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EMPLOYMENT TRIBUNALS

Claimant: Mr N Madari

Respondent: London Ambulance Service NHS Trust

Heard at: East London Hearing Centre

On: 15 April 2019

Before: Employment Judge Tobin (sitting alone)

Representation

Claimant: In person
Respondent: Mr N Caiden (Counsel)

JUDGMENT having been sent to the parties on 9 May 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The time limits for an unfair dismissal claim is set out in section 111 of the Employment Rights Act 1996 (“ERA”). The complaint must normally be presented to the Employment Tribunal within 3 months starting with the *effective date of termination* (“EDT”), or within such further period as the Tribunal considers reasonable were it was not reasonably practical for the complaint to be presented within 3 months. The EDT for this purpose is as defined in s97 ERA. For summary dismissals (i.e. dismissals without notice), the EDT will normally be the date that the employee is first informed of their dismissal, either directly or upon notification by post: see *Gisda Cyf v Barratt* [2010] UKSC 41 and *Robinson v Bowskill* UKEAT/0313/12. The 3 months start with (i.e. includes) the EDT (see *Trow v Ind Coope (West Midlands) Limited* [1967] 2QB 899 and *Hammond v Hague Castle & Co Ltd* [1973] ICR 148) so effectively this means

3 months less a day (see *Pacitti Jones v O'Brien* [2005] IRLR 889 (Court of Session)). For dismissals on notice, unless the contract specifically provides otherwise, contractual notice, whether oral or written, runs from the day after the notice is given: *Wang v University of Keele* UKEAT/0223/10.

- 2 The time limit for presenting a complaint of unfair dismissal shall be regarded as strict. The Employment Tribunal's discretionary power to extend time limit is subject to a two-part test:
 1. The Tribunal must be satisfied that it was not *reasonably practical* for the claim to be presented in time.
 2. The Tribunal must be satisfied that the claim was presented within such further period as the Tribunal considers reasonable.
- 3 Reasonably practical does not mean reasonably or physically possible, but rather something like "reasonably feasible": see *Palmer v Southend on Sea BC* [1984] ICR 372 CA. The determination of what is reasonably practical is a question of fact for the Tribunal (see *Miller v Community Links Trust Limited* UKEAT/0486/07. The burden of proof is on the claimant.
- 4 The remedy of unfair dismissal is considered to be sufficiently well known that ignorance of the remedy will not normally be accepted as an excuse (see *Read in Partnership Ltd v Fraine* UKAEAT/0520/10, *John Lewis Partnership v Charmaine* UKEAT/0079/11 and *Walls Meat Co Ltd v Khan* [1979] ICR 52.
- 5 In respect of the claimant's discrimination complaints, the claims should be received by an Employment Tribunal within 3 months (less a day) of the acts complained of, or such other period as the Tribunal thinks is just and equitable in the circumstances of the case: S123 Equality Act 2010 ("EqA"). In considering whether to exercise its discretion, the Employment Tribunal should consider the prejudice that each party would suffer as a result of granting or refusing the extension of time and should have regard to all of the other relevant circumstances. *British Coal Corporation v Keeble* [1997] IRLR 336 said that the Tribunal should adopt the factors set out in S33 Limitation Act 1980 as useful checklist:
 - The length of and reason for the delay
 - The extent to which the cogency of evidence is likely to be affected by the delay
 - The extent to which the party sued had cooperated with any requests for information
 - The promptness with which the claimant acted once he knew the possibility of taking action
 - The steps taken by the claimant to obtain appropriate professional advice once he knew of the possibilities of taking action.

6 The Court of Appeal said in *London Borough of Southwark v Afolabi* [2003] IRLR 220 that a Tribunal is not required to go through all of the above checklist in considering whether it is just and equitable to extend time, provided no significant factor had been left out in the exercise of the Tribunal's discretion. There is no presumption that Tribunal's should extend time, the claimant must persuade the

Tribunal that it is just and equitable to do so: *Robertson v Bexley Community Centre*, [2003] IRLR 434.

7 The circumstances that gave rise to the claimant's dismissal were as follows. The claimant said that he was an apprentice paramedic. He was on a 5-year apprenticeship which he commenced in 2013. An incident occurred in the back of an ambulance where the claimant was accused of striking a patient. He said that the patient in question was under the influence of drugs and alcohol and that she struck him. The claimant said his hand came up instinctively to move his assailant's hand away, but that in the melee he connected with the patient's face by accident. The claimant said he did not retaliate, and that he did not mean to slap the patient back. The fact that his hand came up was not deliberate, more a reaction to being punched in the face.

8 The claimant said that the incident was observed by one witness only, a student named, Mr S Hinsley, who was in the back of the ambulance. Mr Hinsley subsequently complained about the claimant to his employers. The claimant contended that Mr Hinsley was not an impartial witness because he had taken against the claimant following a discussion instigated by Mr Hinsley about religion. The claimant contended Mr Hinsley had made a number of statements during his shift to the effect that he did not like religion and people who followed religion. The claimant said that Mr Hinsley asked the claimant if he was a Muslim and seemingly took umbrage at his response. The claimant said that Mr Hinsley's complaint was malicious and did not reflect the true picture, saying that the claimant assaulted the patient. Mr Hinsley was a university student on an observation exercise and not an employee or worker of the respondent; he was merely observing a shift so the claimant accusation of Mr Hinsley's discriminatory motives is a complaint against a third-party individual and cannot proceed as the Employment Tribunal does not have jurisdiction for such complaints.

9 The claimant's paramedic colleague, Mr Sebastian England, initially said he did not see the incident but then, according to the claimant, he changed his account and confirmed Mr Hinsley's allegation. The claimant maintained that as Mr England had been driving at the time, he could not have seen the incident. The claimant said that no one had spoken to the patient to gain her account. He said he had not sworn at the patient and at the disciplinary hearing, he accepted that he had slapped the patient, in the context that his hand had made contact with the patient's face. However, the claimant said the disciplinary hearing made no attempt to understand the context that this was not a conscious or deliberate act. The claimant said that he had also raised mitigation, particularly as his father had been hospitalised for cancer and that this was preying on his mind. He said that as someone from outside the ambulance service had made a complaint, his employers were determined to dismiss him. The claimant said

that whatever he said at the disciplinary hearing was not accepted and he attributed this to coming from his BME background.

- 10 The claimant was subsequently dismissed, which he contends was both an unfair dismissal and a discriminatory dismissal. The claimant claimed that he was subjected to direct race and/or religious discrimination because he was treated less favourably than other individuals who were of white British non-Muslim backgrounds as similar cases had occurred where patient were deemed to have been assaulted in similar circumstances. Those individuals accused of assault were not dismissed. The claimant said that he has a direct comparator of a Mr William Learning who was given a final written warning for an assault on a patient. The claimant said there were other individuals for which he does not yet have any names.
- 11 The claim was issued on 3 January 2019. Notwithstanding that this was after the Christmas and New Year break, the claimant still issued 35 days out of time, even when accounting for early conciliation.
- 12 The claimant said that he suffered from depression following his dismissal. He said that he had been training for a vocation and that his career had been taken away because of: an initial malicious allegation; his employer's rush to jump to the wrong conclusion; and the refusal of his employer to treat him the same as white British colleagues. He said that because of his loss of his vocation/career and also his father's illness, he took his dismissal very harshly. Because of the circumstances of his dismissal, he felt he could not get another job and he felt suicidal. He said that he did not have a wife or close friend to talk this over with, which made his depression worse.
- 13 The claimant did not produce any medical report and there was no GP letter or GP notes. I accept that the claimant was prescribed anti-depressants on 26 February 2019, so he sought medical treatment, but this was some 8 to 9 weeks after he issued proceedings. There is no evidence of any previous medical consultation or intervention.
- 14 The claimant said that he went to see a solicitor on 14 December 2018, but he could only afford a 30-minute consultation and although time limits were mentioned, the main discussion was in connection with the difficulties of proving discrimination.
- 15 I am not satisfied in this case that it was not reasonably practical for the claimant to issue proceedings promptly. I accept the claimant's evidence that his dismissal came as a shock, particularly as he was committed to his career and that he felt he had been treated very badly or in a discriminatory manner following Mr Hinsley's complaint. I am not persuaded that the claimant's reaction to his dismissal was such that he was incapacitated or such that it was not reasonably practical for him to issue proceedings. There is no medical evidence or reliable corroboration to make such a finding, in circumstances where such corroboration ought to have been produced to the Tribunal. In any event, the claimant went to see a solicitor before Christmas and delayed a further 3 weeks before issuing proceedings. Even if it was not reasonably practical for him to

issue proceedings before he saw a solicitor, the claimant did not present his claim within a further reasonable period from receiving legal advice.

- 16 If I were to strike out the discrimination complaints, then the prejudice for the claimant would be substantial. He would be left with no opportunity to challenge what he contends to be his dismissal on the grounds of his race/religion. Applying the remaining aspects of the checklist in respect of the discrimination complaints, the cogency of the evidence is unlikely to be affected by a delay of 35 days, such a delay, in itself, does not present a particular prejudice to the respondent. The respondent had not failed to cooperate with any requests for information, so there is no criticism of the London Ambulance Service in this regard.
- 17 I state above that the claimant ought to have known of his right to bring a claim fairly quickly, but his circumstances were such that I accept he had a number of other worries in his life. This was not a sufficient excuse in respect of the unfair dismissal complaint. However, there is a public interest in affording a high degree of latitude for the claimant in respect of his discrimination claim. Discrimination complaints should, as a general rule, be decided only after hearing all of the evidence, see *Anyanwu v South Bank Students' Union [2001] IRLR 305 HL*. On the face of it, the claimant may have a claim with merit and some excuse as to why proceedings were issued out of time. In respect of my wider discretion, I am unwilling to strike out a claim of discrimination where the facts of such claim have not been fully heard. The claimant would be left without any cause of action in respect of his alleged discriminatory dismissal. There is also a strong public interest in discrimination claims being heard in full. Under the circumstances I exercise my discretion to allow the discrimination claims to proceed to for hearing.
- 18 In summary, I consider that it was reasonably practical for the claimant to issue his unfair dismissal complaint within the appropriate statutory time limit. Consequently, I strike this claim out pursuant to s111 ERA. For the reasons stated above, it is just and equitable to extend time in respect of the claimant's race and/or religious discrimination complaint, pursuant to s123(3) EqA.

Employment Judge Tobin

24 September 2019