EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100114/2020

Held on 28 February 2022

Employment Judge N M Hosie

Mr R Hyder	**Claimant** **No Appearance**
Grampian Health Board	**Respondent** **Represented by** **Mr D Gunn,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

1. the claimant's discrimination claim is out of time and is dismissed for want of jurisdiction; and

2. the claimant's unfair dismissal claim has no reasonable prospect of success and is struck out in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

REASONS

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1. The claimant brought claims of disability discrimination and unfair dismissal. The respondent admitted the dismissal but claimed that the reason was conduct, gross misconduct, and that it was fair. Otherwise, the claim was denied in its entirety.

History of the case

2. The claimant was dismissed summarily, allegedly for gross misconduct, on 5 September 2019. He submitted his claim form on 12 January 2020. He was unrepresented. There were numerous case management procedures which included an Order for the claimant to provide Further and Better Particulars of his claim; a strike-out warning letter on the grounds of non-compliance with an Order of the Tribunal and the claim not being actively pursued.

Preliminary hearing on 21 July 2021

3. A preliminary hearing was fixed for 21 July 2021 to consider and determine the issues of time-bar and the "prospects" of the claim succeeding, in terms of Rules 37(1)(a) and 39, in Schedule 1 of the Rules of Procedure. However, some two months after the preliminary hearing had been fixed, the claimant applied for a postponement as *"Eid Day will be on either the 20 or 21 July*". I had reservations about postponing the hearing, having regard to the history of the case and the timing of the application. However, the respondent's solicitor advised that he had been instructed not to object to the application and I decided to grant the claimant's application.

Preliminary hearing on 24 August 2021

4. Having ascertained the parties' availability, on 15 July the Tribunal wrote to the parties to advise that the preliminary hearing had been rescheduled and would be held on 24 August 2021. However, on the morning of the hearing, at 00:10, the claimant sent an e-mail to the Tribunal in the following terms:-

"*I regret to inform you that I am not feeling well since late evening and may not be able to attend the hearing in the morning. I am going to make an appointment with my GP in the morning and will let you know. In case I am unable to attend the hearing, I would like to know the options of having an alternative date. Please advise.*"

5. Later that day at 09:59 the Tribunal sent an e-mail to the claimant, copied to the respondent's solicitor, in the following terms:-

"*I referred your recent e-mails to Employment Judge Hosie. In the circumstances, if you are unable to attend he is left with no option other than to postpone today's hearing. However, he does so with considerable reluctance in light of the history of this case.*

You will require to provide the Tribunal, within the next 7 days, with a soul and conscience medical certificate from your GP with details of your illness and confirming that in his professional opinion you are unfit to attend today's hearing. Should you fail to produce this certificate EJ Hosie will consider whether there are grounds for striking out your claim."

6. On 27 August, the claimant sent an e-mail to the Tribunal with a letter of that date from his GP which was in the following terms:-

"*The above patient asked me to write a letter to explain that he was unable to attend an Industrial Tribunal due to having a panic attack the night before after thinking about everything that had happened. He also had some eye symptoms and was unable to read over the documents that needed prepared. He spoke to one of my colleagues about his symptoms on 24 August.*

I hope this information is helpful."

7. The respondent's solicitor took issue with the terms of the GP's letter in that it was not a "soul and conscience" certificate and the claimant was directed

to provide one. On 8 September, the claimant sent an e-mail to the Tribunal with a certificate from another GP.

Preliminary hearing on 28 February 2022

8. After further e-mail exchanges, on 3 November 2021 the Tribunal sent a Notice to the parties to advise that the preliminary hearing had been rescheduled again and would be heard on 28 February 2022 in Aberdeen.

9. On 8 November, a Tribunal Order was issued for the exchange of documents and preparation of a Joint Bundle for the preliminary hearing.

10. There was no further correspondence until 3 February 2022 when the claimant sent an e-mail to the Tribunal in the following terms: - "*I am currently attending the GMC Hearing in the Medical Practitioner's Tribunal Services in Manchester. I cannot travel back to Aberdeen as my family – wife and four children all have COVID-19 at present. I will try to send you the documents as electronic copy to be considered for the ET case hearing on 28 Feb.*"

11. On 8 February, the Tribunal sent an e-mail to the claimant with a direction that he confirm that he would be in attendance at the hearing on 28 February, which was still over 3 weeks away.

12. Nothing further was heard from the claimant until he sent an e-mail on 22 February, only to the Tribunal, not copied to the respondent's solicitor, in which he requested, "*a short telephone meeting with Hon. Judge Hosie as soon as possible to discuss matters and get his advice regarding the attendance. These are some personal matters that I do not want to discuss via e-mail. I would appreciate your help".*

13. In response, the Tribunal advised, that it would not be appropriate "*or in accordance with the overriding objective in the Rules of Procedure for EJ*

Hosie to have a discussion with you on your own. He is prepared to arrange a telephone preliminary hearing but the respondent's solicitor would require to be in attendance. It might be possible to conduct that hearing in confidence but the respondent's solicitor would have to agree."

14. The respondent's solicitor confirmed that he would be agreeable to attending a telephone preliminary hearing, held in confidence, and on 24 February the Tribunal sent an e-mail to the claimant asking him to confirm if he would be agreeable.

Claimant's postponement application

15. On 25 February at 09:34, the claimant sent an e-mail to the Tribunal in the following terms:-

"*Thank you for taking my call this morning. I would like to postpone this hearing until December 2022. This request is because of the following reasons and circumstances.*

As I had already informed the Tribunal that I will have a hearing at the GMC – General Medical Council from 31/01/2022 because the NHS Grampian referred the case to the GMC in 2018. The GMC Tribunal has put sanctions on my registration which will take effect from next month. I have a fear that by taking this case to the Employment Tribunal during the appeal period could have an impact on my case with the GMC and the NHS Grampian can back to the GMC in revenge.

I am very concerned about it and therefore I would like the ET to postpone this hearing until December 2022 when the sanctions on my registration will be lifted.

After December 2022, I will be in a position that I will not have any fear and be able to fight the case in the Tribunal with more confident (sic) *without the fear that the NHS Grampian will go back to the GMC in revenge.*

It may well not be a matter for the ET to consider but it is a serious matter for me which will have a serious effect on my ability to fight the case in the ET and impact on my GMC registration.

I would therefore, request you to consider this matter and allow me to attend the hearing in December 2022. I am prepared to discuss this issue in detail over the telephone at a mutual convenient time."

16. The claimant was advised that he should have copied his e-mail to the respondent's solicitor in terms of Rule 92. In any event, the Tribunal forwarded his e-mail to the respondent's solicitor and he replied immediately on 25 February at 14:50. He advised that he "*strongly objected*" to the application. He advised that, "*the respondent cannot direct the GMC to take action against an individual doctor nor can it impact the GMC process which has already been concluded.*" He further advised that following a disciplinary process the Medical Practitioners Tribunal Service ("MPTS") had decided to suspend the claimant from practising for a period of nine months. The respondent's solicitor also maintained that, "*it is not clear what impact the claimant considers the Employment Tribunal proceedings could now have on the MPTS process. This is because the MPTS have already made their decision and found the claimant to be impaired by reason of his dishonesty towards his employer.*" The respondent's solicitor also took issue with the timing of the claimant's application. He advised that the MPTS decision was made on 11 February 2022 and that the application had not been made promptly.

17. The claimant responded later that day by e-mail. He claimed that he had, "*a genuine concern that the NHS Grampian could potentially react in revenge due to my past experiences and certainly I do not want the ET case hearing to go ahead until the sanctions are lifted after nine months.*" He also advised that there was no time limit for complaints to be made to the GMC.

18. The respondent's solicitor replied shortly thereafter in the following terms:-

"*Without wishing to be drawn into an extended chain of e-mails with the claimant, we do wish to make one further comment.*

The claimant has pointed out that there is no time limit for complaints to be made to the GMC. Accordingly, it is really not clear to the respondent what relevance the 9 month suspension has on matters and therefore why the hearing on Monday should be postponed and the case then sisted for this period.

If, as the claimant appears to fear, the respondent wished to complain about him to the GMC it could do so after the 9 month period had elapsed anyway. As a consequence, we would repeat the submission that the application is misconceived and should be rejected.

We can confirm that we have copied this e-mail to the claimant."

19. Later that day, the Tribunal sent an e-mail, in the following terms, to the parties:-

"*Employment Judge Hosie has now had an opportunity of considering the claimant's postponement application. He has decided to refuse the application for the following reasons:-*

(1) Postponing the hearing, in all the circumstances, particularly having regard to the lateness of the application, would not be in accordance with the "overriding objective" in the Rules of Procedure.

(2) The lateness of the application.

(3) Once fixed, Tribunal Hearings are only postponed "in exceptional circumstances". There are no such exceptional circumstances here.

(4) By and large, there is merit in the objections by the respondent's solicitor.

Accordingly, the Hearing will proceed, as scheduled, on 28 February with a 10am start."

20. On Friday 25 February 2022 at 18:11, after close of business, the claimant sent an e-mail to the Tribunal, copied to the respondent's solicitor in the following terms:-

"*Considering the decision of Hon Judge Mr Hosie, I would like to inform the Tribunal that I disagree with the Tribunal's decision and would like further advice on how to appeal against the decision if there is any right of appeal. I would therefore like to inform the Tribunal that I will not attend the hearing due to the reason that I have a genuine concern as communicated in my previous e-mails.*

Could you please advise me on the appeal process."

Preliminary Hearing on Monday 28 February 2022

21. The respondent's solicitor appeared at the Tribunal office, at the appointed time. He advised that he had prepared for the Hearing and was ready to proceed. A bundle of documentary productions had been lodged and he had prepared written submissions and a chronology.

22. I reviewed the file, the history of the case and the communications regarding the claimant's postponement request. I was mindful that the Preliminary Hearing had been postponed on two previous occasions at the request of the claimant. I was satisfied that my decision to refuse the claimant's postponement application was in accordance with Rule 30A in the Tribunal Rules of Procedure and in accordance with the "overriding objective".

23. I then had to decide how best to proceed, in all the circumstances. When doing so, I had regard to Rule 47 which is in the following terms:-

"***47 Non-Attendance***

If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."

24. I did not consider that any further enquiry was necessary as the claimant had made it quite clear that it was not his intention to attend. I was also mindful that I had advised the claimant that the Hearing would be proceeding, as scheduled and previously that his attendance would be required as it was likely that he would require to give evidence in relation to the time-bar issue and, in particular, whether it would be "just and equitable" to extend the time limit in respect of the discrimination claim, if it was out of time. I also advised him that it would not be necessary to lead any evidence in relation to the unfair dismissal claim but that I would hear submissions from both parties on

the "prospects" of the claim and the respondent's strike-out application, taking the claimant's averments at their highest value.

25. Whilst there was some attraction in simply dismissing the claim in respect of the claimant's failure to attend, I decided, in all the circumstances, that it would be in accordance with the overriding objective in the Rules of Procedure and in the interests of justice, to proceed with the hearing in the claimant's absence, but to have regard to the terms of his claim form and his written pleadings.

26. Helpfully, the respondent's solicitor had submitted detailed written submissions on "Time-bar & Prospects", and a "Chronology", along with a bundle of documentary productions ("P") and the "Record of Determinations" of the MPTS. I noted that the MPTS hearing into the claimant's alleged misconduct had been completed on 11 February 2022 when the claimant's registration had been suspended for a period of nine months.

Discrimination claim

Time-bar

27. This point was taken by the respondent's solicitor in relation only to the discrimination claim of an alleged failure to make reasonable adjustments on the part of the respondent.

28. The first issue that I had to consider was whether the claim was out of time. The relevant statutory provisions are to be found in s.123 of the Equality Act 2010 ("the 2010 Act"):-

"***123 Time Limits***

(1) …….proceedings on a complaint within section 120 may not be brought before 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……..

(3) for the purposes of this section –
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it;

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

29. The respondent's solicitor detailed in his submissions at paras. 1.2 to 1.6 and in his Chronology the sequence of events. Although I did not hear any evidence, this was clear, not only from the parties' pleadings, but also from the documentary productions. It was of particular significance that it was not disputed that the claimant was suspended on 30 November 2018 until he was dismissed, summarily, on 5 September 2019.

When did the duty arise?

30. The duty arose in August 2018 when a number of adjustments were identified in OH and Access to Work reports which the respondent obtained.

When did the duty end?

31. For the purposes of determining whether the claim form had been presented within the three month time limit it was necessary to establish when the respondent's duty to make reasonable adjustments ended. The Court of Appeal's decision in ***Kingston-Upon-Hull City Council v. Matuszowicz*** [2009] ICR 1170, to which I was referred, illustrated that a failure to make

reasonable adjustments is usually more recognisable as an omission than an act.

32. This distinction was addressed recently in ***Kerr v. Fife Council*** UKEATS/0022/20, to which I was also referred. The EAT made the point that it is also important for a Tribunal to make a finding as to the date on which the duty arises and also the date when the duty ends. The EAT also emphasised that the start and end date of the duty to make reasonable adjustments must be viewed from the claimant's perspective.

33. Very fairly, in his submissions the respondent's solicitor also referred to the EAT case of ***Olenloa v. North West London Hospital Trust*** [2012] UKEAT/0599/11/ZT. In that case, an Employment Judge found that the claim was out of time because, from the point the claimant went on sick leave, there was no ongoing failure to make adjustments: the claimant was simply unable to be at work. The EAT overturned that decision on appeal. It was part of the claimant's case that the employer's failure to make reasonable adjustments caused his absence from work and that, if adjustments were made, he would be able to return. Accordingly, the Judge erred in concluding that the employer ceased to be under an obligation to make reasonable adjustments when the claimant went on sick leave, at least in the absence of a finding that the claimant would not have remained at or returned to work even if such adjustments had been made.

34. However, I was persuaded, as the respondent's solicitor submitted, that the present case could be distinguished from ***Olenloa***, "*and instead is aligned with* ***Home Office v. Collins*** *[2005] EWCA Civ 598 and* ***NCH Scotland v. McHugh*** *UKEAT/0010/06/MT in that the claimant could not return to work at all, rather than the failure to make the adjustments being the reason for the continuing absence from the workplace.*" In ***McHugh*** the EAT held that the duty is not "triggered" unless and until the claimant indicated that he or she was intending or wishing to return to work.

35. I found favour, therefore, with the claimant's submissions that:-

"*In fact, the current case can be distinguished even further in that the reason for the claimant's absence from the workplace was his suspension due to his misconduct and nothing to do with his disability at all. Nevertheless,* ***Collins*** *and* ***McHugh*** *[para. 40] are authority for the position that it is not reasonable to require adjustments to be made when they would not achieve any purpose and so the duty is not engaged while the claimant was unable to attend work anyway.*"

36. As I recorded above, it was not disputed that the claimant was suspended on 30 November 2018 and remained suspended until his dismissal on 5 September 2019. The duty to make reasonable adjustments, therefore, ceased on 30 November 2018 because from that date until his dismissal the claimant was not permitted to return to the workplace and, as the respondent's solicitor put it, "*any adjustments could not achieve their purpose of allowing the claimant to return to work.*"

37. Accordingly, the three month period in which to engage the early conciliation period started to run from 30 November 2018. The claimant had until 1 March 2019 to begin the early conciliation process. He did not do so until 28 November 2019 and his claim was not submitted until 12 January 2020. It was therefore some nine months out of time.

"Two different employers"

38. I also accepted the submissions by the respondent's solicitor, "*that any issues relating to the claimant's exams with, or oversight by NHS Education Scotland ("NES") are not relevant to the claim against the respondent. This is on the basis that NES and the respondent are two separate Health Boards and so two separate entities and employers. As a consequence, any claim relating to the exam process should be brought against NES and not the respondent, who has no control over the qualification process. A very similar point was*

made in the case of ***Jackson & Another v. County Durham & Darlington NHS Foundation Trust & Health Education England*** *UKEAT/0068/17/DA****.***

However, even if the Tribunal disagrees with me on this point. We can see from page 141 of the bundle that the remaining visual adjustments were put in place by 12 April 2019. As a consequence, even using this later date, the claim is still significantly out of time."

Just and equitable extension

39. The three month time limit for bringing a discrimination claim is not absolute: Employment Tribunals have discretion to extend the time limit for presenting a claim when they think it "just and equitable" to do so (s.123(1)(b) of the 2010 Act). Tribunals thus have a broader discretion under discrimination law than they do in unfair dismissal cases as the Employment Rights Act 1996 provides that the time limit for presenting an unfair dismissal claim can only be extended if the claimant shows that it was "*not reasonably practicable*" to prevent the claim on time.

40. In determining whether I should exercise my discretion and allow the late submission of the discrimination claim of a failure to make reasonable adjustments, I found the guidance in ***British Coal Corporation v. Keeble & Others*** [1997] IRLR 336, to be of assistance. In that case, the EAT suggested that Employment Tribunals would be assisted by considering the factors listed in s.33 of the Limitation Act 1980. That section deals with the exercise of discretion in Civil Courts and personal injury cases and requires the court to consider certain factors. However, in the recent Court of Appeal case ***Adedeji v. University Hospital Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23, the Court reviewed a number of recent cases involving the list of Limitation Act factors cited in ***Keeble*** and said this:

"*The best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular, 'the length of and the reasons for the delay'. If it checks*

*those factors against the list in **Keeble** well and good; but I would not recommend taking it as the framework for its thinking.*"

41. The relevance of the factors in ***Keeble***, therefore, depends on the facts of the particular case.

42. While I was mindful that I had a wide discretion to extend the time limit and that the just and equitable "escape clause" is much wider than that relating to unfair dismissal claims, I was also mindful of such cases as ***Robertson v. Bexley Community Centre*** [2003] IRLR 434, to which I was also referred, that when Employment Tribunals consider exercising this discretion: "*…….there is no presumption that they should do so unless they can justify a failure to exercise 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**.* (my emphasis)"

43. The onus was on the claimant, therefore, to establish that it was just and equitable to extend time. This was difficult as he had chosen not to attend the hearing despite having been made aware that it was likely that he would be required to give evidence on this issue. Nevertheless, I proceeded to consider and determine the issue on the basis of the pleadings, the documents and the relevant case law.

44. Mindful of the view expressed by the Court of Appeal in ***Adedeji***, I assessed all the factors in the present case which I considered relevant to whether it would be just and equitable to extend time and checked those factors against the list in ***Keeble*** which the respondent's solicitor had done in his submissions. I am bound to say that, by and large, I was satisfied that these submissions were not only well-founded, but also comprehensive.

Prejudice

45. Were I to decide not to exercise my discretion to extend the time limit, then the claimant will be prejudiced as his discrimination claim will be dismissed. On the other hand, were I to allow the claim to proceed, then the respondent will be prejudiced as it will incur the additional expense of investigating matters which occurred some years ago and conducting a Tribunal hearing which will be much lengthier if the discrimination claim is to be considered. Further, were I to dismiss the discrimination claim the claimant will still have the alternative remedy of an unfair dismissal claim.

46. I came to the view, therefore, that the balance of prejudice/hardship favoured the respondent.

Length of and reasons for the delay

47. As the respondent's solicitor submitted, the claimant has not provided any reasonable explanation for the delay in bringing his claim. He is an Occupational Health Specialist Doctor and will be familiar with the concept of reasonable adjustments and the terms of the 2010 Act.

48. The claimant is well-educated and articulate and well-able to submit a claim form and acquaint himself with time limits. There was no impediment to him doing so. No evidence was produced of any medical condition that would have prevented him from submitting his claim in time. He was known to be fit for work and was able to participate fully in the ongoing disciplinary process.

Cogency of the evidence

49. I was also concerned that were I to allow the discrimination claim to proceed, having regard to the length of time since the alleged events took place and the nature of the allegations, the cogency of the evidence is likely to be

significantly affected. Were I to allow the discrimination claim to proceed, the Tribunal would be required to hear evidence in respect of matters which occurred as long ago as in the latter part of 2018.

Advice

50. As the respondent's solicitor submitted, the claimant "*stated to the respondent in September 2018 that he knew it was possible to take legal action in relation to his concerns about the adjustments. Other than an employment lawyer or union rep., it is hard to think of anyone who could have been more aware of the possibility of taking action in relation to allegations of disability discrimination.*" Further, the claimant had the benefit of union advice (P.102, for example) and was well able to instruct legal representation had he chosen to do so.

51. I had also advised the claimant that it would be in his interests to seek advice from someone with knowledge of Employment Tribunal cases.

52. It was also significant, as the respondent's solicitor submitted, that the claimant chose not to raise a grievance which, "*would have allowed the matter to be investigated when events were still fresh.*"

53. I arrived at the view, therefore, and I am bound to say without a great deal of difficulty, that it would not be just and equitable to exercise my discretion and extend the time limit in respect of the discrimination claim.

54. Accordingly, the discrimination claim is time-barred and is dismissed for want of jurisdiction.

Unfair dismissal claim

Prospects of success

55. The respondent's solicitor submitted that the unfair dismissal claim had "no reasonable prospect of success" and that it should be struck out in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the Rules of Procedure").

56. In the alternative, he submitted that the claim had "little reasonable prospect of success" and that the claimant should be required to pay a deposit as a condition of continuing with his claim, in terms of Rule 39.

57. I was also of the view that his submissions in this regard were comprehensive and well-founded. They are referred to for their terms. In arriving at this view, I was mindful that it is unfair to strike-out a claim where there are crucial facts in dispute and there has been no opportunity for the evidence in relation to those facts to be considered. However, the respondent's solicitor was able to refer not only to the claimant's pleadings but also a number of documents where the facts had already been established which meant that strike-out was a tenable option.

58. I was satisfied, as the respondent's solicitor submitted, that the claimant was dismissed, *"on the basis of three principal acts of misconduct:*

1) Working for a third party (Wood Group) while on sick leave (July & August).

2) Working for a third party while claiming he was too unwell to work for the respondent.

3) Lying during the disciplinary hearing by stating that he had not had contact from the Wood Group prior to requesting annual leave in July".

59. In every unfair dismissal case where dismissal is admitted s.98(1) of the Employment Rights Act 1996 ("the 1996 Act") requires the employer to show the reason for the dismissal and that it is an admissible reason in terms of s.98(2), or some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held. An admissible reason is a reason for which an employee may be fairly dismissed and among them is conduct. It was clear from the terms of the dismissal letter (P.178-184) that conduct was the reason for the claimant's dismissal in the present case. However, it does not necessarily follow that the claimant was guilty of the conduct complained of, only that the respondent believed he was and that was the reason for his dismissal.

60. The remaining, crucial, question, which requires to be determined under s.98(4) of the 1996 Act is whether the respondent had acted reasonably in treating that reason for dismissing the claimant as a sufficient reason and that question had to be in accordance with equity and the substantial merits of the case.

61. What I had to consider, therefore, so far as the prospects of the unfair dismissal claim succeeding were concerned, was whether there were sufficient established facts which would enable me to conclude that the claim had no reasonable prospect of success bearing in mind the cautious approach which, understandably, is required to striking out claims of this nature.

62. The claimant maintained that there was a conspiracy to protect Dr. K Targett and her influence as the wife of the respondent's Medical Director, was, as the respondent's solicitor put it, *"what triggered the investigation into the claimant's private work in response to the claimant raising a concern about the passing by Dr. Targett of a copy of the claimant's OH report to the claimant's Training Programme Director, Dr. Reetoo at NES* (P.72-75)."

63. It is clear from that Report (P.72) that it was being copied to NES, in any event and Dr. Reetoo would have access to it. Furthermore, it was not disputed that the claimant had consented to this. The claimant did not suffer any detriment or prejudice, therefore, by Dr. Targett sending an copy of the OH report to Dr. Reetoo.

64. Further, and in any event, as the respondent's solicitor submitted, "*the investigation into the claimant's moonlighting was instigated by Cheryl Rodrigues and not Dr. Targett* (see P.133, "allegation 1, question 4").

65. Also, the investigation by "Counter Fraud Services" ("CFS") which is not part of the respondent commenced long before on 27 July 2018 (P.66).

66. It is clear from the documentation, therefore, that the claimant's conspiracy theory is without foundation.

Grounds of dismissal

67. The respondent's solicitor made reference to a number of documents in support of his submission that these "undermine any challenge the claimant has to the grounds of dismissal". In my view, these submissions are well-founded. They are as follows:-

"***Annual leave in July and August***

The claimant claims that he was on annual leave in July and August when he worked for the Wood Group. The relevant dates he worked are 19, 20, 26 and 27 July and 13, 14 and 15 August 2018. The claimant claims that he requested these dates as annual leave via two routes.

The claimant claims in his FBPs that he had a phone call with Dr. Targett in 'late June/early July' (P.37). He has stated that Dr. Targett agreed to him taking annual leave in July and August during this phone call. Dr. Targett's position is that she did not have ***any*** *discussions with the claimant during his absence about converting his sick leave to annual leave (P.169). Leaving aside that this is a factual dispute, it is submitted that, in any event, the claimant's position is unsustainable on the basis of the documentation.*

This is for two reasons:

Firstly, the claimant claims in the investigation interview (P.120) and during the disciplinary hearing (P.157) that he requested annual leave in July and August during a telephone call in late June 2018. However, we know this is not true as the correspondence between the claimant and the respondent around that time makes clear that the respondent has not had any contact from the claimant in several weeks. In fact, we can see (P.57, 58 and 59) that the respondent is forced to chase up the claimant due to concerns about the lack of any contact. The shift in his FBPs emphasises the lack of credibility in his evidence.

Secondly, other than the alleged phone call at the end of June, the only other contact the claimant relies upon is his e-mail exchange with Dr. Targett on 18 July 2018. This is at page 65 of the bundle. In this exchange it is noteable that the claimant makes no reference to any prior conversation about leave nor his allegation at this point Dr. Targett had already approved his leave in July. This is in contrast to his e-mail requesting leave in September (P.68).

In addition, it is clear from Dr. Targett's response – advising him that he doesn't need to take annual leave because he is off sick – she has not already approved these dates in late June/early July as claimed. If she had, she would not be advising the claimant that annual leave was unnecessary (P.65).

Dr. Targett makes the point during the investigation interview that she believed you could not take annual leave while off sick – hence her comment on 18 July 2018. She explained during the disciplinary hearing (P.161 and 169) that she genuinely thought you couldn't take annual leave when you were off sick and only learned that this was possible during the disciplinary process. Accordingly, it is clear she would not have approved annual leave during sick leave prior to 18 July 2018 as she thought at this time this was not allowed.

The claimant's position is further undermined by the fact that, despite the claimant's claim that he had already had the specific dates of leave in July and August approved via a phone call, he felt the need to specify the dates in July he wished to take off. If he'd already had the dates in July and August authorised as he claims, he would not need to do this, or would at least have clarified that he was reminding Dr. Targett of what was agreed.

Finally, on this point, despite the need to confirm the dates in July, no mention is made of the dates in August yet the claimant continues to insist that the dates he worked in August had been approved by Dr. Targett prior to the e-mail exchange in July.

It is submitted that the claimant's position on this is just not credible. The e-mails are entirely consistent with the request for annual leave being made for the first time via e-mail on 18 July 2018.

In addition, the e-mail exchange between the claimant and Dr. Targett does not conclude with an agreement that the claimant can take annual leave. In fact, it is quite the opposite. Dr. Targett advising the claimant that, in her opinion at the time, he does not need to take annual leave and instead thanks him for letting her know (that the claimant will be away from Aberdeen). It is noteable that the claimant did not respond to confirm that, in fact he ***did*** *wish these days to be taken as annual leave.*

Further, on the basis of the claimant's own position he asked for one week's leave on 18 July (a Wednesday) starting the next day. This would mean he was on annual leave from 19 (Thursday) to 25 July 2018 (Wednesday) being 7 days (5 working days inclusive). On the claimant's own evidence he was not on leave when he worked for the Wood Group on 26 (Thursday) and 27 (Friday) July 2018 (P.100). Therefore he was guilty of the misconduct he was accused of. It is submitted that working for a third party while claiming sick pay, which is what the claimant did here, is a classic example of gross misconduct."

68. It was also not without significance, in my view, that the claimant was aware of the respondent's procedure in applying for annual leave as can be seen from his e-mail exchange with Dr. Targett on 5 September 2018 (P.68).

"Working while signed off sick"

69. The respondent's solicitor accepted, with some reservations, that an employee can request annual leave while off sick, although he questioned whether employees would be allowed to convert their sickness absence to annual leave when they remained signed off.

70. It was significant that the claimant is an OH Doctor and that he continued to advise the respondent that he was unfit to work for them and continued to receive sick pay when, at the same time, offering himself to work for a third party, namely the Wood Group, as an OH Doctor. The respondent's solicitor submitted that this, *"amounts to a serious breach of the duty of trust and confidence".*

71. The respondent's solicitor then went on to make the following submissions in this regard:-

"*The claimant stated in the FBPs that the work he carried out for the Wood Group was different because he did not have to work on a computer (P.36 (5.1.3), P.42 (first para.) and P.48). However, as can be seen at 52-56, the data held by the respondent could be printed out if required and the claimant was offered the facility to provide hand-written notes and have those typed (P.77). In addition, there were printers in every office at the respondent's office.*

As a consequence, it appears clear that the claimant's position that his role as an OH Doctor for the Wood Group was not so different to his work as an OHS Doctor for the respondent, as to mean he could be entirely unfit for one and yet fully fit for the other, is unsustainable.

It is noted that the claimant was an OH Doctor. Accordingly, it is submitted that, in terms of his duty of fidelity, the fact he is a specialist in this area and is also a qualified G.P. means that he was obliged to at least alert the respondent to the fact that, despite his fit note from his G.P., he considered himself fit to carry out OHS duties – even if that required a couple of tweaks to his role. His failure to do this is an obvious and extremely serious breach of trust."

"Lying at the hearing"

72. The respondent's solicitor submitted that, "*the claimant was also found to have lied about the reason he gave for requesting his annual leave. This came to a head following the information provided by the claimant after the first part of the adjourned disciplinary hearing.*"

73. The respondent's solicitor went on in his submissions to explain:-

"*During the first part of the hearing on 17 June 2019* (the MPTS disciplinary hearing)*, the claimant was asked by one of the Disciplinary Panel members, Dr. Kenneth Lee, whether he (the claimant) knew if he* ***may*** *be working on private work the next day at the time he requested annual leave via his e-mail on 18 July 2018. The claimant responded, 'no Sir I did not'. This exchange is seen at page 147 of the bundle.*

The Disciplinary Hearing was adjourned on 17 June 2019 the second day of the hearing was reconvened for 21 August 2019. During this break, the claimant was asked to and provided, copies of the e-mail correspondence between himself and the Wood Group regarding the private work he carried out. Copies of the information he provided can be seen at page 153 of the bundle.

This information showed that, in fact, the claimant had been aware prior to his e-mail request for leave, that he was going to be, or was likely to be, working for the Wood Group the next day. He had exchanged several e-mails about working the next day during the course of 18 July 2018 (P.153-154).

At the reconvened Disciplinary Hearing, Dr. Walker pointed out the discrepancy between the statements made by the claimant during the first hearing and the information he provided. Dr. Lee also confirmed that he recalled the claimant stating that he hadn't accepted work or engaged with the Wood Group at the time he made his annual leave request via e-mail. These statements can be seen at page. 157 of the bundle.

The claimant then shifted his position again to then claim that what he had meant was that he did not have any contact with the Wood Group prior to his alleged telephone call with Dr. Targett at some point at the end of June. This change in position was wholly inconsistent with the exchange which took place at the first hearing (P.147), during which it was clear that it was the claimant's knowledge at the time of his e-mail on 18 July that was being discussed.

Accordingly, it is clear from the documentation that the claimant's position is unsustainable. For the claimant's position to be correct several senior doctors would need to lie in relation to their recollection of events. It is submitted that this is just not credible and so the claimant's claim has little or no reasonable prospect of success."

Conclusion

74. While I was mindful, with reference to such cases as ***Ezsias v. North Glamorgan NHS Trust*** [2007] IRLR 603 and ***Balls v. Downham Market High School & College*** [2011] IRLR 217, that striking out a claim is a draconian step, I was satisfied that this was one of the exceptional cases where it was possible to take a view on the prospects of the claim succeeding, without hearing evidence. The reason for this was that it was possible, on the basis of the pleadings and, in particular the documentary productions, to determine that there were no factual disputes which remained unresolved, material to the determination of the unfair dismissal claim. Those facts allowed me to conclude that the respondent's decision to dismiss fell within the band of reasonable response available to a reasonable employer (***Iceland frozen Foods ltd v. Jones*** [1982] IRLR 439).

75. I was entitled, therefore, to decide, in the particular circumstances of this case, that the unfair dismissal claim had no reasonable prospect of success and should be struck out.

76. Finally, although the conduct of the MPTS disciplinary hearing and the issues with which it was concerned, were different from the Employment Tribunal case, the MPTS was required to consider and determine facts which were also relevant to the unfair dismissal claim. My view that the unfair dismissal claim had "no reasonable prospect of success" was fortified, at least to an extent, by their finding, a matter of public record, that the claimant was guilty of misconduct and " serious dishonesty", which was part of the basis for the respondent's decision to dismiss the claimant.

Holiday pay

77. In his claim form, the claimant intimated that he wished to bring a claim for unpaid holiday pay. It is not clear whether this is still a live claim which he still wishes to pursue. The parties are directed to clarify the position in writing to the Tribunal, within the next 7 days. If the claim is to be pursued, the claimant will require to provide details of the legal basis for the claim, the sum claimed and how that sum is calculated.

Employment Judge **N Hosie**
Date of Judgement **9 March 2022**
Date sent to parties **10 March 2022**