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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103497/2020 & 4103549/2020

Hearing Held by Cloud Video Platform (CVP) on 10 February 2021

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Employment Judge A Strain

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Mr Marcial Armas Landaura

**Claimant
Represented by:
Alec Rose**

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Tayside Health Board

**Respondents
Represented by:
Ms Hazel Craik
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the application to amend the claim is refused.

Background

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1. The Claimant presented two ET1s on 26 June and 1 July 2020, through his solicitor. The claims were extremely similar and were subsequently conjoined.

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2. Both focused upon a complaint about a disciplinary process which started on 24 June 2019, and which culminated in a decision to offer a

disciplinary transfer as an alternative to dismissal on 18 March 2020. The Claimant produced a chronology of events giving rise to the claim paragraphs 4-20 of the Grounds of Claim.

- 5 3. The Claimant asserts that actions taken by the Respondent throughout the disciplinary process constituted direct discrimination under Section 13 of the **Equality Act 2010 (EA 210)**, and harassment under Section 26 of the **EA 2010** on the grounds of sex and/or race.

- 10 4. The Claimant's solicitor withdrew from acting, and after case management by the Tribunal, the Claimant made an application to amend his Claim Form on 2 November 2020 by virtue of an Amended Grounds of Claim. The application is opposed by the Respondent. The amendment is opposed on the basis that (it is argued by the Respondent) would introduce additional acts of discrimination and potentially new
15 grounds of claim which date back to 2015.

5. The issue for the Tribunal to determine at the Preliminary Hearing was whether or not the application to amend should be allowed.

6. The Parties had lodged an agreed Joint Bundle of Documents with the Tribunal.

- 20 7. The Claimant gave evidence on his own behalf.

Findings in Fact

8. Having heard the evidence of the Parties and considered the documentary evidence before it the Tribunal made the following findings in fact:
 - 25 8.1 The Respondent is a large organisation, part of NHS Scotland, engaged in the provision of health services to the Tayside Community;

5 8.2 The Claimant is a Peruvian national who moved to Scotland in 2004. He is of Latin American ethnicity. He has been employed as a nurse with the Respondent since in 2008. He has worked at various NHS Tayside sites since then. His most recent place of work was Wallacetown Health Centre. He was based at this site from November 2017.

10 8.3 The Claimant believes that he has been treated differently to other members of staff of the Respondent due to his gender and nationality. He raised multiple complaints about the treatment he received at the hands of other staff and management between 2015 and 2019 as detailed in the Scott Schedule (Production 22). The Claimant believes he has been placed under a higher degree of scrutiny than other members of staff, has been subjected to sexually inappropriate behaviour from other staff members, has been sworn at and threatened with violence from staff in his direct line of management. These complaints were largely brushed under the carpet and have never been dealt with in a matter which is commensurate with their seriousness. The Claimant suspected that he had a claim for discrimination from 2015 in respect of the treatment he claims to have received as detailed in the Scott Schedule (Production 22). The Claimant considered that he was subject to a “pattern of discrimination” and “pattern of management behaviour” as detailed in the Scott Schedule and Amended
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25 Grounds of Claim (Production 20).

30 8.4 The treatment detailed within the Scott Schedule and Amended Grounds of Claim makes reference to periods of time where he worked in disparate health centres of the Respondent and where he was managed by different people. Some of the treatment complained of related to actions of his co-workers and not those with management responsibility for him.

8.5 There was no discernable link between the treatment complained of from 2015 to the disciplinary process which commenced on 24 June 2019.

5 8.6 The Claimant had taken advice from his RCN representative on 16 August 2016 regarding the prospect of making claims in respect of the treatment he claims he was subject to in the 2016 incidents. He was advised that the prospects of success were not good. The issue of time bar was never raised with him.

10 8.7 The Claimant was subject to a disciplinary process which started on 24 June 2019, and which culminated in a decision to offer a disciplinary transfer as an alternative to dismissal on 18 March 2020. The Claimant produced a chronology of events giving rise to the claim paragraphs 4-20 of the Grounds of Claim (Production 2).

15 8.8 The Claimant was represented and advised by the RCN throughout the disciplinary process.

20 8.9 The Claimant completed a Protected Characteristics Questionnaire for the RCN around Christmas 2019/20. His RCN representative informed him that the RCN could obtain legal advice for him in January 2020.

25 8.10 The Claimant received legal advice in connection with the treatment he received due to the 24 June 2019 disciplinary process on 24 June 2020. He was told by his solicitor on 25 June 2020 that unless a Claim was submitted before 1st July 2020 then it would be time barred.

30 8.11 The Claimant gave his solicitor details of the previous treatment referred to in the Scott Schedule and was informed by his solicitor that any claims in respect of treatment pre 24 June 2019 were time barred. Previous treatment could only be relied upon as "background".

8.12 The Tribunal ordered the Claimant to provide full specification of each claim and respond to paragraphs 30,31 & 33 of the paper apart to the Respondent's ET3 on 12 August 2020.

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8.13 The Claimant's solicitor subsequently withdrew from acting by email of 25 August 2020.

8.14 The Claimant provided further specification of his claims by email of 19 September 2020 (Production 11 and 12).

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8.15 The Claimant submitted an application to amend his Claim Form on 2 November 2020 by virtue of an Amended Grounds of Claim.

The Relevant Law

9. The Claimant seeks to amend his application to include additional acts of discrimination and potentially new grounds of claim which date back to 2015.

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Overriding Objective

10. The starting point for the Tribunal in considering any such application is the "overriding objective" which provides:

Overriding objective

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2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- 5 (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

10 Applications to Amend

11. In the context of applications to amend the Tribunal should have regard to the case of ***Selkent Bus Company Ltd v Moore [1996] IRLR 661*** (which was followed by the EAT in Scotland in ***Amey Services Ltd and another v Aldridge and others UKEATS/0007/16***). The EAT held that, when faced with an application to amend, a Tribunal must carry out a careful balancing exercise of all the relevant circumstances, weighing up the balance of injustice or hardship that would be caused to each party by allowing or refusing the application. This would include the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

Time limits

12. In this case the amendment purports to introduce claims which may be time barred. The time limit for a discrimination claim to be presented to a Tribunal is 3 months starting with the act complained of (section 123(1), Equality Act 2010). Section 123(3)(a) of the Equality Act 2010 provides for continuing acts of discrimination, where acts of discrimination extend over a period are treated as having occurred at the end of that period. The question a Tribunal should ask is whether the employer is responsible for an “an ongoing situation or a continuing state of affairs”

in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (***Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686***). There must be facts and circumstances which are linked to one another to demonstrate a continuing discriminatory state of affairs. The Tribunal should consider the nature of the conduct and the status or position of the person responsible for it.

Just and equitable extension of time

13. If a claim is out of time the Tribunal has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable (section 123(1)(b)).

14. ***British Coal Corporation v Keeble & Others [1997] IRLR 336*** sets out a checklist of factors which a Tribunal should consider when deciding whether to refuse or grant an application to extend the time limit:

- a. The length of and reasons for the delay.
- b. The extent to which the cogency of the evidence is likely to be affected by the delay.
- c. The extent to which the party sued had co-operated with any requests for information.
- d. The promptness with which the Plaintiff acted once he or she knew of the facts giving rise to the cause of action.
- e. The steps taken by the Plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Knowledge of the Claimant

15. In the case of ***Mensah v Royal College of Midwives UKEAT/124/94***, Mummery J said that knowledge is a factor relevant to the discretion to extend time. Tribunals are therefore entitled to ask questions about a Claimant's prior knowledge, including: when did the Claimant know or suspect that they had a claim for discrimination; was it reasonable for the Claimant to know or suspect that they had a claim earlier; and if they did know or suspect that they had a claim, why did they not present their complaint earlier.

10 **Submissions**

16. Both Parties made submissions orally and also submitted written submissions.

Discussion and Decision

17. The Tribunal heard evidence from the Claimant.

15 *The Claimant*

18. The Tribunal accepted the Claimant's evidence as to be his genuine belief. He believed he had been treated differently over a period of time from 2015. The Claimant considered that he was subject to a "pattern of discrimination" and "pattern of management behaviour".
- 20 19. The Tribunal did not need to consider the veracity of the Claimant's allegations with regard to the treatment he said had taken place. The Tribunal considered the content of the allegations only in relation to the question before it which was whether or not to allow the application to amend.

In this context the Tribunal adopted and followed the approach of the EAT in *Selkent*.

Nature of the Amendment

- 5 20. The Claimant's amendment seeks to add in additional complaints of direct sex and race discrimination and harassment. It refers to treatment from November 2015 up to the disciplinary matter on 24 June 2019. If allowed, the amendment would add considerable and substantial additional facts and circumstances. Further, it may add claims which require further specification such as victimisation, indirect discrimination and detriment for having made a protected disclosure.
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21. By all accounts it is a substantial and extensive amendment.

Claims out of time

22. Unless the treatment referred to in the amended Grounds of Claim can be said to constitute continuing acts of discrimination then it is out of time.
- 15 23. The Tribunal carefully considered each and every one of the incidents referred to by the Claimant in the amended Grounds of Claim which constituted the treatment of the Claimant over time. The Tribunal considered whether it could be said that the Respondent was responsible for an "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (*Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686*).
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24. The Tribunal considered whether there were facts and circumstances alleged in the amendment which were linked to one another to demonstrate a continuing discriminatory state of affairs. The Tribunal considered the nature of the conduct and the status or position of the
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5 person claimed to have been responsible for it. It was evident that the Claimant's amendment makes reference to periods of time where he worked in disparate health centres of the Respondent and where he was managed by different people. Some of the treatment complained of related to actions of his co-workers and not those with management responsibility for him.

10 25. The Tribunal could see no discernable link between the treatment complained of from 2015 to the disciplinary process which commenced on 24 June 2019.

26. The Tribunal considered the Claimant's submissions on this point:

15 *"There is a considerable overlap of managers throughout the chronology, for example Mrs McInnes from 2016, Ms Waterston from 2018, and moreover there is a common senior management structure in Community Nursing based on shared premises and often shared office space at the Crescent. The same is true of Human Resources. The claimant is alleging a pattern of management behaviour based on reputational*
20 *elements which became transparent at the disciplinary process but which originate from the previous chronology, and which demonstrate consistent disadvantage to the claimant."*

25 27. The Tribunal considered and found that, taken at its highest, what the Claimant asserted was a series of unconnected or isolated incidents. An overlap in management did not constitute the necessary link nor did common senior management structure or shared premises/space. There were many different members of management (at varying levels), nursing and medical staff mentioned in the various incidents of treatment. There
30 was no link between them other than they all worked for the Respondent.

28. Having found that the acts complained of were not continuing acts and accordingly out of time, the Tribunal then went on to consider whether or

not it should extend the time limit for presenting such claims on just and equitable grounds.

Just and equitable extension of time

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29. The Tribunal followed the checklist of factors (***British Coal Corporation v Keeble***) a Tribunal should consider when deciding whether to refuse or grant an application to extend the time limit.

i. length of and reasons for the delay

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ii. Promptness with which the Claimant acted once he knew of the facts giving rise to the cause of action.

iii. Steps taken by the Claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

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30. The Claimant had access to advice as long ago as 16 August 2016 from his trade union on the prospect of him presenting a discrimination claim. He had RCN representation and advice from the date of the disciplinary matter on 24 June 2019 and throughout the process.

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31. The Claimant obtained legal advice on 24 June 2020. At that time he was told any claims pre 24 June 2019 were out of time. The Claimant did not present the amended Grounds of Claim until 2 November 2020. His explanation for the delay was that he had not received any advice on time bar until he spoke to his solicitor in June 2020. A period of 4 months elapsed between receipt of this advice and for the Claimant to present the amended Grounds of Claim.

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Knowledge of the Claimant

32. The Tribunal considered the case of ***Mensah v Royal College of Midwives UKEAT/124/94***, where Mummery J said that knowledge is a factor relevant to the discretion to extend time. Tribunals are therefore
5 entitled to ask questions about a Claimant's prior knowledge, including: when did the Claimant know or suspect that they had a claim for discrimination; was it reasonable for the Claimant to know or suspect that they had a claim earlier; and if they did know or suspect that they had a claim, why did they not present their complaint earlier.

10 It was clear that the Claimant had knowledge of the prospect of a discrimination claim from 16 August 2016 when he sought advice from his RCN representative about such a claim. It was reasonable for him to have known or suspected that he had a claim in respect of subsequent events as and when they occurred. He definitively knew of the time limits
15 by June 2020 and did not present amended Grounds of Claim for a further period of 4 months. It could not be argued that he was ignorant of the time limits (at the very latest) from that point in time.

20 33. The Tribunal did not consider that there was any satisfactory explanation for the considerable delay in presenting the amended Grounds of Claim in the circumstances.

The extent to which the cogency of the evidence is likely to be affected by the delay

25 34. A period in excess of 5 years has elapsed in respect of the first treatment complained of in 2015. The Tribunal considered that the passage of time would likely have a detrimental impact on the cogency of the evidence in relation to the treatment pre 24 June 2019.

35. In all the circumstances the Tribunal did not consider that it would be just and equitable to extend the time limit for presentation of amended Grounds of Claim.

Overriding Objective

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36. Having determined that the treatment alleged in the amended Grounds of Claim has been presented out of time and it would not be just and equitable to extend the time for presentation the Tribunal considered that refusal of the application to amend was in accordance with the overriding objective.

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37. The amendment is extensive, appears to introduce new and vague claims of direct sex and race discrimination and harassment. It refers to treatment from November 2015 up to the disciplinary matter on 24 June 2019. If allowed, the amendment would add considerable and substantial additional facts and circumstances. Further, it may add claims which require further specification such as victimisation, indirect discrimination and detriment for having made a protected disclosure.

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38. The Tribunal considers that there would have been considerable prejudice to the Respondent in allowing the amendment given the passage of time, the volume of information that would be required to respond and the further case management the case would be subject to. There would undoubtedly have been delay and considerable further expense.

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39. Given that the Tribunal found that the treatment in the amended Grounds of Claim did not constitute continuing acts of discrimination the Tribunal does not consider that there was any prejudice to the Claimant in not permitting the amendment.

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40. The application to amend is accordingly refused.

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Employment Judge:	Alan Strain
Date of Judgment:	04 March 2021
Date sent to parties:	08 March 2021