



EMPLOYMENT TRIBUNALS

Claimant

Mr S Herbert

Respondent

v West Hertfordshire Hospitals NHS
Trust

OPEN PRELIMINARY HEARING

Heard at: Watford

On: 12 August 2020

Before: Employment Judge Alliot (Sitting alone)

Appearances:

For the Claimant: In person

For the Respondents: Mr S Sudra (Counsel)

JUDGMENT

1. The claim was presented out of time.
2. It was not reasonably practicable to present the claim for unfair dismissal in time and the claim was presented within such period as the tribunal considers was reasonable.
3. The claim for racial discrimination was presented within a period the tribunal thinks is just and equitable.
4. The respondent's application for strike out and/or deposit orders is dismissed.

Note: Reasons for the decision having been given orally at the hearing, written reasons will not be provided unless a written request is received from either party within 14 days of the sending of this record of the decision.

CASE MANAGEMENT SUMMARY

Final hearing

1. All issues in the case, including remedy, will be determined at a final hearing before an Employment Judge sitting with Members at the **Employment**

Tribunals Watford, Radius House, 51 Clarendon Road, Watford, WD17 1HP, on a date **to be fixed**, starting at 10 am or as soon as possible afterwards. The parties and their representatives, but not necessarily any other witnesses, must attend by **9.30 am** on that day. The time estimate for the hearing is **5 days**, based on the claimant's intention to give evidence and call 1 further witness and the respondent's to call 4 witnesses, and on the following provisional timetable:

- 1.1 ½ a day for tribunal pre-reading and any preliminary matters;
 - 1.2 1 day for the claimant's oral and other evidence on liability;
 - 1.3 1 ½ days for the respondent's oral and other evidence on liability;
 - 1.4 a maximum total of 1 hour (half each) for submissions on liability;
 - 1.5 The balance of Day 4 and Day 5 for the Tribunal to determine the issues which it has to decide, reach its conclusions, prepare its reasons, give judgment and deal with remedy if appropriate.
2. The claimant and the respondent **must** inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or of the case not being ready for the final hearing.

The claim

3. The claimant was employed by the respondent as a Logistics Co-ordinator from 18 February 2008 until resignation with effect on 19 July 2019. By a claim form presented on 6 December 2019, the claimant brought complaints of unfair dismissal and race discrimination. The respondent resists the claims.

The issues

4. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Time limits / limitation issues

- 4.1 Were all of the claimant's complaints presented within the relevant time limits? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures.

Unfair dismissal (Constructive)

- 4.2 Was the claimant dismissed, i.e. was the respondent in fundamental breach of the contract?
- 4.3 The claimant relies on the implied term of mutual trust and confidence.
- 4.4 The conduct the claimant relies upon as breaching the trust and confidence term is:
- 4.4.1 Coming to the conclusions set out in the letter dated 8 April 2019 without giving the claimant an opportunity to defend himself, or see the investigation material other than the conclusion

4.4.2 Disciplining the claimant by taking informal action.

4.5 Did the claimant affirm the contract of employment before resigning?

4.6 Did the claimant resign in response to the respondent's conduct?

4.7 If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 and, if so, was the dismissal fair or unfair in accordance with the Employment Rights Act and, in particular, did the respondent in all respects act within the so called band of reasonable responses?

Race discrimination

4.8 Did the respondent subject the claimant to the following treatment?

4.8.1 Unknown colleagues during the investigation suggesting that the claimant acted inappropriately due to their race;

4.8.2 Coming to the conclusion that the claimant acted inappropriately to others due to their race.

4.9 Was that treatment "less favourable treatment", ie did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparator, namely a non-white colleague accused of similar behaviour.

4.10 If so, was this because of the claimant's race?

Remedy for unfair dismissal

4.11 If the claimant succeeds in whole or part the tribunal will be concerned with issues of remedy and, in particular, if the claimant is awarded compensation and/or damages will decide how much should be awarded.

Other matters

5. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at:
www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/

6. The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise)...*". **If, when writing to the tribunal, the parties don't comply with this rule, the tribunal may decide not to consider what they have written.**

7. The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
8. If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.
9. The following case management orders were made.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Complaints and issues

- 1.1 The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

2. Judicial mediation

- 2.1 The parties are referred to the "*Judicial Mediation*" section of the Presidential Guidance on 'General Case Management', which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/. The claimant is interested in judicial mediation. The respondent must inform the claimant and the tribunal in writing by **4pm, 23 September 2020** whether or not it is, in principle, interested in judicial mediation.

3. Amendment

- 3.1 By consent, the respondent's name is amended to West Hertfordshire Hospitals NHS Trust.

4. Statement of remedy / schedule of loss

- 4.1 The claimant must provide to the respondent by **4pm, 9 September 2020**, a document – a "Schedule of Loss" – setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant's complaints and how the amount(s) have been calculated.
- 4.2 If any part of the claimant's claim relates to dismissal and includes a claim for earnings lost because of dismissal, the Schedule of Loss must include the following information: whether the claimant has obtained alternative employment and if so when and what; how much money the claimant has earned since dismissal and how it was earned; full details of social security benefits received as a result of dismissal.

5. **Amended response**

5.1 The respondent may, if so advised, amend its response in light of the issues. Such amended response is to be sent to the tribunal and the claimant by **4pm, 9 September 2020**.

6. **Dates to avoid for the final hearing.**

6.1 By **4pm, 26 August 2020**, the parties are to send to the tribunal dates to avoid for a 5 day hearing taking place after 10 March 2021 for the whole of 2021.

7. **Documents**

7.1 On or before **4pm, 21 October 2020**, the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so within **7 days** of any such request.

8. **Final hearing bundle**

8.1 By **4pm, 16 December 2020**, the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files ("bundle"), and provide the claimant with a 'hard' and an electronic copy of the bundle within **14 days**. The bundle should only include documents relevant to any disputed issue in the case and should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional / further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are relevant. These must be put right at the start of the bundle, in chronological order, with all the other documents after them;
- documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally be simple chronological order.

9. **Witness statements**

9.1 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each

other on or before **4pm, 10 February 2021**. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission. The written statements must: have numbered paragraphs; be cross-referenced to the bundle(s); contain only evidence relevant to issues in the case. The claimant's witness statement must include a statement of the amount of compensation or damages he is claiming, together with an explanation of how it has been calculated.

10. Final hearing preparation

10.1 On the first day of the hearing the following parties must lodge the following with the Tribunal:

10.1.1 four copies of the bundle(s), by the respondent;

10.1.2 four copies of the witness statements by whichever party is relying on the witness statement in question;

11. Other matters

11.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.

11.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.

11.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.

11.4 Public access to employment tribunal decisions

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

11.5 Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.

11.6 Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

Employment Judge Alliott

Date 24/08/2020

Sent to the parties on:

09/09/2020

For the Tribunal:

Jon Marlowe