



## EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

“This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and no-one requested the same.”

**Claimant**

Mr Emeka Umerah

**Respondent**

Alliance Care (Dales Homes) Limited

v

## OPEN PRELIMINARY HEARING

**Heard at:** Watford by CVP

**On:** 14 March 2022

**Before:** Employment Judge Alliot (sitting alone)

**Appearances:**

**For the Claimant:** In person

**For the Respondents:** Mr Daniel Piddington (counsel)

## JUDGMENT

The judgment of the tribunal is that:

1. The claimant is granted permission to amend his claim to add claims of race discrimination and detriment for making a protected disclosure arising out of his referral to the NMC on 4 February 2021 and a claim for notice pay.
2. The respondent's application for a strike out order is dismissed.
3. The respondent's application for a deposit order is granted in part as regards the detriment for making a protected disclosure claim and race discrimination claim arising out of the events of 6 and 7 September 2020 and the referral to the NMC on 4 February 2021.
4. The claim against the second respondent Brighter Kind, claim number 3315484/20, is dismissed, upon withdrawal.
5. The claims for detriment for making a protected disclosure arising out of being requested to work night shifts and being referred to OH in September 2020 are dismissed upon withdrawal.

## REASONS

1. This open preliminary hearing was ordered by Employment Judge Tobin on 10 January 2022. The issues to be resolved are as follows:
  - “1. Whether the claims or any specific allegations should be struck out for having no reasonable prospects of success under rule 37(1) (a) of the Tribunal rules and/or a deposit order made under rule 39(1) on the basis that the claims or any specific allegation or any argument (including arguments raised in the response) have little reasonable prospects of success.
  2. The claimant’s application to amend his claim dated 8 July 2021 to provide for a further claim of victimisation and/or discrimination.
  3. Any further case management orders as appropriate.”

### Amendment

2. On 8 July 2021 the claimant sent the following email to the tribunal:

“Dear Sir

Additional evidence of discrimination and unfair treatment.

I write to inform you that I have been further discriminated against and victimized. On 22 March 2021, I received paperwork from Nursing and Midwifery Council (NMC) informing me that I had been referred for misconduct during care services rendered to one of the residents. Yet again this allegations **[sic]** towards me is embodied with discrimination and hatred towards me.

I have attached the paperwork at my disposal for your perusal.”

3. During the course of this hearing there has been considerable debate as to what the exact nature of the claimant’s application to amend is. Mr Piddington has pointed to a further document supplied by the claimant in response to his written submissions in which the claim for victimisation does not include any allegation of race discrimination and refers to the NMC referral being done in retaliation for his protected disclosure to the CQC. Nevertheless, I take into account the fact that the application to amend itself does contain the word discrimination.

### Timings

4. The alleged protected disclosure was made by the claimant to the CQC on 19 August 2020. It is true to say that the claimant has yet to give details of what information was disclosed on that occasion. Nevertheless, in my judgment, he should be given a further alternative to provide this information and I have taken into account that in all probability any disclosure to the CQC is likely to involve concerns about patient safety.
5. The primary events that were reported to the NMC in due course took place on 6 and 7 September 2020. The claimant’s employment terminated on 7 September

2020. There is a dispute between the parties as to whether he resigned or was dismissed.

6. It would appear that the respondent first started a potential referral to the NMC on or around 5 October 2020. The relevance of this is that predates the claimant's presentation of his claim form on 26 October 2020. Whether or not the claimant can identify a protected act prior to 26 October 2020 remains to be seen. However, the draft NMC referral was sent to the respondent's Group Regulatory Team and the referral was not made at that time.
7. The actual referral to the NMC was made on 4 February 2021. That obviously postdates the claimant's presentation of his claim form.
8. In my judgment, the nature of the claimant's proposed amendment is as follows:

Equality Act s.13 Direct discrimination on the grounds of race

- 8.1 The claimant describes his race as Black African.
- 8.2 Did the respondent treat the claimant as follows:
  - 8.2.1 Referring him to the NMC on 4 February 2021.
- 8.3 Was that treatment "*less favourable treatment*", i.e. 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 Mr Dariusz Kapelewsky and/or a hypothetical comparator being a non-black African nurse on duty.
- 8.4 If so, was this because of the claimant's race?

Equality Act s.17/27: victimisation

- 8.5 Did the claimant do a protected act *and/or*: did the respondent believe that the claimant may do a protected act, namely bring proceedings in the Employment Tribunal.
- 8.6 Did the respondent subject the claimant to any detriments as follows:
  - 8.6.1 Referring him to the NMC on 4 February 2021.
- 8.7 If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

**The law**

9. I have a discretion as to whether or not to allow any amendment. In particular the case of Selkent Bus Company Limited v Moore indicates that relevant factors will include the nature of the amendment, the applicability of time limits and the timing and manner of the application.

10. The exercise is a balancing one dealing with hardship and injustice on both sides. Further, as per the IDS Employment Tribunal Practice and Procedure Employment Law Handbook at 8.27,:

“Tribunals should, when considering applications to amend that arguably raise new causes of action, focus “not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: The greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted.””

11. The claimant is a litigant in person who has referred to his limited legal knowledge.
12. Mr Piddington has pointed to the fact that in February and April 2021 two orders were made by the tribunal for the claimant to provide further particulars of his claim. The claimant did respond to the first order but not in the format as required in those orders.
13. The referral to the NMC was made on 4 February 2021. As such, the three-month primary limitation period would have expired on 3 May 2021. However, the claimant told me that he only became aware of the referral on 22 March 2021. Ignorance of the fact about which you are complaining is, in my judgment, a good reason for delay. Consequently, in my judgment, it would be reasonable to start time as from 22 March 2021. The three-month period for bringing a claim would therefore expire on 21 June 2021. The claimant made his application to amend on 8 July 2021 and so can be considered as being 18 days late.
14. It is fair to say that the claimant had access to legal advice from the RCN. However, that was in the context of his NMC referral and, in my judgment, is unlikely to have included employment law advice.
15. The claimant told me that on 7 April 2021 he sent an email to the Employment Tribunal indicating that he had new evidence and stating that he would like to introduce changes to his claim. I have not seen that email but I am prepared to accept that he sent it at that time. The claimant should disclose a copy of it to the respondent in due course.
16. As far as the timing and manner of the application is concerned, for the reasons set out above, I consider that the claimant is about 18 days late. Further, I have taken into account that within time the claimant was making active steps to amend his claim by consulting the Employment Tribunal.

**The nature of the amendment.**

17. This is a new factual allegation. The reason it is not in the original claim form is that it postdates that claim form. The referral to the NMC was made by Rebecca Challenger who was also responsible for investigating the events of 6 and 7 September 2020. As such, although it includes new factual allegation, it covers the same evidential ground by the same witness that would have to be dealt with in this case in any event. I accept that it will involve some extra work from the respondent’s perspective in investigating the events surrounding the referral to the NMC but, in my judgment this is not major.

### **The applicability of time limits**

18. As set out above I am working on the premise that the claim has been lodged 18 days late.
19. Mr Piddington has endeavoured to point to prejudice on the part of the respondent in having to obtain further evidence, the fact that the hearing will take longer and therefore will, in all probability, not be listed for some time and that the claimant should and could have formulated his claim earlier, not least because the tribunal had made orders for him to do so.
20. Nevertheless, in balancing hardship, in my judgment, there would be greater hardship on the claimant to exclude this head of claim. The claimant is a professional man and being referred to your regulator is a serious matter. The claimant seeks to advance a claim that the motivation for his referral was not genuine concerns about his professional practice but was based upon his race and/or because he had made a protected disclosure. In my judgment, those are potentially very serious allegations that deserve to be explored in evidence by a tribunal.
21. Consequently, in my judgment it would be just and equitable to extend time for the claimant to bring those claims and, taking into account all the circumstances, in my judgment the amendment should be allowed.

### **The application for a strike out order and/or deposit order**

22. The first allegation of race discrimination arises out of an event that took place on 16 July 2020. It is alleged that the claimant had been on duty when there were fire safety failings in that a door was allegedly tied shut. The claimant was subjected to disciplinary proceedings and received a written warning on 26 August 2020. The claimant alleges that similar failings took place on 14 and 15 July 2020 when he was not the nurse in charge and when another nurse, namely Mr Ionuts Oprea, was on duty. Mr Oprea is a white European national. The claimant alleges that in being subjected to the disciplinary procedure he was treated less favorably than Mr Oprea who had done, or allowed to be done, the same fire safety failings.
23. I do not know if Mr Oprea was subjected to any disciplinary proceedings and, in any event, I have been told that he resigned on 29 July 2020.
24. Having considered all the information before me I cannot conclude that the claimant has no reasonable prospect of success. Similarly, I do not conclude that he has little reasonable prospect of success. It seems to me that the facts surrounding this instance need to be examined by a full tribunal in order to determine what has actually happened.
25. As regards the first whistleblowing detriment identified by Employment Judge Tobin, namely in relation to being asked to work night shifts and referred to OH in September 2020, the claimant has indicated to me today that he does not wish to pursue these claims and, consequently, they are dismissed upon withdrawal.
26. In the case management summary of Employment Judge Tobin, a further whistleblowing allegation is made as follows:-

“The claimant contends that he was compelled to remain at work on 7 September 2020 by Ms Challenger, despite complaining of being too stressed to work.”

27. Mr Piddington in his written submission has dealt with this as being a complaint of detriment, namely being required to complete his shift. The justification being that that was in order to ensure patient safety as a replacement could not be found there and then.
28. The further detriment relied upon is the claimant allegedly being falsely accused of the claimant making safety failings as regards to the care of a resident who had fallen.
29. I have been taken to a number of contemporaneous documents dealing with the incident of the fallen patient. There is a substantial factual issue as to precisely what went on. Nevertheless, I have seen a complaint by a care worker to the effect that when paramedics attended to treat the patient who had fallen the claimant had been on a break and that whilst he attended initially he resumed the break leaving the care worker to deal with the paramedics in circumstances where she was not competent to do so. Further, there is evidence from Dariusz Kapelewsky to the effect that when he attended the care worker was on her own and in some distress. Further, there is an issue concerning a blanket. I express no view as the merits or otherwise of either party's case.
30. I have taken into account that the Employment Appeal Tribunal has repeatedly indicated that due to the fact sensitive nature of discrimination claims a strike out order is only appropriate in the clearest of cases. In particular, Mr Piddington cited to me the case of Ahir v British Airways Plc [2017] EWCA Civ 1392 indicating that notwithstanding the Employment Appeal authority it was nevertheless entirely possible for a discrimination claim to be struck out even in circumstances where the facts were in dispute. Fundamentally, it is a matter for my judgment.
31. In the exercise of my judgment I do not conclude that the claimant's claims have no reasonable prospect of success. The fact of the matter is that he appears to have made a CQC referral and, on the claimant's case, it became common knowledge in the workplace that he had done so. In those circumstances it is entirely possible that management may have been motivated to act as a result. That having been said, having seen the evidence, it is my judgment that the claimant stands little reasonable prospect of succeeding given the nature of the complaint against him and the fact that it appears to be corroborated by the care worker, a fellow nurse and, to an extent, a report of the paramedics.
32. It follows that, given that the NMC referral followed on from the events of 6 and 7 September 2020, the same conclusion must be made in relation to those allegations.
33. Consequently, there will be a deposit order for the allegations concerning 6 and 7 September 2020 and the amended claim.

#### **The amount of the deposit order**

34. I am required to take into account the claimant's means in assessing what would be a fair and reasonable amount for the deposit order. The claimant told me that

he resigned his permanent position last month and is currently working as a Bank Nurse. He told me he currently does about two shifts per week averaging £300 per week. He told me the reason he is not working fulltime is that he has a six-month-old child and, due to his wife's medical issues, has childcare commitments and works according to her health limitations. However, the claimant told me that he is shortly changing accommodation and his new house will involve rent of £600 per month and that he would have to up his shifts as a Bank Nurse. Working five days a week the claimant should be able to earn approximately £750 per week. The claimant told me that he is in receipt of no state benefits.

35. The claimant informed me that he did have some savings, namely £911.
36. The claimant will be required to pay the deposit order within three weeks of the receipt of the order. It will take some weeks for this order to be typed up and sent to the claimant. The claimant therefore has in excess of one month to start saving for the deposit.
37. In my judgment, a fair, reasonable and affordable sum for the deposit order would be £500.

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**Employment Judge Alliott**

11 April 2022

Sent to the parties on:

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For the Tribunal:

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