (which may involve invoking the disciplinary process, to close the matter and / or identify any relevant learning). You asked on several occasions during the meeting if you were now part of a disciplinary process, I advised that this was not the case and reiterated the procedure regarding the collation of facts.
>
> You also raised a concern regarding your current job title noting this had been changed on the Outlook System. I asked what your job title was on 24 March 2023, and you explained it was Research and Clinical Audit Manager. I advised that this would be your job title whist the

> pause in the recruitment process is in place. Since our meeting the Trust's Electronic Staff Record (ESR) has been checked and your title is recorded as Medicines and Research Manager and this has not changed on ESR, this is also what is recorded on your payslips.

35. The claimant says that on the 23 August 2023 she received an invitation to a disciplinary hearing. That invitation had appended to it an email dated 14 March 2023. The claimant relies upon a large number of extracts from that document which are set out in paragraph 26 of her witness statement. She goes on to state:

> I have taken the respondent' conduct and its surrounding circumstances into account and inferred from their actions that I had been dismissed by demotion to a RaCAM role with significantly lower responsibilities and two paygrades lower remuneration package (circa £ 20 000 difference/annum). This was, to me, an unequivocal statement of the respondent's intention to remove me from the HORO role as the dismissal letter strongly alleged gross misconduct, which was to be further confirmed (!) by the Collation of Facts investigation.

36. The claimant says that it was not until she received that document on the 23 August 2023 that she realised that she had a claim for unfair dismissal. She says that she then contacted ACAS on 24 August 2023 to notify them of the unlawful dismissal claim but did not receive the ACAS certificate until 9 October 2023. She then submitted her claim on 8 November 2023. The claimant told me that she did not have sufficient information to present a claim for unfair dismissal before 24 August 2023 because she did not have a confirmed belief that she had been dismissed from the band 8C role. She only had a perception of facts which was open to misinterpretation.

Conclusions

37. The reason that the claimant says there was dismissal was because she was unilaterally demoted from the band 8C role.

38. In terms of the application of the relevant law, the claim was not presented within three months of the date of the effective date of termination, which was, according to the claimant, 14 March 2023.

39. I must ask myself whether it was reasonably practicable for the claim to be presented within that time. Given that the claimant wrote in her grievance that there was a breach of section 98(4) ERA 1996 because the decision to demote/dismiss her was an unreasonable one, it is clear that the claimant believed, at that stage, that she had been dismissed.

40. In those circumstances, I consider that it was reasonably practicable for her to present the claim within 3 months. While the claimant may have wanted more evidence, that cannot be a reason for delaying. Litigants often want more evidence to prove their claims, it is often provided within the process of the

litigation by way of disclosure and exchange of witness statements. If claimants were able to take as long as they wanted to get as much evidence as they could, time limits would cease to have any real impact. The claimant knew that she believed she had been dismissed by way of unilateral demotion as early as 12 May 2023 and, therefore, it was reasonably practicable to present the claim within three months of 14 March 2023.

41. However, if I were wrong in this respect and the claimant was right to say that she did not have the requisite information until 23 August 2023, I do not consider that she presented the claim within a reasonable time thereafter. She was already on notice of the time limits, she had already contacted ACAS in relation to the unlawful deductions from wages claim (1405293/2023) and should clearly have known about time limits by doing so. As Ms Dobbie says, the claimant is a senior employee employed in a medical research role who could easily have found out about relevant time limits.

42. There was no good reason for delaying from the 23 August 2023 to 8 November 2023. The claimant did not expressly say that she believed that she had to wait until the ACAS process had finished but even if that were the case, she still delayed for a month thereafter before presenting her claim form.

43. In those circumstances I find that it was reasonably practicable to present the claim within a three month period and, even if it was not, the claim was not presented within such period as I consider reasonable.

Employment Judge Dawson

Date 18th April 2024

JUDGMENT SENT TO THE PARTIES ON
10 June 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Notes

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/