



EMPLOYMENT TRIBUNALS

Claimant: Ms Jennifer Stewart

Respondent: Mr Luke Guinness

PUBLIC PRELIMINARY HEARING

Heard at: Bristol

On: 5 September 2024

Before: Employment Judge C H O'Rourke

Representation:

Claimants: in person

Respondent: Ms G Nicholls - counsel

RESERVED JUDGMENT

1. The Claimant's claim of age discrimination is dismissed, for want of jurisdiction.
2. As the age discrimination claim is not proceeding, the Claimant's claim of breach of contract in respect of notice pay is also dismissed, in accordance with the agreement reached at the case management hearing of 15 April 2024.

REASONS

Background and Issues

- 1) The Claimant was either employed, or was a self-employed worker of the Respondent, commencing in November 2021 and terminating on a date to be determined, with the Respondent stating 4 August 2022 and the Claimant stating 5 June 2023. She was engaged to care for a relative of the Respondent, at that person's home ('the House'), working in a rota system with others.

- 2) The date of termination is significant as, if the latter date, her claim of age discrimination, presented on 23 October 2023, would have been brought in time.
- 3) If, however, the actual termination date is in August 2022, then the claim is some ten months out of time. In that event, the Claimant argues that either there was a continuing act of age discrimination, to the point she did bring the claim, or it would, in any event, be just and equitable to extend time.
- 4) This hearing was listed at a case management hearing of 15 April 2024, to determine the issue of time limits
- 5) I set out the issues at the outset of the Hearing, as follows:
 - i) What is the date of the Claimant's termination of service by the Respondent?
 - ii) If not June 2023, then, the claim being out of time, is there either:
 - (1) Conduct extending over a period that links the termination to the Claim; or
 - (2) Reasons to consider that it would be just and equitable to extend time?
- 6) I mentioned the following considerations:
 - i) That the Tribunal had a wide discretion in such matters.
 - ii) That it was a question of fact for the Tribunal.
 - iii) That there was no presumption in discrimination claims that time would be extended, but instead that time limits should be complied with.
 - iv) The 'burden of persuasion' was on the Claimant.
 - v) Factors relevant to my decision would be as follows:
 - (1) The length of and reason for the delay.
 - (2) The balance of prejudice between the parties.
 - (3) The merits, or otherwise, of the claim.

The Law

- 7) **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434, CA, stated that when tribunals consider exercising the discretion under what is now S.123(1)(b) EqA, '*there is no presumption that they should do so unless they can justify failure to exercise the discretion*'.
- 8) In **Southwark London Borough Council v Afolabi** [2003] ICR 800, CA, the Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by rendering it difficult to recall evidence).
- 9) The strength of the claim may also be a relevant factor when deciding whether to extend time. In **Lupetti v Wrens Old House Ltd** [1984] ICR 348, EAT, the Appeal Tribunal noted that tribunals may, if they think it necessary, consider the merits of the claim, but if they do so they should invite the parties to make submissions. However, this is not necessarily a definitive factor: even if the claimant has a strong case, time may not be extended for it to be heard

The Facts

- 10) Both parties provided written skeleton arguments, and I heard evidence from the Claimant and the Respondent.
- 11) The Claimant's evidence can be summarised as follows:
 - i) She believed that she had been 'kept on the books' by the Respondent, until June 2023, pending resolution of an alleged disagreement between her and Mr Guinness's aunt ('the aunt'), who, she agreed, had told Mr Guinness, in early August 2022 that due, the aunt asserted, to shouting or rude behaviour by the Claimant (which the Claimant disputes), she (the aunt) wanted the Claimant dismissed. The Claimant referred to this as her 'original dismissal' and said that Mr Guinness had told her that his aunt told him that the Claimant's '*behaviour was intolerable*'.
 - ii) She also said that Mr Guinness stating that she was being 'kept on the books' was because Mr Guinness needed to act on the instructions of trustees and that until they stated their view, in June 2023 that he was correct to dismiss her, her engagement remained in force.
 - iii) She accepted that he had told her on 4 August 2022 that she couldn't continue working for the Respondent but said '*at that time, yes*', but

that nonetheless she considered that there would be further work made available to her in the future.

- iv) Mr Guinness' email of 16 August 2022 [84] was read out to her, which stated, '*once again, I'm very sorry things didn't work out ... if you are still interested, I'll keep your details on file in case something major happens in the medium term and then maybe we can chat again.*' When it was suggested to her that that was clear that her services were no longer required and 'things not working out' was in the past tense, she said that she '*was not sure I believed him.. and in my mind, the sole reason for the dismissal had been resolved* (the Claimant considering that she had resolved matters with the aunt) *and I thought therefore that the dismissal would be retracted*'. When it was further suggested that she was cherry-picking phrases such as '*keep on file*', but omitting '*in case something major happens in the medium term*', she said that she didn't know what '*medium term*' meant.
- v) She agreed that she was paid for shifts that had been booked for her in September and October, even though she didn't work them.
- vi) She agreed that correspondence between her and Mr Guinness in August to November [87, 88, 93 to 97] was predominantly about negotiating payment for the September and October shifts.
- vii) On 11 November, she asked him the direct question '*are you planning on reinstating me?*' to which he replied '*No, we won't be requiring your services, as we have other arrangements in place now.*' [97 & 98]. When it was suggested to her that that response was entirely clear, she said that she '*read it as he won't go further with this*'. When pushed, she agreed that it was a '*clear statement*' and '*unequivocal*', but that that '*was his intention, not the Trustees*'. (The Claimant considered that there was a board of trustees, to whom Mr Guinness was subject). She did not accept, however, that if she wanted to bring a claim that was the date from which at the latest, time should be calculated.
- viii) It was suggested to her that her correspondence thereafter with Mr Guinness and with his aunt, was largely one way, with very little response from either person, Mr Guinness not writing again until June 2023 and with which she agreed.
- ix) On 17 December, she wrote 'without prejudice' to the 'Trustees' of the House [100]. Mr Guinness said that there is no formal trust in place, merely members of the family who share ownership of the House. She

asserted that Mr Guinness' aunt had on being approached by the Claimant, denied ordering the dismissal and said that she hoped the Claimant would return. She implied a possible claim of unfair dismissal and referred again to being reinstated. She was asked why, in that letter, she had not alleged age discrimination (the younger colleague, who is her comparator, having been appointed two months before her dismissal) and said that *'up until that point I had done everything to attempt reconciliation and genuinely thought the Respondent had made a sudden and not thought-through decision. I negotiated in good faith. I was aware of the events of 4 August and that (the aunt) is a trustee, but she didn't have the ultimate word and therefore I could apply to the Trustees. I knew that age discrimination would be a severe claim and didn't want to get the Respondent in trouble with the Trustees, so danced around that factor.'* She received a holding response referring to *'a serious lack of communication resulting in unfortunate misunderstandings and over-hasty actions. I am extremely sorry about this'* [102]. A further response was promised.

- x) On 9 March 2023, the same person wrote, stating that *'we have conferred and have decided that we don't think a meeting is necessary, as there really isn't anything to discuss. Luke made bookings with you and we were not involved in this side of things. He has spoken further to (the aunt) and has relayed her reasons for your unsuitability in the role as far as she is concerned, and these are still valid, despite your own conversations since, with (the aunt). ... Luke has to factor in the opinions of several people all the time and he had to take the position of asking you not to return. Having any bad feeling, or unnecessarily complex relationships between family and those working within the house is unsustainable, hence his no longer wishing to book your services. I am sorry that things did not work out differently.'* [103]. When it was suggested to the Claimant that this was yet again a further clear re-statement of the Respondent's position, she said that *'the Trustees don't have access to the truth and I'm not sure they'd spoken to (the aunt).'* She agreed that despite this correspondence and seven months having passed since the events of August 2022, it was *'not yet'* appropriate to bring her claim. She said that she *'thought she was following the rules and that I had a right to go to those who ultimately were responsible for my employment.'* When it was further suggested that in this response from the 'Trustees' the situation had been clarified for her, she said that the letter *'confirmed the Trustees' decision to hand back the matter to the Respondent.'*

xi) She called Mr Guinness on 30 May 2023 and he responded by WhatsApp on 5 June [110]. He apologised for not having responded to an earlier email from her, but went on to say that *'I need to be quite frank, as I think it will help in the long run that I cannot and will not offer to book you again, as the reasons are still the same, due to your relationship with (the aunt) being as it was. I know you may have felt that it was blowing hot and cold, but I can assure you it is better this way and is not open for any more discussion ...'* When it was suggested to the Claimant that he was not saying anything new and now being very direct, as opposed to, in the past, being quite direct, but wishing to be polite, she said that *'he was now being clear, and I thought I needed to go to the Trustees.'* When asked how, if she eventually brought her claim against Mr Guinness, not the 'Trustees', she could not know that it was his decision, she said *'no, I'm not sure. He said on 4 August that the Trustees were his boss.'*

xii) In respect of her claim of age discrimination and the merits of such a claim, she was asked specifically what it was that she was alleging motivated Mr Guinness' decision to recruit her younger comparator, in place of her and that such allegation should be put to him. When she did not answer, it was put to Mr Guinness, by the Tribunal that one possible motive could be a sexual one, which he strongly denied. The Claimant said that she had not asserted such a motivation (although her 'response' to the Respondent's response included the assertion in relation to this person that she *'was inappropriate in every way ... She is, however, young and attractive.'*) [46]. The Claimant said, instead, that Mr Guinness wished to hire younger staff as they would be more compliant than older staff, which he also denied.

12) The Respondent's evidence is summarised as follows:

- a) Mr Guinness said that when the Claimant was first appointed, the rota system was somewhat ad hoc, but in May 2022, a permanent arrangement was made, with dates agreed, up to October 2022.
- b) He said that he was always looking to expand the pool of carers, to ensure flexibility and said that in June he engaged a further carer. (This is the person with whom the Claimant compares herself in respect of her claim of direct age discrimination – the Claimant being in her late sixties and this person being in her late twenties ('the Comparator')). He denied that the Comparator had been hired to replace the Claimant but that in fact he and his aunt had much greater concerns about another carer's performance and it was thought she could be replaced in due course. The Claimant

- asked him why he had not instead recruited a local person that she had recommended to him, and he said that he had asked his aunt about this person and she had said '*Oh my god – no*'. He also said that he didn't want the Claimant '*treading on his toes*' in respect of recruitment of carers.
- c) On 4 August 2022, he spoke with his aunt who said that the Claimant had '*been very rude to her and that it was intolerable having someone in the house who could speak to her like that ... that Ms Stewart was impossible and confirmed to me that this should be her last shift ...*'. He said he was aware of other clashes between them, as his aunt attends the House daily. He agreed that the Claimant's '*working relationship with us (would) end.*'
- d) He spoke to the Claimant by telephone the same day and while he couldn't remember the exact words used, told her that she couldn't work for him anymore because of the way she'd spoken to his aunt. He referred to his aunt, as a 'trustee' having the final say, but clarified that by 'trustee' he meant co-owner of the House, along with other siblings/relatives and that there was no formal trust in place. He said that the Claimant did not deny his aunt's accusations. He told her that she should finish her current shift (ending on 11 August), but '*would not be asked to return to work at the house again.*'
- e) The Claimant texted and emailed him on 5 and 12 August, stating firstly that she wished to '*patch things up*' with his aunt, to which he said he did not think that worthwhile and that he would prefer she didn't [83]. He said that this was because there '*was a good chance my aunt would change her tone*'. However, on 12 August the Claimant emailed stating that she had spoken to the aunt and that it was all a misunderstanding, and that the aunt had denied instructing Mr Guinness to dismiss her. His reply has already been referred to in the Claimant's evidence above ('*keep details on file*') [83].
- f) He agreed that there were then discussions for a period of time about the Claimant being paid for pre-booked shifts that she didn't work, for which she was in due course, paid.
- g) He said that he was categoric in his email of 11 November that he would not re-instate her [97-98] and referred to subsequent correspondence on the same theme.
- h) He was challenged by the Claimant as to whether or not he was responsible for engaging and managing staff and he said he was '*responsible for all of it*'. He agreed that some of the work the Claimant

did was not related specifically to his relative's care, but also involved the cleaning and security of the House, which was co-owned by siblings/relatives and if that was the case, why was he paying her, when he wasn't a co-owner. He said that that was because it was his relative she cared for, who lived in the House and therefore he had told the co-owners that he would pay for her and the other carers.

- 13) Closing Submissions. The Claimant provided lengthy written closing submissions and Ms Nicholls made oral submissions, both of which I take account of in my conclusions below, as I consider appropriate or relevant to my considerations.

Conclusions

- 14) Effective Date of Termination. I find that the Claimant's date of termination of her contract for/of service (regardless of whether she was an employee or worker) was 4 August 2022. I do so for the following reasons:
- a) Mr Guinness told her so, by telephone, on that date and Claimant, in evidence, accepted that he had told her she couldn't work there anymore.
 - b) She was not offered any further shifts and the only contractually-related matters that were discussed thereafter were whether she would be paid for booked shifts that she wasn't going to work and in what amount.
 - c) All the subsequent correspondence from Mr Guinness confirmed his decision, but, it appears, the Claimant willfully chose to either ignore or misinterpret that correspondence, either because she didn't 'believe' him, or it was his position '*at that time*' only, or that the commonly understood meaning of the phrase '*keep your details on file*' meant something else than 'we'll keep a note of your contact details in case any future positions come up'. Even though she accepted, in cross-examination, that Mr Guinness' 11 November 'we won't be requiring your services' email was 'unequivocal', she still persisted in the fantasy that he was somehow unable to terminate her contract, without the approval of the 'Trustees' and that therefore she could transfer her attentions to them, for their rescinding of Mr Guinness' decision and her reinstatement.
 - d) Her own use of the word 'reinstatement' implicitly accepted that her contract had in fact terminated, but that she considered she could be restored to her position at the House.
 - e) Apart from the use of the word 'trustees' there was no evidence whatsoever of any formal trust being in place, but, in any event, all the

evidence indicates that the Claimant's contractual relationship was with Mr Guinness, alone. He recruited her (and other carers), for the care of his relative; he instructed the carers and as the Claimant's invoices show, paid them [73]. Mr Guinness' relative was the sole permanent occupant of the House, so it was implicit that those who cared for her could also be engaged in cleaning duties and ensuring the security of the building. Those latter functions did not, in any way, imply any contractual relationship with the 'Trustees'/co-owners of the House. While (the co-owners being siblings or other relatives of Mr Guinness) he may have felt it incumbent on him to seek their agreement to staff changes in the House that does not mean that the Claimant can seek to 'go behind' her contractual relationship with him. Once he decided that relationship was over, her only recourse was against him. The fact that she may or may not have patched matters up with his aunt, or received some sympathetic words from the 'Trustees' did not change that situation. Until his email of 11 November, the vast bulk of the Claimant's correspondence about reinstatement had been with him and it was only when she read his 'unequivocal' statement in that email that she decided to change tack to the 'Trustees'.

f) Mr Guinness did not change his stance over the remaining period of time leading up to the Claimant bringing her claim.

15) 'Continuing Act'. There is no 'continuing act' in this claim. If there was any act of discrimination, then it can only have been the Claimant's dismissal, a one-off act, on 4 August 2022. The alleged 'failure to reinstate' was merely the continuing consequence of the decision to terminate her contract. This is exemplified in the case of **Sougrin v Haringey Health Authority [1992] ICR 650, CA**, where the Court of Appeal held that a decision not to regrade an employee was a one-off decision or act, even though it resulted in the continuing consequence of lower pay for the employee who was not regraded (and of course, in that case, unlike this one, that person continued to be an employee of that respondent). Accordingly, therefore, the Claimant cannot rely on s.123(3)(a) of the Equality Act, in that respect and therefore the limitation period in this claim runs from 4 August 2022 and as she brought her claim in October 2023, it is approximately ten months out of time.

16) 'Just and Equitable' to extend time. Accordingly, therefore, the only remaining element of s.123 that the Claimant can seek to rely on is s.123(1)(b), namely that she '*brought (her claim) after the end of such other period as the employment tribunal considers just and equitable.*' I consider the factors relevant to such consideration as follows:

- a) The Length of and reasons for the delay. It is self-evident that ten months is a lengthy delay. While the length of the delay is not determinative, there are many examples of such out-of-time claims being dismissed with considerably less delay, sometimes even days or weeks.
- b) The Claimant's stated reasons for the delay are as follows:
- i) Her belief that her employment/contract was ongoing to June 2023 and therefore that there was no need to bring her claim any earlier.
 - ii) Alternatively, her belief that there was a continuing act, which by its nature, in this case, continued up to the day she brought her claim (and indeed continuing thereafter).
 - iii) That, as a 'lay person', representing herself, she found the legal issues '*confusing*' [C's written closing submissions].
 - iv) That '*the alleged basis for the Claimant's dismissal appeared to her to be a pretext, which would be resolved in due course, given her exemplary service.*'
- c) Conclusions on Reasons. I don't consider the reasons advanced to be such that would justify the extension of time on 'just and equitable' grounds, and I do so for the following reasons:
- i) There is an implied (and I consider, the true) reason for the delay, set out in Claimant's evidence, namely that she hoped, against all logic and commonsense that Mr Guinness would reverse his decision and reinstate her, or that she could persuade the 'Trustees' to pressurize him to do so. She finally gave up on that hope following his correspondence in June 2023 (supported, as it was, by the 'Trustees' earlier correspondence of March 2023) and decided to belatedly bring her claim. She did not previously mention the possibility of an age discrimination claim, or make any allegations of that nature, to Mr Guinness or his relatives, because, she knew, if she did that what slim chance (at least in her own mind) she had of being reinstated would disappear. It was her choice, therefore, for that reason, not to either threaten or actually bring such a claim in that ten-month period.
 - ii) As I've set out in the preceding paragraphs, the Claimant's stated belief that either her date of termination was June 2023, or that there was a continuing act is utterly misconceived. While she stated that that was what she '*believed*' and that that therefore that belief should

be a factor in her favour, such belief has to be reasonable, logical and based on evidence. Her belief that her employment was not terminated in August 2022 (or very shortly thereafter afterwards and certainly by November 2022) defied all logic and as I've stated, was based on a willful misinterpretation and partial reading of what was being said to her by Mr Guinness. Such a belief was entirely unreasonable. Similarly, her belief in a continuing act, which by its nature would still, now, be continuing, is entirely illogical and is again, unreasonable.

- iii) As to the Claimant being a 'lay person' that is obviously the case, but she is clearly an intelligent and well-educated person (studying, in her late sixties at the Open University) and therefore, while not a lawyer, would be expected to be better informed than the average claimant. She is clearly able to research the law (as evidenced in her written skeleton argument and 17-page closing submissions, both containing several references to case law) and to put her arguments across, in detail. She has, I consider, clearly carried out extensive research in respect of her claim (she referred at the point of presenting closing submissions to having '*spent months on them*'), but that research has been focused on attempting to justify her understandable desire not to completely alienate the Respondent by either threatening or bringing a claim of discrimination, until she felt that she had nothing left to lose by doing so. That was, as I've said, a calculated decision on her part, which she hoped, in due course, to be able to justify on legal grounds, but which she cannot.
- d) Balance of Prejudice. As submitted by Ms Nicholson, I accept that there is a degree of prejudice to the Respondent in having to continue to defend against that claim, as by the time it comes to hearing, over two years will have passed and that memories fade, with Mr Guinness, in this Hearing, having some difficulty fully recalling events. Such a timeframe, however, is entirely routine in this Tribunal and apart from the initial 4 August dismissal discussion, the vast bulk of the evidence is documentary, in emails or Whatsapps. I don't therefore consider that much weight can be given to any prejudice against the Respondent. In contrast, if the claim is dismissed, the Claimant will be unable to pursue it, in this or any other forum, which, if it succeeded, might potentially have resulted in sizeable compensation ordered in her favour. The balance of prejudice clearly, therefore, falls in her favour.
- e) Merits of the Age Discrimination claim. I consider that this claim has little merit, to the extent that I would have had no hesitation in ordering a

deposit order, if the circumstances required it. The Claimant agreed that the sole basis of the claim was the coincidence in time between the appointment of the Comparator and her subsequent dismissal (two months later). That fact alone, without more, would be very unlikely to satisfy the initial burden of proof upon her in such claims. The 'more' might be evidence from which a tribunal could draw inferences, such as, purely by way of example, in this case, evidence of any attraction between Mr Guinness and the Comparator (which even the Claimant said was not what she relied on), or any adverse comments or behaviour by him that indicated a discriminatory view, or impatience towards older employees, but no such assertions or evidence has been advanced by the Claimant and indeed the entirely measured tone of Mr Guinness' correspondence belies any such view on his part. However, even if the Claimant were to get over this hurdle and the burden of proof were to shift to the Respondent to provide a non-discriminatory reason for the dismissal, it seems likely that Mr Guinness would be able to do so; the need for as large a pool of carers as possible, explaining the Comparator's recruitment and that his aunt (even if temporarily) had a 'falling out' with the Claimant and that as the person who visited the House daily, she wanted the Claimant gone.

17) Overall Conclusions. I don't consider that this is case where I should exercise my discretion to extend time, on the basis that it might be just and equitable to do so. The delay is lengthy, and I do not find the Claimant's reasons for that delay to be satisfactory. While the balance of prejudice is in her favour, I give that less weight in view of my findings as to the likely merits of her claim. Her claim of age discrimination is therefore dismissed, for want of jurisdiction. Her claim of breach of contract in respect of notice pay is also dismissed, on the basis that, at the case management hearing of 15 April 2024, she was given leave to amend her claim, to include this claim, conditional on her discrimination claim being given permission to proceed on just and equitable grounds.

Employment Judge O'Rourke

Dated: 6 September 2024

JUDGMENT SENT TO THE PARTIES ON

17 September 2024

Jade Lobb
FOR THE TRIBUNAL OFFICE