**Case No: 1301725/2008, 1305903/2012, 1317709/2013**
**1317488/2013, 1303231/2016**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs Patricia Cleary**

**Respondent:** **Birmingham City Council**

**Heard at: Birmingham** **On: 18 January 2018**

**Before: Employment Judge Findlay**

**Representation**
Claimant: no appearance
Respondent: Miss L Chudleigh, Counsel

# JUDGMENT

The claims in each of the above numbered cases are dismissed.

# REASONS

Preliminary issue: Email from the claimant's son on 17 January 2018

1. On 17 January 2018 at 18.54, the Tribunal received an e-mail, said to be from the claimant's son, quoting the 2012, 2013 and 2016 case numbers set out above and the "multiple" references, and stating as follows: "I am emailing to let you know that my mother, Mrs Patricia Cleary, has been unwell all day with diarrhoea (sic) and vomiting and will not be well enough to attend tomorrow. Apologies for this. Regards Steve Cleary".

2. The tribunal had received emails from the same email address before, but always signed "Patricia Cleary". The tribunal has never been notified that Steve Cleary was the claimant's representative. The email did not formally request a postponement but I heard Ms Chudleigh's submissions as to how I should proceed. She opposed any postponement.
3. The factual background to Mr Cleary's email is as follows: On 2 November 2017 I caused an initial Notice of hearing to be sent out, giving a date for an open preliminary hearing to consider whether any of the claims were out of time and should be dismissed, and or whether any of them had been compromised and

therefore should be dismissed, and to give any necessary directions. I directed that the claimant should obtain copies of all relevant documents from her former solicitors and bring copies of all relevant documents to the hearing, including evidence of when the casual hours started and stopped. The date for the hearing was listed as 12 December 2017.

4. The respondent asked for the date to be altered as its representative was not available. On 9 November 2017 I gave the claimant an opportunity to respond, but she did not. As a result, a new notice of hearing, for 18 January 2018 was sent out to deal with the same issues and giving the same directions as to documents.

5. On 8 January 2018, the claimant wrote in stating "As I am unavailable to attend in January could you please suggest some dates in Feb/March that you are available for? Regards Patricia Cleary."

6. On the same day, I caused a letter to be sent to the claimant asking whether she was formally requesting a postponement; if so she was to provide the reasons and to copy them to the respondent for comment. I also asked her to state whether she had complied with the directions given on 24 November regarding documentation. The claimant was asked to reply by 2pm on Friday 12 January 2018.

7. On 12 January the claimant confirmed that the email dated 8 January was a formal request to postpone; the reason for the postponement request was "due to medical issues with my granddaughter which unfortunately makes it impossible for me to attend the 18th January date. Yes I have complied with directions given in the notice of hearing."

8. On 15 January I wrote to the parties and directed that the claimant was to state why (copying her response to the respondent) her granddaughter's medical condition stops the claimant from attending the hearing, and to produce medical evidence to explain why she cannot attend. I asked the respondents to comment on the postponement request. Replies were sought by return of email.

9. The claimant did not reply, but on 17 January 2018 at 11.52am the respondent wrote in objecting to postponement on the grounds of costs that would be wasted.

10. That day I had a letter emailed refusing the postponement request as the claimant had not responded to the email from the tribunal on 15 January. At 18.54 that day, the claimant's son's email was received.

11. Law: I have considered the overriding objective and Presidential Direction.

12. Conclusion: I decided to proceed. The tribunal has never been told that Mr Cleary is representing the claimant. Neither he nor the claimant appears to be medically qualified and there is no medical evidence that the claimant would be unable to attend today. Conflicting reasons have been given, at a late stage, as to why she cannot attend. No supporting documentation has been produced despite a clear invitation to do so. The claims are old and given the nature of the issues I considered it in the interests of the overriding objective to proceed in the claimant's absence. I have taken account of her previous correspondence and all the documentation available to me.

Background and Issues

13. Up until the 10 May 2017, the Claimant was represented by Thompsons Solicitors, who informed the Tribunal on that date that they were no longer acting.

14. On the 15 May, the Tribunal wrote to the Claimant saying that in the future, correspondence would be addressed directly to her, and that she should tell the Employment Tribunal immediately if she appointed a new representative. No new representative has ever been notified.

15. Secondly, the Claimant was asked whether she wished to continue with her claims by the Tribunal. She replied on the 26 June 2017, saying that her outstanding claim was for "casual hours", and attaching two letters from Thompsons Solicitors; one dated the 08 July 2016, which said that payment for 2007 to 2008 should be "settled" later in 2016, and a second letter dated the 27 April 2017, stating that the claim could not continue as the claim period had expired, that is, it was out of time.

16. The Claimant said she disagreed with this. The letter of the 27 April 2017 from Thompsons said that her solicitor understood that Mrs Cleary would continue with a claim for casual hours from 2007 to 2008 despite advice to the contrary. The earlier letter referred to a claim for casual hours from 2004 to 2008, referred to as a "First Generation" Claim. In that letter, Thompsons did say that they thought that this claim would be settled later in 2016, but said that it would only cover the period from 2007 to 2008, that is, six years prior to the acceptance of the claim on the 18 July 2013. It is apparent from the documents that the Claimant has disclosed, that she was not seeking payment for casual hours in respect of any period after 2008. The claim referre4d to had been made more than 4 years after the period in question.

17. On the 13 July 2017, Mr Harris replied on behalf of the Respondent commenting that the Claimant had in fact brought five claims, giving their case numbers. He made the respondent's position quite clear in respect of each claim, saying effectively that both the "First" and the "Second Generation" Claims - that is, relating to all periods before 2011 - had been settled, and that the 2013 claims, of which there were three ( all lodged on the 18 July 2013) duplicated the 2008 claim (which had been settled). He pointed out that, in any case, the Claimant had stopped working as a casual worker in August 2008 - on the information before me, on (at the earliest) the 20th, and at the latest on 28th August 2008. Those claims were, therefore, out of time, if (which he did not accept), they added anything to the 2008 claim.

18. The Claimant did not attend or produce any documents today (despite my Order of the 24 November 2017), but I decided to proceed for reasons I have already given.

19. On the 18 October 2017, the Claimant had written by email to say that she wished to pursue her claim for casual hours as detailed in her email of the 27 June 2017 –for the period which ended in 2008. On 24 November 2017 I therefore listed this Hearing to determine, firstly, which (if any) of the five claims had been compromised and so should be dismissed for that reason, and/or to determine whether any of the claims were presented out of time and therefore should be

dismissed on the basis that the Tribunal has no jurisdiction to consider them; and to give any necessary further directions.

20. I directed, as stated above, that the Claimant should obtain from her former solicitors and bring to this Hearing all relevant paperwork, including evidence of when the "casual hours" started and ended.

21. I considered the issues which had been notified to the parties on 2nd and 24 November 2017 today, and I thank Miss Chudleigh for her helpful submissions.

22. Mr Harris gave evidence, which I accepted, on oath, verifying the Respondents records (which show that the Claimant last worked as a casual worker for the Respondent no later than the 28 August 2008).

23. In passing, I should say that this evidence tallies with the correspondence which the Claimant had earlier produced and which is detailed above.

The relevant law

24. Section 2, subsection 4 of the Equal Pay Act 1970 provides that no determination may be made by the Employment Tribunal in proceedings under section 2(1) of the Act (as these proceedings are) unless the proceedings are instituted on or before the "qualifying date" determined in accordance with section 2ZA.

25. In this case, there is no evidence before me that this is anything other than a "standard" case, so the "qualifying date" is the date following six months after the last date upon which the Claimant was employed as a casual community care assistant, which would be the 27 February 2009 at the latest. There is no provision for extension of this time limit.

26. If proceedings have been validly compromised under Section 77 of the Sex Discrimination Act 1975/ section 144(4) of the Equality Act 2010 with the assistance of a conciliation officer, I have no jurisdiction to entertain them and they should be dismissed.

Applying the Law to the Facts

27. Dealing first of all with Case number 1301725/2008 which was presented on the 27 March 2008, it is clear from page A4 of the bundle that this is a general claim regarding the claimant's role as a Community Care Assistant - manual grade 5. I accept Mr Harris's evidence that the *casual* community care assistant role was on manual grade 5 as well as any substantive/permanent position. The claim form itself makes no distinction between casual and permanent work, and my interpretation is that it was intended to cover both –in my view, an objective observer knowing the relevant circumstances and that the casual work was on manual grade 5 would have thought that this claim was intended to cover that casual role in addition to any permanent role at that level. I have seen a valid COT3 settlement agreement, on ACAS headed notepaper indicating that a Conciliation Officer assisted, in relation to this claim which is dated the 20 September 2011 at Division C page 6-10 of the bundle. – that is, it was signed at a

time before any of the other claims were made, 1305839.2012 having been made on 13 April 2012.

28. The COT 3 agreement of 20 September 2011 is quite clear, in that it is related to the role of a Community Care Assistant, and settles all equal pay claims and related claims associated with the "subject matter" (as defined in the agreement – it clearly encompassed "rated as equivalent" claims for the Community Care Assistant Role) that the Claimant either had, or may have at the settlement date, and whether these claims were known to the Claimant or not at that date, in relation to the "settlement period".

29. The "settlement period" is said to be the period for six years before the date on which the Claimant's claim form was presented (or the date upon which the claimant started employment in the relevant job if later) until the earlier of the termination of the claimant's employment in the relevant posts (which is the case here – at the latest 28 August 2008 in respect of the casual worker role), or at the 31 December 2008; that is it covers the relevant period in respect of which the Claim in respect of casual work was made. The "settlement sum" was £88,723.

30. In my view this "Cot 3" Agreement clearly compromises not only the claim(s) made in Claim 1301725/2008 [the 2008 claim], but also any claim in relation to the Community Care Assistant role, whether casual or permanent, up until the date specified, that is the 31 December 2008, which would encompass all the work done by the claimant in her casual worker role which was the subject of the 2008 claim.

31. Miss Chudleigh also referred me to pages C11-C13 in the bundle, which records that, as it had been recorded on a schedule sent by the respondent that the claimant's claim had been settled and the sum set out in the agreement had been paid on 28 September 2011 (just over a week after signing), Employment Judge Goodier had directed that, unless the Employment Tribunal heard from the Claimant by 4pm on the 29 August 2014 giving good reason to the contrary, the claim would be treated as withdrawn and would be dismissed.

32. There can be no doubt in my view that this claim has been treated as withdrawn with effect from 29 August 2014 as no reply was received to EJ Goodier's letter, and was either dismissed automatically on that basis, or ought to be now (if it has not been dismissed before today's date) as no good reason was given by the date shown and it clearly had been settled. If there is any doubt as to the position, I do dismiss that claim.

33. The next claim, claim number 1305903/2012, was lodged, as I have said, on the 13 April 2012 and starts at page A14 in the bundle. This is a "2nd Generation" Claim for the period starting from 01 April 2008, and relates again to the Community Care Role – at page A 29 it states that the role in respect of which the claimant was claiming was "Community Care Assistant – casual". There is some overlap with the agreement in respect of the first, 2008, claim, but that has clearly been ignored or overlooked (to the Claimant's benefit) by the Respondent.

34. As the Claimant had ceased to be employed in the casual worker role by the 28 August 2008, this claim was clearly out of time when it was presented and falls to be dismissed on that basis (see above – it was more than 3 years out of time). The same applies to the three other claims re- presented on the 18 July 2013, which appear to duplicate each other (and earlier) claims – they are out of time,

there is no jurisdiction to entertain them and they must be dismissed.

35. The Cot 3 Agreement at Divider C – pages 14-19 -which was signed by the Claimant on the 18 August 2015 covers the period from 8 August 2008 up until the termination of employment in the job role in question or, if later, the 30 August 2011 in any event. The "job role" is said to be "Home Care Assistant/Community Care Assistant". As stated above, it seems to me that, on an objective interpretation, this was intended to cover all such roles carried out for the period in question, whether casual or otherwise. .As I have said, the Claimant stopped working in the casual worker role of Community Care Assistant in August 2008, so even if 1305903/2012 and the later claims were not out of time, I would have dismissed the 2012 and the 2013 claims (1 of which has a 2016 case number but all of which were presented on the same date) as there has been a valid compromise, assisted by a conciliation officer, reached covering that role and the relevant period, as shown at pages C14-19.

36. If even this was not enough, for the avoidance of doubt at page C20-25 there is a further Cot 3 agreement, assisted by a Conciliation Officer, which expressly relates to casual worker role and is for the relevant period from 8 August 2008 until the termination of that role (or 30 October 2011 if it had not been terminated earlier – it had, no later than 28 August 2008). It is again dated the 18 August 2015. In my view, even if the tribunal had jurisdiction to consider them because they were not out of date, all of the claims from 2012 and 2013 (including 1303231.2016) would have to be dismissed because they had been compromised in any case.

37. So, therefore, all of the above numbered claims are dismissed, having been compromised, and those from 2012 onwards would have been dismissed even if they had not been compromised because the tribunal has no jurisdiction to consider them in the alternative, as they were out of time.

38. In my view this claim has been unnecessarily complicated by the duplication of claims and consequent repetition of settlement agreements and Cot 3 Agreements covering the same claims and the same period of time. It appears that the claimant may have been over compensated by being paid more than once for the same claim/period. Whichever way one looks at it, all of these claims should be dismissed.

Employment Judge Findlay
2 February 2018