



# EMPLOYMENT TRIBUNALS

**Claimants:** Dr Russell Hall

**Respondent:** HCA International Limited

**Heard at:** By CVP video link **On: 24 February 2022**

**Before:** Employment Judge Sutton QC

## **Appearances**

Claimant In person

Respondent Ms C. Casserley, counsel

## **JUDGMENT**

The Claimant's claim is dismissed for lack of jurisdiction, the same having been presented outside the prescribed limitation period.

# REASONS

## Introduction

1. The claim arises out of the withdrawal of a conditional job offer which was made to the claimant following an interview of the role of resident doctor in general medicine at Princess Grace Hospital, which is owned and operated by the respondent.
2. The claimant was informed immediately following the interview that it had gone well and that references were being sought. A health screening would also be required. The claimant was subsequently informed, before commencement of his appointment, that he had failed to meet pre-employment checks. He later discovered that the reason for this was that one of his named referees, Dr Simcock, had declined to support his application for employment.
3. The claimant ascribed this negative attitude to Dr Simcock's awareness that he has experienced symptoms of anxiety and depression in the course of his last employment position. The claimant relies upon these conditions as amounting to a qualifying disability for the purposes of a claim of disability discrimination. The claimant does not contend that Dr Simcock had any negative disposition towards him by virtue of his sexual orientation.
4. During the health screening meeting, which was undertaken at the respondent's occupational health unit, the claimant contends that, when he disclosed the fact that he had been prescribed prophylactic HIV medication, the reaction of staff made him feel that there was an adverse attitude towards his sexual orientation – this notwithstanding the fact that he subsequently passed the pre-employment health screening.
5. The claimant brought employment tribunal claims against three parties: the respondent; Barts Health NHS Trust (his previous employer) and Dr Simcock, (his previous line manager). The claims were not directed to be heard together. The complaints against the respondent are understood to be founded upon

discrimination arising from disability contrary to s.15 Equality Act 2010 and discrimination because of sexual orientation contrary to ss.12 and 13 Equality Act 2010.

6. A case management hearing in the claim against the respondent was conducted by Employment Judge Nicklin on 21 December 2021. The hearing proceeded on the incorrect footing that the claim had been presented on 22 June 2021. The employment judge noted in his hearing summary that, contrary to what was apparent from the Tribunal's records, the claimant contended that the actual date of presentation of the claim was significantly earlier, in January 2021. The employment judge encouraged the claimant to address this contention in his evidence at today's hearing where issues of jurisdiction would be considered.
7. The employment judge also noted that the claimant has brought other claims against his previous employer but that he had been told that the issues in the claims were not related. Again, on closer inquiry, this assertion was incorrect as more fully explained below.
8. The Tribunal decided that it was in accordance with the overriding objective to list a preliminary hearing to determine the issue of whether the claims or either of them were brought within the stipulated limitation period, and if not, whether time should be extended. The employment left it open to this Tribunal to decide whether to approach the hearing as a preliminary issue on jurisdiction or as a question of whether to strike out the claim (or make a deposit order).
9. In accordance with the Tribunal's earlier direction, the issues for determination at today's hearing are therefore as follows: -
  - (a) whether the tribunal has jurisdiction to hear the claimant's discrimination complaints. In particular, whether it is just and equitable for the tribunal to extend time in respect of the time limit for presenting the claim.

- (b) The tribunal may decide this as a preliminary issue (Rule 53(1)(b) of the Tribunal's Rules of Procedure) or as a question of strike out and/or deposit order (Rule 53(1)(c) or (d)) as it sees fit.

10. With the agreement of the parties, the hearing was conducted by video link. The claimant provided a witness statement on which he was cross-examined. The Tribunal found the claimant a measured and frank witness, who aimed to assist the Tribunal in its understanding of the relevant events. A bundle of 376 pages was produced by the parties for consideration at the hearing.

### **Statutory Provisions - Jurisdiction**

11. The statutory requirements relating to the time period in which claims of unlawful discrimination may be brought are set out in s.123 Equality Act 2010, which provides as follows: -

- (1) .... (P)roceedings on a complaint within section 120 may not be brought after 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. N/A For the purposes of this section—
- (2) N/A
- (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.

## Caselaw Guidance

12. As noted by Ms Casserley in her submissions on behalf of the respondent, guidance on the approach to be adopted by employment tribunals in relation to the issue of whether time should be extended on ‘*just and equitable*’ grounds pursuant to s.123(1)(b) of the Equality Act 2010 was provided by the Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194. Leggatt LJ, as he then was, said as follows:-

18. First, it is plain from the language used (“such other period as the employment tribunal thinks just and equitable”) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act 2010 does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corp v Keeble [1997] IRLR 336 ), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] ICR 800 , para 33.....

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

13. More recent guidance from the Court of Appeal on the proper approach for a Tribunal to adopt in the exercise of the just and equitable discretion is provided in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23. The Court of Appeal endorsed the guidance in Morgan referred to above. Underhill LJ also observed :-

32. .... that the fact that the grant of an extension will have the effect of requiring investigation of events which took place a long time previously may be relevant to the tribunal's assessment even if there is no reason to suppose that the evidence may be less cogent than if the claim had been brought in time.

37. ....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 (as Holland J notes) “the length of, and the reasons for, the delay”.”

14. Circumstances which have been regarded by Tribunals as being of potential relevance to the exercise of this discretion include :-
- (i) whether the claimant has been engaged in the pursuit of an internal process;
  - (ii) disability or ill health, particularly as regards mental health conditions, if the health condition provided a real impediment to the giving of instructions and the formulation of a claim.
15. It is clear from Morgan that it may also be relevant to give some weight to the *prima facie* merits of the complaint (bearing closely in mind the potentially limited degree to which those merits can be investigated)..

## Findings

16. Immediately prior to his application for employment with the respondent, the claimant had been employed by Barts Heath NHS Trust, specialising in respiratory medicine. His line manager was Dr Simcock. The claimant characterised his time at St Bartholomew's as having been very difficult. He explained that he had experienced challenges in his professional relationships which he ascribed to his mental health condition at the time, and specifically anxiety and depression. He contended that Dr Simcock was aware of these health issues and that they would have affected his assessment of the claimant as a candidate for new employment.
17. On 8 July 2020, the claimant attended an interview with the respondent for the role of resident doctor in general medicine at Princess Grace Hospital. The interview was chaired by Dr Sczudlo, with two other persons present.
18. Immediately after the interview the claimant was telephoned by Dr Sczudlo, who explained that the panel had been impressed with the claimant's application and that a conditional employment offer would be issued, subject to

satisfactory references. The claimant named three referees for the respondent to approach: Dr Simcock and two others. Out of the three, Dr Simcock, knew him much the best in terms of recent professional experience.

19. The conditional offer was confirmed in a letter dated 15 July 2020. The claimant attended the respondent's occupational health unit for a pre-employment screening. At this meeting the claimant explained that he was prescribed prophylactic HIV medication. The claimant contends that, despite this being a routinely prescribed and familiar preventative medication, the member of staff undertaking the screening gave him 'looks' and asked 'wary' questions, which he felt indicated a negative or adverse view of his sexual orientation. The claimant did not register his concern about this behaviour at the time, or indeed for many months thereafter.
20. This episode provides the basis for the complaint of sexual orientation discrimination. The detriment which the claimant asserts in this heading of claim lies in the impact of the screening staff member's alleged response upon him. It is not contended that the issue sexual orientation was a factor in the decision to withdraw the offer of employment, and indeed he was cleared for employment following the health assessment.
21. On 29 July 2020, the respondent was notified by Dr Simcock that he felt unable to provide a reference in support of the claimant's application. A discussion then took place between Dr Simcock and Dr Sczudlo the following day. In the course of this discussion it appears that Dr Simcock conveyed his misgivings about the claimant's past performance and suitability for employment. It is the respondent's case that no reference was made to the claimant's anxiety or depression.
22. On the basis of this feedback from the claimant's former line manager, the respondent took the decision formally to withdraw its conditional offer of employment and this was communicated to the claimant by letter of 30 July 2020. The reason given was failure to meet pre-employment checks.

23. Although his efforts to try and identify whose feedback had led to this outcome took some months to produce a definitive response, the claimant had deduced by August 2020 that it was very likely to have been Dr Simcock.
24. The claimant contended that the withdrawal of the job offer triggered an acute depressive episode. Whilst it fully accepts that the outcome must have been upsetting and perhaps destabilising to some degree, in the absence of any medical evidence to substantiate his assertion, the Tribunal considers that the claimant's characterisation of the depth and extent of its impact on his mental state was somewhat overstated. The Tribunal notes in this regard that the claimant was able to secure new employment on 2 October 2020, as a clinical research fellow in Cardiology, again with Barts Health NHS Trust.
25. It is apparent from the documents that up to the first half of November 2020, the claimant was making significant efforts to try and find a suitable lawyer to guide him on his available legal remedies. The claimant was not clear as to whether he had also approached the Citizens Advice Bureau. He eventually was put in touch with ACAS on 16 November and focused his efforts initially on trying to achieve a mediated solution as his preferred first option. This proposal was perfunctorily dismissed by the respondent.
26. Given that his cause of action accrued at the latest on the date when his offer of employment was withdrawn, the primary limitation period of three months came to an end on 29 October 2020. The claimant initiated the Early Conciliation process several weeks later on 16 November 2020.
27. Significantly for present purposes, the claimant was able to engage the grievance procedures of his former employer Barts Health NHS Trust and this resulted in meeting on 25 November 2020, where the claimant learnt formally that it was indeed Dr Simcock who had declined to provide a reference. The Trust appears to have acknowledged at the grievance meeting that this refusal was inappropriate.

28. In the course of the Preliminary Hearing, the claimant produced a letter from the Employment Tribunal's Central Office in Leicester dated 11 January 2021, confirming receipt of his claim against the respondent. The claimant also received two similar letters bearing the same date, confirming receipt of his further claims against Barts Health NHS Trust and Dr Simcock.
29. The letters from Leicester confirmed that, in the case of the claims against the respondent and Dr Simcock, the same would be passed onto London Central Employment Tribunal, and in the case of the claim against Barts Health NHS Trust, to London East Employment Tribunal. The claimant was notified that those Tribunal centres would be in touch once the respondents in each case had been notified.
30. For reasons which it has not been possible to ascertain on the information available, there appears to have been an administrative delay in registering the claimant's claim against the respondent at London Central and this only occurred, some months later, on 11 June 2021.
31. In the meantime, the claimant focused his efforts in pursuing his claim against Barts Health NHS Trust, which was being case managed at London East. The claimant explained that his claim against the Trust ultimately resulted in a compromise agreement, recorded in a form COT 3 dated 23 November 2011. Although the Tribunal was not shown and did not inquire into the detail of the compromise, which was subject to a confidentiality agreement, it was informed that the claim against the Trust was for the same financial remedy as that pursued against the present respondent, namely losses flowing from the withdrawal of the job offer.
32. It does not appear that the claim against the Trust contained allegations of sexual orientation discrimination. The claimant informed the Tribunal that he felt reticent about including this heading of complaint and considered that his disability based claim was weighty enough on its merits to be proceeded with alone.

## Discussion and Conclusions

33. Turning firstly to the issue of when the claims became time-barred, having regard to the three month primary limitations periods applicable to each, the complaint in relation to discrimination on ground of sexual orientation accrued at the point when the claimant says that he experienced an adverse response during the occupational health screening. This was followed a few days later by the notification of the withdrawal of his conditional job offer, by letter of 30 July 2020, at which point the complaint of discrimination arising from disability will have accrued. It follows that the primary limitation period will have expired at the latest on 29 October 2020.
34. In determining whether it would be just and equitable to extend time for presentation of the claim, the Tribunal accepts that the respondent was slow to respond to requests for confirmation as to which of the claimant's referees had been responsible for giving a poor reference or being otherwise unsupportive of his job application. It appears that this clarification was only provided on 25 November 2020 and then through the Barts Health grievance process. As noted above, the claimant had deduced who he considered must have been responsible by August 2020. But the respondent's slow response, coupled with its reluctance to engage with the claimant (particularly in relation to his requests for a mediated resolution) are factors which tell against the respondent in the balancing exercise.
35. The Tribunal notes and accepts the claimant's genuine efforts to try and locate suitably specialist advice to guide him as to the appropriate route to legal redress. His references in contemporaneous correspondence to small claims court proceedings support for his assertion that he was unaware as to how his legal challenge should best be progressed. This deficiency in his knowledge was however addressed on or about 16 November 2020 when he had the benefit of guidance from ACAS.
36. In the absence of medical evidence, the Tribunal does not find that there was a compelling health-related reason for the claimant's delay in issuing his claim

against the respondent by 29 October 2020. The fact that the claimant was able to secure new employment as a clinical fellow in cardiology by the start of October 2020 attests to his ability to function at an intellectually demanding level and suggests that he was able, from a health perspective, to apply himself to the formulation of his claim. This was several weeks before the expiry of the primary limitation period.

37. A compelling factor in favour of refusing to extend time on just and equitable grounds is the issue of prejudice – although it may have somewhat greater weight in relation to the sexual orientation complaint. The resolution of this complaint appears to depend on the reaction of a member of staff within the respondent’s occupational health unit, during the screening visit at some point in late July 2020. The evidence material to this strand of the claimant’s claim would include inquiries about the nature of the claimant’s medication as well as the interpretation of the demeanour and ‘looks’ which are attributed to the member of OH staff who conducted the screening.
38. The cogency of this sort of evidence is going to be critically affected by the passage of time and the dimming of recollections. For reasons which are noted above, the claimant did not indicate this basis of complaint until many months had passed, and there was therefore no cause for the respondent to carry out a contemporaneous inquiry. The Tribunal also considers that the cogency of the evidence relevant to the disability discrimination limb of the claim may also have been diminished through time. There was no contemporaneous inquiry into the circumstances of the claimant’s job offer withdrawal, and, given that he was an employee of an outside organisation, the respondent was not well placed to assess the underlying factors or reasoning that may have caused Dr Simcock to respond as he did.
39. Having regard to the totality of the evidence before it, and bearing in mind the guidance summarised above, the Tribunal considers that insufficient grounds are shown for extending time in this case.

40. Having received ACAS advice on the legal framework on 16 November 2020, and following his grievance meeting with Barts Health NHS Trust on 25 November 2020, the claimant was in a position where he could lodge his claim, even on a protective basis whilst other avenues were pursued. At that juncture, and given the time that had already passed, there was a burden on him to do so with some expedition. In the event, he stayed his hand until 11 January 2021. The claimant provided no convincing explanation for this further period of delay which might have justified the Tribunal in exercising its ‘just and equitable’ discretion.
41. Accordingly, and for the reasons set out above, the Tribunal finds that the complaints are time-barred and that the claim must be dismissed for lack of jurisdiction.

**Further observations**

42. The Tribunal did not consider that the apparent merits of either complaint was relevant to the exercise of its discretion to extend time in this case. It is right to note, however, that the losses for which the claimant contends in the current proceedings may have been substantially remedied by the resolution of his claim against Barts Healthcare NHS Trust. If that is so, had the case proceeded against the respondent, the principle against double-recovery might well have become a relevant consideration.

28<sup>th</sup> Feb 2022

**Employment Judge Sutton QC**

Sent to the parties on:

28/02/2022.

For the Tribunal