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EMPLOYMENT TRIBUNALS

Claimant: **Mr M S Islam**

Respondent: **Princess Alexandra Hospital NHS Trust**

Heard at: **East London Hearing Centre**

On: **Tuesday 26 March 2019**

Before: **Employment Judge Prichard**

Representation

Claimant: In person

Respondent: Mr D Panesar counsel, instructed by Cater Leydon Millard, solicitors, Abingdon.

Also in attendance: Ms T Lewin Poole, solicitor, Cater Leydon Millard

Ms Soofia Idress HR with PAH

JUDGMENT

The judgment of the Employment Tribunal is that: -

The claimant's dismissal and any other prior claims are dismissed as out of time in circumstances where it is not just and equitable to extend time under s 123(1)(b) of the Equality Act 2010.

The claims arising from the refusal of the claimant's appeal against dismissal are struck out under Rule 37(1)(a), (c), and (e) of the Employment Tribunal Rules of Procedure 2013.

REASONS

1 The claimant, Mr Islam, presented complaints to the tribunal on 31 July 2017 alleging unfair dismissal, disability discrimination, race and religious discrimination. He had started employment with the respondent on 1 June 2015 as a band 6 Information Analyst for PAH. A lot of his duties consisted of coding diseases and disorders for administrative and budgetary purposes.

2 The claimant is highly qualified. He came to the UK from Bangladesh in 2003. He gained an MSc in Astrophysics at QMUL. He also ran a telecommunications company of his own. He is very knowledgeable about IT.

3 He has a standing diagnosis of Autistic Spectrum Disorder (ASD), latterly it was complicated by clearly psychotic symptoms for which he was treated in 2016 with oral Olanzapine 2.5mg bd. That is a well-known common antipsychotic medication.

4 In February 2016, the claimant was suspended. There were 2 areas of concern. One was that, at one stage, he had been off sick but was seen working on checkouts at a supermarket near his home in Harlow. Disciplinary action was ultimately not pursued because it was felt that that work was of a sufficiently different character, and that the claimant might well have been too unwell to undertake analytical work, but that the work on the check-out in the supermarket was far simpler. In fact, the claimant tells me he is still working there, at the weekends on the check-out in the supermarket.

5 The claimant was also suspended because of relations with colleagues and the fact that he had by then started to manifest what seemed to be psychotic symptoms. Typically, he seems to have had persecutory delusions which have apparently persisted, despite the fact that he was diagnosed as having an acute "transient" psychotic episode. On 11 March 2016 the respondent's occupational health recommended he return to work in stages.

6 The plan for the return to work seem, in hindsight, to have been over-ambitious and to have imposed extensive burdens on the respondent at a time when the claimant was still quite unwell. Ultimately it did not go ahead. After 6 months the claimant's GP from the Nuffield House Surgery said that he had done very well over the past 6 months, that he took his medication regularly, he was staying active, and he had not been experiencing paranoid delusions or hallucinations for at least 6 months.

7 The same was confirmed by his consultant psychiatrist who reported him to be doing well and to be symptom free. That was on 12 September. Previously there had been a GP's report on 30 August confirming the claimant was well, and was no longer having psychotic symptoms. The claimant had agreed to continue taking Olanzapine, something he now says he was "bullied" into taking by his employer. Occupational health signed him fit to return to work, on a phased return, and said:

> "Saidul told me that he doesn't think he requires any adaptations at work. This may indeed be the case however he will qualify as disabled under the 2010 Equality Act and if his manager believes adjustments are required, then Dr Berend's letter of 11 March gives the appropriate advice."

8 That letter, already referred to, mentioned the claimant's autistic spectrum disorder, and specifically this:

> "It is important that all communication is ideally written, unambiguous, and very clear, given that he is affected by autistic spectrum disorder. He will have limited ability to understand innuendo or jokes. This, in actual fact, could have a negative impact in terms of the psychotic symptoms."

She continues:

> "This return to work should be considered a trial and I would like to see him again in 4 weeks."

9 Dr Berend's view, which is generally correct, was that patients are generally better served by returning to work if management can accommodate any adjustments to enable that to happen. It is true, at times, that this can impose an unrealistic burden on an employer. The main purpose of the employment relationship is work, rather than therapy.

10 The claimant did return. I am informed by Ms Idrees that the employer may put in place a buddying system. Instructions were given in writing, and they were simple. He was assigned tasks which were considered simple. The claimant was also re-inducted as they happened to have 2 new starters at the time. He was not given access to more sensitive personal data, given the respondent's misgivings about him at that time. They needed to reacquaint themselves with him and any special needs the claimant might have had.

11 Despite all this support, it appeared that the claimant was taking up to 3 days to complete apparently simple tasks, that would take most people one day.

12 At this stage of his employment he had been off for 7 months so his probationary status had been extended to allow for the fact that time was not running on his probation when he was off sick. They needed to restart the probationary review process.

13 Next, following a probation review meeting on Friday 13 January, the claimant was told that his employment would be terminated, and that he would be given notice but that he would not be required to return to work, and he would be paid in lieu of notice. This was followed-up by a confirmation letter on 23 January 2017 confirming the arrangement for payment in lieu of notice, and also stating that the claimant had a right to appeal within 5 working days of the receipt of the letter.

14 The claimant says he did not get the letter until 14 February 2017, I do not know how that could have happened, but he did appeal at some length. He sought to be reinstated. That appeal was by email dated 14 February 2017. The appeal was heard by Liz Booth, the Director of HR on 23 May and the outcome was given to the claimant by letter of 31 May. His appeal was not upheld because:

> "there is good evidence that the decision not to confirm you in post was based on a fair process and was taken after adjustments had been made to your role to take account of your disability. The Trust has also made an attempt to find you an alternative role but was not able to do so.

> Therefore, it was a reasonable decision not to confirm you in post."

15 Next, the claimant applied for early conciliation with ACAS on 5 June. Let us recall now that the effective date of termination was Friday 17 January 2017. The reference to ACAS was clearly outside the 3-month time limit from that date.

16 Today, the claimant has told me that ACAS told him that he would have to exhaust the internal procedure before referring the matter for early conciliation. I told the claimant frankly I thought the chances of that advice having been given by anybody from ACAS was about 1 in a million. ACAS is painfully aware of the jurisdictional time limits and will go to great lengths to avoid being blamed by would-be claimants who find themselves out of time. By the time the claimant had referred the matter for conciliation, it was already out of time. If day A was 5 June 2017, day B was 5 July and the claim form was presented in time relative to that on 31 July 2017.

17 The claim form is indicative of paranoid persecutory and grandiose delusional beliefs. That is the only sensible way to look at it. Just to quote a few paragraphs to illustrate the point:

> "It is very difficult to summarise the chronology of hoax, intimidation, torture set up by Princess Alexandra Hospital NHS Trust to provoke me because I am Bangladeshi, Muslim and disabled. Like the example is holocaust of Nazi concentration camp for 5/6 years when Nazi forces were judge and prosecutor same time."

The compensation he sought was:

> "I want continuous job from 1 June 2015 to present full higher band payments more than other English colleagues got and urgently become director and CEO and any other open options to be allowed."

The attachment to the claim states:

> "MI5/MI6 provocateurs inflicted following abuses and a lot more forcing me into sick is evidence regarding intimidation to making me where I would sabotage as an active provocateur…..
>
> 3. Heatha shouted at me and broke my head.
>
> 4. Vince shouted at me to grab a post.
>
> 5. I was denied access to database for two weeks.
>
> 6. Sampath [the claimant's line manager] did malicious attack on me.
>
> 7. I was targeted because I am Bangladeshi and Muslim."

18 That is enough to demonstrate the point. This claim form is not in an intelligible form to respond to. Nonetheless, the respondent did its best, in their ET3 Response form, to put its side of how they saw the claimant's employment with them and its termination. They clearly took the point that there were problems with the jurisdictional time limits.

19 On 14 November 2017, I heard this case at a substantive public preliminary

hearing to look into (1) the time points; (2) the claimant's length of continuous service (given he was claiming unfair dismissal at that stage) and (3) the question of the claimant's mental capacity or ability to conduct the proceedings himself as a litigant in person.

20 I then gave a judgment making an order striking out the unfair dismissal claim for not having 2 years' qualifying service.

21 I also stayed the proceedings for 6 months to permit the claimant to obtain a professional psychiatric assessment of his ability to conduct or participate in the proceedings. I directed that a copy of that judgment and the judgment and reasons was to be shown to any psychiatric professional who prepared a report, as it detailed the tribunal's concerns and the reason for ordering that a report be obtained. I postponed consideration of all discrimination issues, and jurisdictional time limits, to a future public preliminary hearing. That judgment and reasons should please be read with the present one.

22 The preliminary hearing has finally come around today, 26 March 2019, nearly 15 months later. In that time the claimant has provided no evidence and no report. I could strike the claim out simply for failure to comply with an order to produce a medical report under 37(1)(c) the Employment Tribunal Rules of Procedure 2013, or under other sub-rules.

23 The claimant appears before me again today. He has been very accommodating and has come across pleasantly to the tribunal and to the other side, but he has nothing to show for the last 15 months. His explanation for that is frankly bizarre and I cannot accept it. He states that in December 2017 he went down to his GP, at the Nuffield House Surgery and discovered that he had been automatically deregistered and that all his medical records had been deleted. He had been at that practice for 12 years from 2006.

24 He showed some evidence and sent it in on email to say that his medical records now start in May 2018. The evidence he supplied of that is not conclusive and is not properly explained. I have been unable to accept it. He states it is a printout from a direct patient database (all NHS patients can directly access their reports online, something which I did not appreciate before. I have never seen a similar form before. it is called Systemonline, the patient online service. I cannot see that word on the document he provides. His NHS number appears to be his true NHS number because he provided a copy of his NHS medical card and the numbers are the same.

25 I understand what he is putting forward but it does not prove to me the extraordinarily rare thing that a patient's entire medical records have been deleted. The reasons he says he cannot get a psychiatric report is that he cannot get a referral from his GP because in his GP surgery he does not exist as a patient. I hear what he is saying but I cannot accept it.

26 The claimant should appreciate that if he is going to prove that something quite exceptionally unusual has happened, the tribunal would need evidence to see that this extraordinary thing has actually occurred. There is no such evidence, there are just the

claimant's repeated assertions. I do not consider he has made proper or reasonable attempts to get the report he needed.

27 Having spoken to him for some time today, I doubt that any report he did obtain would say that he was fit to conduct these proceedings. I must say I have grave reservations, having seen him today. He is not making a great deal of sense. He is talking about his unfair treatment at Princess Alexandra. Of course, that is not what we are here for today. This is a preliminary hearing, not a final hearing. I had set out very clearly in my judgment what the claimant's preliminary problem was. We have not reached the merit of the claim, we have got nowhere near to it.

28 Of all the agenda items I could consider at this hearing today, the clearest is the jurisdictional time limit. It is quite clear that the claims are well outside the three-month time limit in section 123 of the Equality Act 2010. There are two ways round this, the first is if I considered it "just and equitable" to extend time for the hearing of the claims. According to the old authority *Hutchinson v Westward TV* IRLR [1977], 69, EAT and other authorities, the apparent merits of the claim will have an influence on the discretionary decision as to whether it is just and equitable to extend time to hear the out of time claims.

29 In my view, and I have quoted from the ET1 above, the merits of this claim are far from obvious. The claim form itself seems to be symptomatic of psychotic disorder which would suggest that the claimant is not fit to conduct the hearing and that is why I took the unusual step of staying the case so that we could get a psychiatric view on the claimant's fitness to conduct the proceedings. There has been no intelligible list of issues and the ET1 claim form he presents defies rational analysis. It contains a large amount of hyperbole, and the allegations are patently implausible.

30 The claimant states today that he would go down and see Linda at the Nuffield House Surgery to get confirmation that he has been compulsorily de-registered and that his records have been deleted and that there is nothing he can do about that, and that there is no way to obtain any psychiatric report.

31 The claimant has been warned for a long time now that this hearing would happen, and that he needed to prepare for it, and he should either have psychiatric report or an extremely good excuse after 15 months as to why there is not one, or why it is no longer necessary.

32 I cannot extend time on the basis just and equitable to extend time under s123(1)(b) of the Equality Act 2010. This includes consideration of whether it would be equitable for the respondent for me to do so. It is patently not. Given an effective date of termination of 13 January 2017, the matter should have been referred for conciliation on 12 April.

33 There are no possible circumstances which could indicate that there was a continuing act for the purpose of s123(3) of the Act. In my view, the employment relationship clearly ended on 13 January 2017. All that remained was for the claimant to appeal against dismissal, as was his right.

34 The ET1 claim form, however, is in time relative to the outcome of the internal appeal against termination on 31 May 2017. For completeness, that falls to be dealt with under Rule 37 of the Employment Tribunal Rules of Procedure 2013.

35 Another factor which makes it not just and equitable to extend time is that the respondent had originally up to 8 witnesses who they would have called at a final hearing if it had been managed to make a final hearing possible. 4 of those 8 have left. Mr Sampath Gamvasan was the claimant's line manager at one stage, against whom the claimant raised a grievance. He has left. Julie Starr was the Head of Information Technology, and has left. Liz Booth who determined the appeal against the termination has left. Gemini Padman, (another relevant witness of fact), had also left.

36 Certainly 3 of these witnesses are not just minor witnesses as I have seen from some of the documents in the case. They all have significant parts to play and had significant views on the claimant. These factors support a finding that a fair trial is no longer possible Rule 37(1)(e). This is of particular relevance in the case of Liz Booth who heard the claimant's appeal, which complaint is in time.

37 I have made a primary finding under rule 37(1)(a) of the Employment Tribunal Rules of Procedure that the claims appear to have no reasonable prospect of success. Still today, my impression is precisely that. Looking at the claim form and some of the papers in the case and hearing about the efforts that the respondent made to accommodate the claimant back into his role at the probationary stage, when he was still quite ill. The thought that any tribunal could find the claimant's termination was motivated to any extent by the claimant's race or religion I find impossible to imagine. He had been recruited so soon before these events.

38 The fact that the claimant had autistic spectrum disorder was something that the respondent knew about and was fully prepared to accommodate. What they found much harder to accommodate were the apparent psychotic delusional beliefs. Ultimately, this tribunal too is unable to accommodate these.

39 So this judgment on one principal issue of those set out in my letter of 27 November. It was ascertained that the claimant was asking for an 8-month extension of the original stay. Despite that request it did not seem there was any prospect of the claimant being in any better position in 8 months, or however long.

40 I wrote stating that the case had to come on for a hearing, the claimant had had long enough. On 27 November 2018 and I set out the issues for this hearing: (1) the claimant's unreasonable failure to provide a medical report; (2) the claims having no reasonable prospect of success; (3) a fair trial not being possible and (4) the claims being out of time, and the Judge could dismiss one or more of the claims for lack of jurisdiction. I could decide these issues in the order of my choosing on the day.

41 In the event, my judgment is principally based on the 4th issue, that the claims are out of time. It is not just and equitable to extend time, all the claims are dismissed. The other considerations 1, 2, & 3, <u>all</u> impact on why it is not just and equitable to extend time under s 123(1)(b) of the Equality Act 2010.

42 The exception to this reasoning is the discrimination complaints, to the extent that they are made of the decision made by Liz Booth to refuse the claimant's appeal. These are not out of time. These are struck out under Rule 37(1)(a) (c) and (e) of the Employment Tribunal Rules of Procedure 2013. Rule 37(1)(a) is no reasonable prospect of success, (c) non-compliance with an order of the tribunal, and (e) fair hearing no longer possible. There is a special emphasis here on Rule 37(1)(e) because Liz Booth has now left the respondent, and after this time may also struggle with the detail anyway.

Employment Judge Prichard

19 June 2019