Case Number: 1700941/2010

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Agnieszka Gbidi	**v**	Aermid Health Care plc (1) Mrs Carol Edwards (2) Mrs Rebecca Archer (3)

PRELIMINARY HEARING

Heard at: **Plymouth Magistrates Court** **On: 8 November 2017**

Before: **Employment Judge O'Rourke**

Appearances
For the Claimant: Not in attendance or represented
For the Respondent: Mr C Murray - Counsel

RESERVED JUDGMENT

1. The Claimant's claim of race discrimination against the Third Respondent, Mrs Rebecca Archer, is dismissed because it was presented out of time.

REASONS

Issues

1. This is a judgment following an open Pre-Hearing Review, to determine whether or not the Claimant's claim of race discrimination against the Third Respondent ('R3') should have the following outcomes:

    1.1. That it should be struck out as out of time, or whether it would be just and equitable to extend time;

    1.2. If not, whether the claim should be struck out as having no reasonable prospects of success;

    1.3. In the alternative that it has little reasonable prospect of success and that the Claimant be ordered to pay a deposit as a condition of proceeding with it;

1.4. Alternatively, whether R3's Response should be struck out, as having no reasonable prospect of success; and

1.5. If appropriate, to hear a costs application by R3, adjourned by the Regional Employment Judge on 1 July 2016. (In fact, R3 wished to reserve her position in respect of costs and may, if so advised, request the hearing of the existing, or any amended or new application, on a subsequent date and that issue is not therefore considered further.)

2. Claimant's Non-Attendance at today's Hearing. The Parties had been notified of this hearing date on 31 August 2017. The Claimant made an application on 11 October for adjournment of the hearing, due to the absence of a witness and which was refused by the acting Regional Employment Judge (REJ) on 27 October. She repeated that application on 6 November, citing medical reasons and provided a letter from her doctor, but it was again refused by the acting REJ, on 7 November. This decision was on the basis that the doctor's note gave no indication of when the Claimant would be fit to attend any hearing and it was noted that the acting REJ was '*not satisfied that in these circumstances the Claimant will attend any preliminary hearing. It is in the interests of justice that the preliminary issue is resolved without any further delay.'* The Claimant made a further application by email of 7 November, at 12:40, which was again refused by the acting REJ, by email of the same day, at 15:39, for the same reasons as before. On the day of the hearing, its commencement was delayed until 10:40, in the event that the Claimant may have changed her mind as to attending, but she did not attend, or communicate any intention to attend. A further, fuller history of these entire proceedings are set out below in the chronology, in particular those points of relevance to the Claimant's participation in and progressing of her claim.

3. The Claimant instead provided various documents, none of which were not already before the Tribunal (less that the witness statement she provided, dated 18 October 2017, had an additional paragraph to the original version, at its conclusion, stating '*attachment to witness statement'*). The other documents provided included copies of an EAT judgment of HHJ Eady, an excerpt of a transcript of a Nursing and Midwifery Council (NMC) hearing, orders, judgments and correspondence from the Tribunal and a list of case references, all of which were already on the Tribunal file. That email and enclosures were treated as her written submissions in this matter and applying Rule 47, it being clear from the Claimant's correspondence and absence from the Tribunal that she would not be attending this hearing, it was decided to proceed in her absence.

The Law

4. The Claim was presented on 6 August 2012 and therefore s.123(1) of the Equality Act 2010 applies, as to any extension of time that might be required, namely that:

(1) … proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

It had been considered, in a previous successfully-appealed judgment on these same issues that s.68 of the Race Relations Act 1976 applied, as the claim which is the subject of this hearing related to similar matters raised in an earlier claim against R1 and R2 and which pre-dated the in-force date of the Equality Act 2010. That is not the case, as this claim before this Tribunal constitutes fresh proceedings against R3 which have since been combined with the earlier claim. In any event, the provisions of s.68 are to the same effect as s.123(1) of the Equality Act, namely that:

(1) An industrial tribunal shall not consider a complaint under s.54 unless it is presented to the tribunal before the end of the period of three months beginning when the act complained of was done.
(2) – (5) …
(6) A court or tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.'

5. The case of **British Coal Corporation v Keeble [1997] IRLR 336 UKEAT** which indicated that the factors set out in s.33(3) of the Limitation Act 1980 may be useful when considering time limitation points. These are:

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b)the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed …

(c)the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d)the …;

(e)the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f)the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

6. The case of **Robertson v Bexley Community Centre [2003] IRLR 434 EWCA** which stated, in the context of the exercise of discretion as to a time limit in discrimination cases that '*there is no presumption that they* (tribunals) *should do so, unless they can justify failure to justify the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.'*

7. The case of **Selkent Bus Co. Ltd v Moore [1996] ICR 836 UKEAT** which in the context of amendment to existing pleadings, set out that an employment tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties by granting or refusing an amendment.

8. The Claimant provided a list of authorities, which I consider below:

   8.1. Five Employment Tribunal judgments, which, firstly, are not reported cases and of which the full judgment was not provided and secondly are not, in any event, binding on this Tribunal. They are as follows, based on the short summary of each provided by the Claimant:

      8.1.1. Johnson v Ark-Burlington Danes Academy and another ET3300180/09 This relates to the issue of balancing prejudice between the parties, where it was not considered just and equitable to extend the time limit, due to conflicting legal advice, as the claimant had found out the correct information herself on the internet. It's unclear to me the significance of this judgment for the Claimant's case.

      8.1.2. Kakad v Consignia ET52066424/00 where an eleven-month time extension was considered just and equitable in a disability discrimination claim. I comment that it goes without saying that there is no upper limit to the amount of time by which a time limit could be extended.

      8.1.3. Meso v London Borough of Hillingdon ET3300165/11 simply records the outcome of a successful race discrimination claim.

      8.1.4. Bochenek v Mid-Norfolk Canners Ltd ET1501491/10 which records the successful outcome of a race/nationality discrimination claim involving Polish workers, with English comparators. It is a given that discrimination on grounds of Polish nationality can found a race discrimination claim.

      8.1.5. Michalak v Mid-Yorkshire Hospitals NHS Trust ET181081/08 is a case where a tribunal made a finding that Respondent witnesses had been untruthful. I presume from this that I am being invited to find R3 similarly untruthful.

   8.2. **Clarke v Hampshire Electro-Plating Co. Ltd [1991] IRLR 490 UKEAT** which indicated that the time period for bringing a claim of discrimination runs from when the act of discrimination is complete.

The Facts

9. I heard evidence from R3, Mrs Rebecca Archer.

10. Background. The Claimant was a nurse, employed by a care/nursing home (R1). R2 was the Home's then manager and R3, also a nurse, was a supervisor/unit

manager. Following an incident involving the clinical administration of a 'chest drain' to a resident, the Claimant was subject to disciplinary proceedings and summarily dismissed. R3 had witnessed the incident and reported it to management. An additional disciplinary charge had also been brought, alleging that the Claimant had failed to mention, when recruited, her dismissal by a previous employer [letter of dismissal 39-40]. Following her dismissal, R1 made a report to the Nursing and Midwifery Council (NMC) and the Claimant was subject to investigation by that Body also.

11. Chronology. Due to the longevity of this case, I consider it necessary to set out a chronology, to put this matter in context.

9 November 2009 – Claimant's employment begins.

13 March 2010 – incident with chest drain. R3 stated that the Claimant was removing the chest drain tube from the resident, instead of merely changing the dressing, which the Claimant denies.

15 March 2010 – R3 provides written report of incident to R1/R2 [37].

18 March 2010 – Claimant dismissed.

March/April 2010 – the Claimant visits R3's home on at least two, if not three occasions. R3 stated that the purpose of the visits was to attempt to persuade her to change her report as to the chest drain incident (paragraph 5 R3's statement). In an undated letter sent to R1, in response to her dismissal [43b], the Claimant refers to having spoken to R3 about the incident, stating that her account was '*false*', '*lies*' and '*false judgment'*, concerning which the Claimant '*can go to court'*. A further letter, of 27 April 2010 [43d] refers to that conversation as having taken place on 19 March 2010. The Claimant's skeleton argument of 10 June 2013 [63] states that she went to R3's home twice in April and that '*I came to her and said that I have done nothing wrong and she knows that she said that prior seeing her second respondent asked her to write statement so the statement has not got a real date … she* (R3 said she) *has not written anything bad about me but only regarding dressing. I said that because of false accusation I might not get work …'.*

15 June 2010 – Claimant files ET1 against R1 and R2, alleging automatic unfair dismissal, due to a protected disclosure, failure to pay notice pay and race discrimination.

3 December 2010 – Neither Respondent having filed a Response, the Claimant obtained default judgment against R1 and R2. The judgment against R2 was subsequently revoked and the Claimant continues to pursue a claim of race discrimination against that Respondent. R1 failed in an application to have its default judgment revoked, but was already in administration by that point.

6 February 2012 – R3 signs a statement for the NMC.

3 May 2012 – Claimant provided R3's statement by NMC

6 August 2012 – Claimant presents ET1 against R3, who files an in-time response, denying the Claimant's allegations and asserting that the claim is out of time. A pre-hearing review (PHR) was listed in October 2012, to determine whether the claim was within time and if not, whether time should be extended. Over the intervening period from this date to the next, applications to resolve the matter of default judgments against R1 and R2 were also heard.

5 April 2013 – a case management order (CMO) ordered that the claims against R2 and R3 be stayed until the outcome of the NMC hearing. The Claimant was ordered also to file a statement setting out why she had not filed the ET1 against R3 earlier. The Claimant did not comply with that order, instead making the second of her, by then, two appeals to the EAT. A CMO of 8 May 2013 made two 'unless' orders against the Claimant, for non-compliance with previous orders and not actively pursuing her claim. The Claimant did not comply, but again appealed to the EAT.

10 June 2013 – holding of the PHR to determine the time limit point in respect of R3, having been re-listed due to the Claimant's health problems. It concluded that the claim was out of time and that it would not be just and equitable to extend time and therefore struck it out. The Claimant appealed against that judgment.

August and September 2013 – NMC hearing twice postponed at Claimant's request.

13-16 January 2014 – R3 commences evidence at NMC hearing.

29 April 2014 – NMC resumes hearing and R3 completes evidence.

22 August 2014 – the Claimant's appeal against the strike out judgment against R3 is allowed and remitted for consideration by a differently constituted tribunal. The EAT also revoked the order staying the proceedings until the outcome of the NMC hearing. The Claimant appealed to the Court of Appeal against one aspect of that determination, namely that the case should be remitted to a tribunal other than Exeter. That appeal was dismissed on 2 January 2015 as wholly without merit.

31 October 2014 – a telephone CMD is listed to deal with the reinstatement of the claim, but postponed pending the outcome of the above-mentioned Court of Appeal decision.

9 February 2015 – the telephone CMD is re-listed and CMOs made for a PHR on 13 May 2015.

24 March 2015 – the Claimant having appealed to the EAT against those CMOs, the appeal was dismissed as having no reasonable prospect of success.

13 April 2015 – R3 applies to strike out the Claim against her.

15 April 2015 – Claimant applies to strike out R3's Response.

16 April 2015 – the PHR is postponed and re-listed for 4 September 2015, at Plymouth.

20 May 2015 – the Claimant applies again to the EAT for leave to appeal against the Tribunal's acceptance of R2's response and which appeal was rejected as totally without merit. The Claimant appeals against that decision and it is listed for hearing on 15 July 2015, but adjourned at her request, on medical grounds. It was re-listed for 23 September 2015 and subsequently dismissed.

19 October 2015 – the Tribunal re-lists the PHR, at Plymouth, for 14 January 2016.

5 November 2015 – the Claimant appeals to the Court of Appeal against the most recent EAT judgment. The Tribunal postpones the PHR.

12 February 2016 – the Court of Appeal dismissed the Claimant's application for leave to appeal as having no prospect of success whatsoever and refused leave to appeal to the Supreme Court. It states that '*The Appellant seems wholly unable or unwilling to accept case management directions in relation to her case … these appeals have already had the effect of slowing down an already excessively lengthy case. The Appellant must now proceed to have her dispute resolved substantively, without raising unarguable points in attempted appeals. Otherwise she will risk being made the subject of a civil restraint order.'*

8 April 2016 – the Tribunal re-lists the PHR, for 2 June 2016, at Plymouth. The Claimant applied in late April and 10 May for it to be postponed on medical grounds and other grounds, but which was refused.

31 May 2016 – the PHR is postponed on medical grounds.

27 June 2016 – R3 makes a costs application.

1 July 2016 – the PHR is further stayed for an additional two months, on medical grounds. The Claimant is requested to confirm whether she is withdrawing or proceeding with her claim.

27 September 2016 – the Claimant writes to the Tribunal stating that her case is now with 'one of the European Courts' and that the PHR should be stayed until the outcome of such case. Around this time, the Tribunal receives correspondence on her behalf from the Polish Embassy.

22 November 2016 – the PHR is re-listed for 4 January 2017.

15 December 2016 – the PHR is postponed on medical grounds. She is advised that any further application must be accompanied by medical evidence providing diagnosis and also prognosis as to when she would be fit to attend a hearing in the Spring/Summer of 2017.

4 April 2017 – the PHR is re-listed for 13 June 2017.

15 May 2017 – the Claimant applies for the PHR to be converted to a full merits hearing, which is refused.

31 May 2017 – the Claimant writes stating that she is unable on medical grounds to participate in any proceedings.

6 June 2017 – the Tribunal receives further correspondence from the Polish Embassy.

8 June 2017 – the Tribunal postpones the PHR, on the basis that the Claimant's doctor expressly indicated that she would be likely to be fit to attend a hearing after 10 July 2017.

19 July 2017 – the Claimant applies for a full merits hearing and transfer of the hearing to Bristol, which is refused.

31 August 2017 – the Tribunal relists the PHR for 8 November 2017.

11 October 2017 – the Claimant applies to postpone the hearing due to the absence of a witness, which application was rejected, on 23 October 2017.

24 October 2017 – further correspondence is received from the Polish Embassy and the Claimant's MP's office. Further application for postponement and a witness order are refused on 2 and 7 November 2017.

8 November 2017 – the hearing proceeds in the Claimant's absence.

12. R3's Evidence. In respect of the issues I need to decide upon, R3's evidence to this Tribunal was as follows:

12.1. The Claimant was aware in March 2010 that she (R3) had reported the 'chest drain' incident to R2, as the Claimant came to R3's house asking her to change her statement, to say that she (R3) had made a mistake, pleading that she had a daughter and elderly mother to care for. As far as R3 was concerned, she had only reported what she had seen and was not prepared to change her statement. On questioning, she said that she had not been placed under any pressure from R1 or 2 to make the report, or to make any amendment to it, but was simply obliged to do so, for professional reasons, as she had witnessed an incident where she feared that the resident may suffer serious hurt, due incorrect clinical practice. The Claimant knew full well that it was R3's evidence that was used against her in the disciplinary hearing, as nobody else, apart from the resident had been present nearby when the incident took place. If the Claimant was dissatisfied with what R3 was saying about the incident (which she clearly was) then she could have taken legal action against her, at the same time as she did against R1 and R2, but instead delayed doing so for almost two and a half years.

12.2. She categorically denied the Claimant's allegations that she was lying about the incident, or had either made the report, or subsequently given evidence at the NMC hearing, in an effort to discriminate against the Claimant. R3

was contacted by the NMC in December 2011 and asked to give a statement about the 'chest drain' incident, which she did [45-63].

12.3. She gave evidence at the NMC hearing from 13 to 16 January and on 29 April 2014, over four years after the incident and two years after her statement. Prior to the second sitting in April, she had not seen a transcript of the first sitting, but was asked questions about what she said at that sitting three months before [120] and she was unable to recall all the detail of the incident. When the NMC confirmed its findings it could not uphold a finding of misconduct on that matter as it was unclear what had happened. That tribunal found [100] that '*in considering* (R3's) *evidence in its entirety, the panel concluded that it is inherently unclear what in fact she instructed* (the Claimant) *to do and what she actually saw when she entered the lounge on 13 March 2010. There also appears to be discrepancies between* (her) *written statement and her oral evidence, not least because she provided no clear evidence at all that you were attempting to remove the chest drain tube.'* Therefore this charge was not upheld by the NMC, but they did find the Claimant liable on two other charges, failing to report the fall of a resident to their relative and deliberate dishonest failure to disclose her employment and dismissal by a previous care home employer. They concluded that those matters '*fell well below the standards expected of a registered nurse and that you have breached a fundamental tenet of the NMC code. Honesty, integrity and trustworthiness are the bedrocks of the nursing profession'* and gave her a three-year caution [111]. R3 was questioned by the Tribunal as to the quality of her evidence at the NMC hearing, with the clear allegation by the Claimant that she was therefore lying. She said that she had found the hearings difficult, particularly as they were spread over two hearing dates, months apart and four years after the incident. It had been a long time since the incident and she gave evidence as to what she could remember. The lawyers representing the parties had also changed in the interim.

12.4. R3 had no involvement in the other incident for which the Claimant was dismissed (the failure to mention the previous employer), or in any other of the charges brought against the Claimant at the NMC hearing.

12.5. R3 was asked about the general 'culture' in the Home, in particular in relation to racial or ethnic issues. She said that, as was common in the care and health sectors, R1 had employed people from a wide range of races and cultures and the owners of the business were themselves from an ethnic minority. It was common knowledge that these sectors could not survive without non-British/English staff and relations between staff were good and certainly not affected by any racism, or discrimination. She had been quite friendly with the Claimant prior to her dismissal, giving her lifts and having her visit her home. There was certainly no animosity towards her because she is Polish.

12.6. As to the effect upon her of this claim, R3 said that it was placing an enormous and unnecessary burden on her, both financially (she confirmed that she is self-funding her legal representation) and emotionally. Both the allegations against her of dishonesty and implied race discrimination and

the numerous and significant delays in progressing this matter have placed a huge amount of emotional strain upon her. Her marriage has broken down and she has moved back in with her parents, for which this case is partly to blame.

13. Claimant's Written Submissions. These are contained in an email of 8 November 2017 and a revised statement dated 18 October 2017. In summary, those submissions are as follows:

13.1. That R3 has manipulated the whole situation and that she was effectively looking for reasons to blame the Claimant wrongly, by arriving to examine the Claimant administering the chest drain, but that due to R3's pretense of politeness at the time, the Claimant had not realized her true intentions.

13.2. That deceit on R3's part has caused the Claimant incredible loss and humiliation, to include her profession. It has also damaged her health.

13.3. The Claimant wishes to restore her profession, clear her reputation and to be compensated.

13.4. She is an experienced nurse who had never before had disciplinary charges against her. Even the NMC considered her '*a competent and caring nurse'*.

13.5. R3's involvement in the NMC proceedings shows continued malice and discrimination on her part. The failure of the NMC to uphold her false accusations show that they are without foundation. If anything, the NMC concluded that R3's own clinical practice was poor, which was why she was seeking to blame the Claimant, to cover up her own failings. There were discrepancies in her evidence that showed that she was dishonest.

13.6. She had only a '*feeling'* that R3 might be involved in the false accusations leading to her dismissal '*but I could not understand and did* (not?) *know the reason.'* It was only when she received the entire bundle of documents from the NMC that she knew that R3 was making false accusations against her. Nothing in the dismissal letter mentions R3, or who made the false accusations against her and no statement from her was provided at the time.

13.7. That any evidence from R3's father as to the Claimant visiting R3's home should be discounted, due to a natural bias on his part. (In fact, I took no account of the father's evidence – he had provided a letter in the bundle which I did not read, as R3's counsel chose not to call her father to give evidence, although he was in attendance.)

13.8. (The Claimant made assertions in respect of R2, but as those issues are outside the remit of this hearing and R2 did not attend the hearing, or provide any evidence, I don't consider those further).

14. Closing Submissions. On behalf of R3, Mr Murray made the following closing submissions:

14.1. The Claim against R3 was brought well over two years after R3's report to R1 and R2 and also several days in excess of a three-month-period after the Claimant had been sent R3's statement for the NMC. The only acts of alleged discrimination pleaded are R3's original report on the incident and the provision of her statement to the NMC.

14.2. 'Knowledge' is not an essential ingredient in considering the application of time limits – the limitation still runs, without knowledge, from the date of the act, although of course it may clearly be a factor in the exercise of discretion. If the act complained is R3's report in March 2010, then limitation expired in June 2010, or if it is the production of the NMC statement, then May 2012.

14.3. In fact, however, it is clear that the Claimant knew that R3 had made her report to R2 from early 2010, for the following reasons:

14.3.1. She visited R3's house on three occasions, following her dismissal, to attempt to persuade her to change her account of what had happened.

14.3.2. The accusation about the 'chest drain' incident can only have come from R3 and her comments in contemporaneous correspondence [43b and d] appear to suggest she knew that.

14.3.3. In a letter to the Tribunal dated 3 August 2012 [19 – 3.2], the Claimant said that she had received the '*first part of statement with false accusation I received through NMC four days before Tribunal hearing in December 2010.'*

14.4. The Claimant has had access to legal advice, at least on and off, throughout this matter. She discussed the prospect of bringing a claim against R3 with her two solicitors [19 – 3.1 and 22], when she states that the reason she did not pursue a claim against R3 was that a Ms Evans and another unnamed male solicitor advised her to focus on R2, as being the most responsible person, which advice she accepted. This was not, as she now asserts, negligent or poor legal advice: she was fully appraised of the possibility of a claim against R3, but despite herself considering R3 to be deeply involved in the discriminatory acts against her, chose not to pursue such a claim. This issue was not a 'flash in the pan', but clearly on her mind. We know from the way that the Claimant has conducted this litigation that she is no 'shrinking violet' and not intimidated by the judicial system and therefore quite capable of issuing proceedings, if so minded.

14.5. In respect of potential prejudice to R3 in permitting this claim to proceed, there is clear prejudice to her, namely:

14.5.1. R3 is, as is the Claimant, a nurse and at the time of the dismissal had only a minor supervisory role. She is not and never has been an employer and is of modest means. Nonetheless, without the resources available to an employer, she faces the financial burden of

responding to this unnecessarily complex and inordinately long-running claim. (Counsel confirmed that R3 does not have access to litigation funding from her professional body.) At the previous hearing, she represented herself and was not represented in the Claimant's appeal to the EAT. R3 is not some plc that can commit significant resources to dealing with such a claim, but a private individual, which is significant. It is entirely proper that if a claim is brought against her that she should be expected to respond to it, but that would be in the expectation that it would be resolved within a reasonable time period.

14.5.2. The '*eye-wateringly'* lengthy period of time this case has being in progress has placed enormous stress on her and her young family and resulted in, or at least contributed to, the failure of her marriage. If this claim had been commenced when the Claimant knew of R3's report on the 'chest drain' incident and been properly progressed, it could have concluded six years ago, in 2011. It is entirely relevant that there has been a significant delay of five years since the issue of the ET1 against R3.

14.5.3. If this matter proceeded, it would be unlikely to come to hearing until next year, eight years since the incident in question. That is far too long a period to expect a witness/respondent to recall events and it's clear from the 2014 NMC hearing that R3 had difficulties even then.

14.5.4. Allowing a claim of race discrimination to run against R3 for such a prolonged period of time, when it is clear that she is not racist, is very hurtful to her.

14.6. In respect of potential prejudice to the Claimant, the following matters arise:

14.6.1. It is clear from much of the correspondence the Claimant has provided from her doctors that the stress of these proceedings is at least contributing to some of the symptoms she describes [as set out in her statement of 18 October 2017].

14.6.2. The Claimant would not be left without a remedy, as her claim against R2, also for race discrimination, continues.

14.7. The 'just and equitable' test applies to both parties

14.8. In any event, the Tribunal is invited to either strike out the claim, or order the payment of a deposit, as it has either no, or little reasonable prospect of success. The Claimant has no evidence of any racial motivation on R3's part, beyond her assertions to that effect and even in the ET1 does not specifically say that R3's acts were because of the Claimant's nationality, but instead attributed them to R3 wishing to cover up for her own errors. Despite the enormous amount of correspondence and paperwork from the Claimant over the years, she has provided nothing that would go near reversing the burden of proof that applies to her. While it is accepted that the hurdle for strike out in discrimination cases, on 'no reasonable

prospects of success' grounds is a high one, this may be a case to which it applies. In any event, the bar is lower for a deposit order, which, as a minimum, clearly applies in this case.

14.9. As to the Claimant's application to strike out R3's Response, she has provided no evidence or argument to support it and has not attended this hearing to contest it. The case simply revolves around the Claimant asserting that R3 lied because the Claimant is Polish. R3 has told the truth and has no reason not to do so. The initial burden of proof rests on the Claimant and for R3 to deny the allegations against her is clearly nowhere near vexatious or without merit and must therefore have reasonable prospects of success. Further, R3's conduct of these proceedings has been exemplary.

Findings

15. Claimant's Knowledge of R3's Report to R1/R2. I am entirely confident that the Claimant knew full well, in March 2010 that R3 had reported the 'chest drain' incident to R1 (or R2 as representing R1) and which was instrumental in her dismissal. I find that for the following reasons:

15.1. I accept R3's evidence as to the Claimant coming to her house in the period immediately following her dismissal and attempting to persuade her to change her report. I had no reason to doubt R3's evidence on this point, describing as she did the Claimant pleading with her, on the basis of her need to support her daughter and elderly mother. The Claimant also admits, in her own written statements/letters that she went to R3's house to discuss the report made by R3. This is clear evidence therefore that in March/April 2010 the Claimant knew that R3 had made a report on the incident. Within three months of her dismissal, she had brought a claim against R1 and R2, alleging *inter alia* race discrimination, on grounds of her nationality, but not against R3, the person who had witnessed and reported the incident and who she now says did so, at least partially, on racially-motivated grounds. The Claimant asserts that R3 lied about the incident to cover up her own errors and continued to lie at the NMC hearing, hence the decision of that tribunal not to uphold the 'chest drain' charges against her and therefore that she is not a reliable witness in these proceedings. However, the NMC did not conclude that R3 was lying, or fabricating her evidence, but simply that it was '*unclear'* and '*insufficient'* to support the charges against the Claimant. It also commented that there were some discrepancies between her statement and her oral evidence, which, taking into account the time lag of two years between the incidents and the completion of her statement and then a further two years before she was questioned on it, over two hearings four months' apart, is hardly surprising. I don't consider that those findings damage R3's credibility as a witness at this hearing. I note (as the Claimant has sought to rely on the NMC findings), by way of comparison that the NMC found that the Claimant '*had brought the nursing profession into disrepute, breached one of the fundamental tenets of the nursing profession and acted dishonestly'* [113]. It concluded that her dishonesty was deliberate and that she had provided

no '*evidence of reflection or remorse into your misconduct'* and '*attempted to deflect the blame and discredit the witnesses of these proceedings.'*

15.2. The incident was one of two that was used by R1 to dismiss her and was specifically referred to in the letter of dismissal [39], as being '*witnessed by another nurse*', namely that she was attempting to remove a chest drain from a resident, rather than simply changing the dressing. At no point has the Claimant stated or implied that any other '*nurse'* was present at the incident, apart from herself and R3 and therefore it is a statement of the obvious that the nurse referred to can only have been R3. Therefore, on receipt of that letter, the Claimant knew that R3 had reported the incident and specifically stated that the Claimant was attempting to remove the chest drain, thus potentially putting the resident at risk and which, at least partially, resulted in her dismissal. She may not, at that point, have seen R3's written report, but can have been, I find, in no doubt as to what R3 had alleged against her and was already, at that point, accusing her of '*lies'* and '*false judgment'* and considering the possibility of going '*to the court'* in respect of those alleged falsehoods [43b]. If the Claimant considered, as she did, R3 to be lying about the incident and that R1/R2 dismissed her at least partially on racial grounds, resulting in her claim against them on that basis three months later, there is no valid reason (and she has not provided one) as to why she would not have included R3 at that point. Two alternative (but related) potential reasons seem much more likely: firstly, she didn't believe at the time that R3 had been racially-motivated in her report and in any event was not her employer and therefore that she would focus her claims on R1 and R2. Secondly, it was not until it was clear to her that R3 was going to give evidence against her to the NMC that she decided to attempt to intimidate her from doing so, by bringing these proceedings.

15.3. Even if it were the case that the Claimant was unsure as to R3's involvement in the incident report (which I don't accept) and had not seen R3's written report [42a] at the time of her dismissal (which is possible), she can have been in no doubt when she received the '*first part of statement with false accusation … through the NMC four days before Tribunal hearing in December 2010.* She knew therefore at that point that she was subject to a report to the NMC and that clearly the chest drain incident would form at least part of that report and as previously stated, R3's evidence was crucial to that incident. If she genuinely believed that R3 was motivated to lie about the incident for discriminatory reasons, then she had ample opportunity to bring her claim against her, at least two years earlier than she did.

Conclusions

16. The Claimant's claim against R3 is obviously out of time, either by approximately two and a half years, from the date of the incident, or, in the alternative, by three days, based on her receiving R3's statement to the NMC on 3 May 2012 and filing her ET1 on 6 August 2012.

17. Whether Just and Equitable to Extend Time. Applying **Keeble**, I consider the following factors and find that it is not just and equitable to extend time in this case:

17.1. The length of the delay and the reasons for it: if the act of discrimination is taken as R3's report in 2010, then, as stated, the delay is well over two years. If the Claimant's case is taken at its highest, that she was unaware of that act, until receipt of the NMC statement, then the delay is three days. My findings of fact indicate that the Claimant's state of knowledge was that she knew in March/April 2010 that R3 had made the report which at least partially resulted in her dismissal and did not need, therefore, to wait until receipt of the NMC statement two years later to conclude that R3 had wronged her. She has provided no alternative reason for that delay and as stated in my findings of fact, I consider that the real reason for the delay was a combination of her not considering that R3 had acted from a discriminatory motive; that she had sufficient recourse in any event against R1 and R2 and that when she realized that R3 was to give evidence against her to the NMC, she sought to intimidate her against doing so. Even, however, if the Claimant's case at its highest is considered, she still failed to meet the time limit by several days, despite clearly having discussed the possibility of such proceedings with her solicitor(s). As pointed out by Mr Murray and as is clear from the chronology of this case, this is not a claimant intimidated by, or unfamiliar with tribunal proceedings. It is clear, therefore, that even in the latter scenario, she had ample opportunity to bring the claim within time, but did not, for no good reason.

17.2. To my mind, there can be no doubt that the inordinate delay in this matter will affect the cogency of the evidence. It is already clear from the NMC findings that R3 found it difficult to recall precise details after four years, let alone a potential eight.

17.3. The factor as to whether the parties co-operated with any request for information is not relevant in this case.

17.4. In respect of the promptness, or otherwise, with which the Claimant acted, once she knew of the facts giving rise to the claim, it is clear that she did not act in any way promptly. Given my findings of fact as to her state of knowledge in 2010, bringing a claim over two years' later is clearly far from prompt and even reliant on her case that she didn't know the facts until May 2012, she still failed to act promptly, even though she was considering proceedings against R3 and missed that time limit. I note the Claimant's reliance on **Clarke**, but this is not a case where the alleged act of discrimination was not complete until (in these circumstances) R3 had filed her statement with the NMC. The act was R3's report to R1 and R2 in respect of the original incident and was complete at that point. R3's statement to the NMC merely set out her account of that incident.

17.5. In respect of legal advice, the Claimant had such advice on and off from the outset of this matter and crucially at the time she received the NMC statement. In any event, without or without legal advice, the Claimant has been able to pursue claims against three respondents, make three appeals

to the EAT, two to the Court of Appeal and participate in NMC proceedings and is therefore, I find, a person quite capable of and willing to launch proceedings in her own right, without such legal advice.

18. Balance of Prejudice. If, instead, in the alternative, this claim is treated as an amendment to the existing claim against R1 and R2, then **Selkent** applies. I consider the following matters in relation to potential prejudice to either party, in deciding whether to either grant or refuse an extension of time:

18.1. The Claimant. If refused, the Claimant will be unable to pursue her claim against R3 and if successful in that claim, to seek remedy from her. However, the Claimant has a continuing claim against R2, on similar grounds and therefore would not be left without potential remedy.

18.2. R3. I consider that R3 would potentially be at risk of the following prejudice:

18.2.1. She has been obliged, for approximately five years now, to defend herself against this claim, with much of the delay during that period being the fault of the Claimant. While the Tribunal ordered a stay of proceedings until the NMC reached its conclusions, those NMC proceedings were postponed twice, in August and September 2013, due to the Claimant's requests for adjournment on both medical and the need to seek legal advice grounds. It proceeded in January 2014, despite another postponement application from her, in her absence [85]. Following the NMC findings, in late 2014, three years have passed in which it should be clear from the chronology set out above that the Claimant has not only failed to co-operate in the progress of this matter, but actively delayed it by unmeritorious appeals to the EAT and Court of Appeal (as recorded by both those bodies in their decisions of 2 January, 24 March, 20 May, 23 September 2015 and 12 February 2016). R3 is entitled to finality in this litigation and based on the Claimant's past behaviour, it seems unlikely that her future co-operation could be depended upon, in the event that this matter proceeded to hearing. Inevitably, a litigant will find such proceedings stressful, particularly in view of the personal nature of the allegations against her and the accusation of racism and I note her evidence as to effect on her and her family life.

18.2.2. She is self-funding her representation and I accept, as a nurse, that she will be of limited means. This factor alone might not be so significant, were it not for the significant delay in the progress of this matter, with many adjourned hearings no doubt adding to her costs.

18.2.3. Her ability to defend herself against the Claimant's allegations and give cogent evidence is severely prejudiced by the delay in the hearing of this matter.

19. Conclusion on Balance of Prejudice. I conclude, therefore, weighing the prejudice to be caused to Claimant by dismissing her claim, against the prejudice being suffered and likely in the future to continue to be suffered by R3 that the

balance falls in the latter's favour and that it would not be in the interests of justice to permit the claim to proceed.

20. Overall Conclusion. For these reasons, therefore, I am not satisfied, applying **Robertson** that the Claimant has persuaded me that it would be just and equitable to extend time in this case and I accordingly refuse an extension of time to the Claimant to bring this claim and dismiss it, as out of time. Having dismissed the claim, I make no findings in respect of the merits, or otherwise, of either the Claim or Response.

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Employment Judge O'Rourke

Sent to the parties on:

29 November 2017

For the Tribunal:

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