Neutral Citation Number: [2024] EAT 178

Case No: EA-2023-000237-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7 November 2024

Before :

HIS HONOUR JUDGE SHANKS
(Remote Hearing)

- -

Between :

MRS NKECHI LEEKS **Appellant**

- and –

ROYAL MARSDEN NHS FOUNDATION TRUST **Respondent**

- -
- -

MR PATRICK HALLIDAY (**Counsel**) for the **Appellant**
MR SAN NICHOLLS (instructed by **Hill Dickinson LLP**) for the **Respondent**

Hearing date: 7 November 2024

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JUDGMENT

SUMMARY

WHISTLEBLOWING & JURISDICTIONAL/TIME POINTS

The C applied for a job with the R NHS Trust. On her account in July 2020 she was offered a job and told that she would be given the start date but nothing happened. On 26/12/20 she started proceedings alleging religious and disability discrimination under the EqA 2010 and for whistleblowing detriment under the Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations 2018. R applied to dismiss the claims on the grounds they were out of time.

The EJ decided that time had started to run for both the EqA 2010 and the 2018 Regs claims at the end of July and did not extend time and accordingly dismissed the claims.

On C's appeal, the EAT decided:

(1) The EJ had failed properly to analyse when time had started to run under the 2018 Regs which had detailed provisions at reg 5 dealing with this issue and the issue would therefore have to be remitted to the ET;

(2) The EJ had taken into account all relevant factors and reached a permissible conclusion in relation to extension of time. (Note: This conclusion applied in relation both to the EqA claims and the 2018 Regs but if the "start date" for the claim under the 2018 Regs was found to be different on the remission the question of extending time may need to be revisited by the ET).

HIS HONOUR JUDGE SHANKS:

Introduction

1. This is an appeal against a decision of Employment Judge Morton in the London (South) Employment Tribunal whereby she dismissed the claims made by Mrs Leeks against the Royal Marsden Hospital on the grounds that they were out of time. That followed a hearing on 16 November 2022 at which the Claimant was self-represented and Mr Nicholls of counsel represented the hospital.

2. The appeal was allowed through to a full hearing by Her Honour Judge Tucker, following a preliminary hearing on 6 March 2024 on the amended grounds which are in my bundle at page 28. Mr Halliday has acted *pro bono* for the Claimant on the hearing of the appeal, and I am most grateful to him for that; Mr Nicholls has represented the hospital, as he did below.

Background

3. The Claimant applied for three catering assistant roles with the hospital on 7 March 2020. Her application for a full-time role was refused. However, she was interviewed in relation to the other two, both part-time roles, on 9 and 30 June 2020. Following that, she was offered and attended a "taster session" on 10 July 2020. Her case at the hearing was that on 30 June 2020 she was orally offered one of the part-time roles and that at the end of the taster session she was given to understand that she would soon receive a start date. That is all disputed by the Respondent, although, unfortunately, the Employment Judge did not make any findings in relation to that dispute.

4. At the end of July 2020, there was apparently a freeze put on all catering job recruitment at the hospital. The Claimant however heard nothing further from the Respondent in relation to the part-time role that she had been interviewed for and that she said she had been made

an offer in relation to. Her evidence was that she had called the hospital every two weeks or so asking what was happening but she never got a substantive response. Again, the Respondents did not accept that, although they did accept that there was one call in late August 2020 when the relevant member of staff was on holiday, but no findings were made by the Employment Judge on that issue either.

5. On 29 September 2020, the Claimant noticed that the word "unsuccessful" had been appended to her electronic application in relation to the full-time role that she had applied for and been refused. At the hearing, she submitted, as the Judge records at paragraph 22, that time did not begin to run until 29 September 2020 when she uncovered some information that indicated that a "decision may have been made about recruiting her" (that is the end of the sentence, although it is plain that it refers to recruiting her in relation to the part-time role).

6. On 26 December 2020 the Claimant wrote an email to the hospital asking for an update and on the same day she submitted an application to ACAS for early conciliation which was then followed by her Employment Tribunal claim made on 6 February 2021. She claimed that the hospital had discriminated against her because of religion and/or disability and because she had made a protected disclosure to another NHS Trust in 2010. The detriment that she relied on in relation to all these claims was recorded, following a preliminary hearing on 2 August 2022 by EJ Self, as being a refusal or failure by the Respondent to give the Claimant a start date despite her having been offered the role on 30 June 2020 and having attended for a taster day on 10 July 2020.

7. The religious and disability claims arose under the Equality Act 2010 and the relevant provisions as to time are at section 123 of the Equality Act. I am not going to read those into this decision and, in fact, they do not directly arise. The claim relating to protected

disclosure (or "whistleblowing") arose under the Employment Rights Act 1996 (NHS Recruitment - Protected Disclosure) Regulations 2018. Regulation 3 of those Regulations states that an NHS employer must not discriminate against an applicant for a job because of a protected disclosure. Regulation 5 of the 2018 Regulations deals with time limits and I will read that into the record of this judgment.

> "5.-(1) Subject to paragraph (4), an employment tribunal must not consider a complaint under regulation 4 unless it is presented to the tribunal before the end of the period of three months beginning with the date of the conduct to which the complaint relates.
>
> (2) An employment tribunal may consider a complaint under regulation 4 that is otherwise out of time if, in all the circumstances of the case, it considers it just and equitable to do so."
>
> (3) In the cases specified in paragraphs (a) to (e), the date of the conduct to which the complaint under a complaint under paragraph 4 relates is –
> (a) in the case of a decision by an NHS employer not to employ or appoint an applicant, the date that decision was communicated to the applicant;
> (b) in the case of a deliberate omission-
> (i) to entertain and process an applicant's application or enquiry, or
> (ii) to offer an contract of employment, a contract to do work personally, or an appointment to an office or post,
> the end of the period within which it was reasonable to expect the NHS employer to act;
> (c) in the case of conduct which causes an applicant to withdraw or no longer pursue an application or enquiry, the date of that conduct;
> (d) in a case where the NHS employer withdrew an offer, the date when the offer was withdrawn.
> (e) in any other case when the NHS employer made an offer which was not accepted, the date when the NHS employer made the offer.
>
> (4)Where a complaint under regulation 4 relates to conduct extending over a period, the conduct is to be treated as done at the end of the period."

The EJ's decision

8. The Employment Judge found that the Claimant was complaining, in essence, about the hospital's omission to follow up after the taster day on 10 July 2024 with confirmation of when the job would start. In relation to the claims made under the Equality Act 2010 she found either that a decision was made not to do anything further in relation to the Claimant's application, or that the hospital might reasonably have been expected to do something, by the end of July so that that was when time started to run.

9. In relation to the whistleblowing claim, she did not carry out any detailed analysis in relation to regulation 5, but she seems to have assumed that the same date for the start of the running of time applied, i.e the end of July. Mr Nicholls had submitted, I am told, that the relevant provision was 5(3)(b)(ii), i.e that there had been a deliberate omission to offer a contract of employment or an appointment to an office or post, so that time began to run at the end of the period when it was reasonable to expect the hospital to act, i.e the end of July 2020. I am told, and I am not remotely surprised, that Mrs Leeks herself made no submissions in relation to regulation 5.

10. On the basis that time started to run at the end of July 2020 for both the discrimination claims under the Equality Act and under the 2018 Regulations, the claims were clearly brought more than three months after the start date and the Employment Judge turned to consider whether to extend time on the just and equitable grounds. In doing so, the Judge first noted that the delay was some three months but decided that no prejudice had been caused by this delay.

11. She then turned to consider the reasons for the delay at paragraphs 34 and 35 of her judgment. She recorded at paragraph 34 that the reason for the delay was the Claimant's assumption about the time limit and she said at the last part of paragraph 34:

> "… the fact is that the Claimant became aware at the end of September that a decision may have been made about her job application, but she took no steps at all either to ascertain the legal position or to contact ACAS for another three months."

Then the judge went on at paragraph 35:

> "It seems to me that once she had made a discovery that something appeared to have happened that affected her this particular Claimant could have been expected to be aware that she should at least find out what the legal position was."

Then she records that the Claimant in this case had considerably more knowledge than may be usual as a result of her experience of employment tribunal proceedings in the past. The judge also recorded the Claimant is an intelligent person who could be expected to research

her rights once she had concluded that something was not as it should be.

And then she goes on:

> "She became aware of an important fact at the end of September and it was rash of her to assume that time would not have started to run at an earlier date."

She then referred to the *Keeble* case, where one of the factors includes the promptness with which a claimant acts once that claimant becomes aware of the facts giving rise to the claim and the steps taken by a claimant to obtain appropriate advice. She says the Claimant was neither prompt nor took advice and that this was a factor that weighed heavily against the granting of an extension of time.

12. Then the third factor that she particularly took into account is dealt with at paragraph 36 of the judgment where she found - and there is no challenge to this - that the claims were not strong because there was clear evidence that the true reasons for the failure to act by the Respondent was the freeze on recruitment rather than any protective characteristic or disclosure. Further, she said that she considered the whistleblowing claim to be weak because she thought it was "highly improbable" that whistleblowing to a different NHS trust back in 2010 would have influenced the Respondent.

13. For those reasons she refused to extend time for any of the claims.

Grounds of Appeal

14. The grounds of appeal relate first to the application of regulation 5 of the 2018 Regulations in relation to the whistleblowing claim and, secondly, to the judge's failure to extend time for any of the claims.

Regulation 5

15. It is fair to say that the Employment Judge initially, before issuing a corrected judgment,

which is what I have been looking at, had failed to refer to the 2018 Regulations at all. And even in the corrected judgment there is really no specific analysis as to which of the provisions in regulation 5(3) applies.

16. Mr Halliday says that, on a proper analysis of the claim and the evidence, the Employment Judge could have decided that rule 5(3)(a) or 5(3)(d) applied and that rule 5(3)(b)(ii) did not. So far as 5(3)(b)(ii) is concerned, he said that this was not a case of a deliberate omission to offer a contract of employment because, in fact, the Claimant's evidence was that she was offered a contract of employment at the end of the interview on 30 June 2020, so that that provision would not apply. There may be answers to the point and it may be that a "contract of employment" means a written contract of employment, but, in any event, that was not really the gist of the complaint the Claimant was making: her complaint was the failure to offer a start date for her employment.

17. When the complaint is categorised in that way, it seems to me arguable that rule 5(3)(b)(ii) did not apply, and it is certainly arguable that either (a) or (d) applied, ie that either the NHS made a decision at some point not to employ the applicant or, if the offer had already been made, it was withdrawn, at least in the mind of the employer. If either (a) or (d) applied the position would be that in the absence of the communication of the decision either not to employ or to withdraw an offer, time would never start to run under either (a) or (d). The effect of that would be that time was continuing to run when the Claimant started her proceedings and indeed until something was communicated to her, it would have continued to run indefinitely. That would be a rather unsatisfactory outcome, but Mr Halliday said that it could be mitigated by either a possible finding that if there was no communication for a very long time that would itself amount to an implied communication or that Rule 37 of the Employment Tribunal Rules might be relied on in some way to weed out a very old

claim if it was unfair for it to proceed but I do not think I need to decide whether he may be right about any of that.

18. It seems to me that the Employment Judge did err in law in just failing to analyse which provisions did apply from paragraph 5(3), to make any express finding that 5(3)(b)(ii) applied, and that, if she had gone into it more and analysed the position, there may have been a different result for the reasons I have sought to explain. On that basis, I am going to allow this part of the appeal and remit the issue of when, if at all, time started to run on the whistleblowing claim to the employment tribunal.

Extension of time

19. The extension of time appeal relates to the claims both under the Equality Act and the 2018 Regulations. However, in relation to the whistleblowing claim it is, of course, contingent on a decision ultimately that the Employment Judge was right to decide that time began to run at the end of July 2020. If the ultimate decision on the application of regulation 5 is different, and there is a new date (as opposed to time just running on indefinitely) there may have to be a reconsideration of the question of extension, but that can be built into my order on remittal. Concentrating on the decision not to extend time based on the notion that time began to run on all the claims at the end of July 2020, there are three points relied on by Mr Halliday in relation to the exercise of the Employment Judge's discretion.

20. The first arises out of paragraph 32 of the reasons, where the Judge said this:

> "The authorities make it clear a Claimant cannot assume that an extension will be granted and that an extension of time is the exception rather than the rule."

Then *Robertson v Bexley Community Centre* [2003] IRLR 434 is cited. I am satisfied that in that sentence the Judge is using what may be somewhat unhappy shorthand. The important thing is not whether she used a shorthand which might not be fully accurate but whether in fact any such error influenced the exercise of her discretion. Looking at the reasons, it is

clear to me that she exercised her discretion without requiring the Claimant to show any exceptional circumstances and without otherwise limiting it by reference to any kind of principle of exceptionality. So even if she has expressed things slightly unhappily in paragraph 32, I am quite satisfied it had no influence on the decision.

21. The second part of the reasoning that Mr Halliday challenges relates to paragraphs 34 and 35, which I have quoted from. Mr Halliday says that the Tribunal Judge has taken into account matters that are irrelevant here. He says that in fact the Claimant had not become aware of any important fact which was relevant to her part-time job application which she had been offered. She already knew that the full-time job application had been unsuccessful so the fact that she found on 29 September 2020 that the word "unsuccessful" had been added to the online system could not be relevant.

22. I do not accept this point. The Claimant had submitted, as I have already mentioned, that, in her view, time did not begin to run until 29 September 2020, when she uncovered some information that indicated that a decision may have been made about recruiting her to the part-time job. It seems to me that when she was considering the reasons for the delay at paragraphs 34 and 35, the Employment Judge was perfectly entitled to take that fact, which relates to the Claimant's state of mind in September 2020, into account in the way that she did. I do not read the reference to the *Keeble* case and to a Claimant becoming aware of facts which give rise to a claim as meaning that the Employment Judge was saying that on 29 September the Claimant positively knew that she had a claim against the Respondents. The Employment Judge made clear that what the Claimant had told her was that on that date she became aware that a decision *may* have been made and that this meant as far as the Employment Judge was concerned that she ought at that stage to have researched her rights and established the legal position. The Employment Judge, in my view, was clearly entitled

to take those considerations into account in the exercise of her discretion.

23. The third point Mr Halliday makes is that the Employment Judge failed to take into account the point that the Claimant remained "in the dark" about what was happening all the way up to 26 December 2020 when she started the ACAS process, and that this is an important consideration when deciding whether it is just and equitable to extend time under the 2018 Regulations. In this context he referred me to a passage in the document issued by the Department for Health and Social Care which was a response to the draft Employment Rights Act 1996 NHS (Recruitment - Protected Disclosure) Regulations 2018 and she also referred me to comments in the Court of Appeal in the case of *Kingston upon Hull City Council v Matuszowicz* [2009] EWCA (Civ) 22, which in fact is dealing with a claim under the Disability Discrimination Act 1995.

24. In fact, the Employment Judge dealt directly with the Claimant's state of knowledge throughout the relevant period at paragraph 31, which itself leads into paragraphs 34 and 35. I will read that into the record now:

> "The Claimant's case was that she was in the dark until 29 September 2020. It would not therefore have been reasonable to expect her to contact ACAS before that date. It is clear that in deciding when to present her claim, the Claimant was operating on the assumption that the Respondent's silence was an ongoing failure to act that crystallised on 29 September when she became that were some sort of decision seems to have been made about her and she assumed that she could rely on that in deciding to wait until December 2020, three months later, to contact ACAS. That was the only explanation the Claimant put forward and she did not address the point any further in her claim form or what she said during the hearing."

So what I take from that is that, as a matter of fact, the Claimant was not, it seems, totally in the dark after 29 September 2020 and that such knowledge as she had fed into the date when she decided to start proceedings by going to ACAS. So, as a matter of fact, the Judge rejected the notion that she was *totally* in the dark. In any event, there is no reason from the Judge's reasons to conclude that she did not have all the relevant facts in mind, including

the difficulties where a claimant does not know what decision has been made, when she exercised her discretion not to extend time.

25. Overall I am satisfied that, although the decision may have been different if a different judge had made it, the EJ did not go outside the bounds of exercising her discretion properly, and did not fail to take account of relevant matters or take account of irrelevant matters. I therefore dismiss the appeal relating to the discretion to extend time.

26. I also dismisss the counter-appeal/cross-appeal, which does not arise in my view, because, whatever happens to the case hereafter, it remains open to the Respondents to apply to strike the claim out on the grounds that it does not stand any reasonable prospect of success, and indeed Mr Halliday expressly accepted that that remained an open point if matters go further.

(***Proceedings continued***)