



# EMPLOYMENT TRIBUNALS

**Heard at:** Croydon (by video) **On:** 17 July 2023

**Claimant:** Mr Ajeet Kumar

**Respondent:** Lewisham and Greenwich NHS Trust

**Before:** Employment Judge E Fowell

**Representation:**

**Claimant** In Person

**Respondent** Ben Jones of counsel, instructed by Capsticks LLP

## JUDGMENT ON A PRELIMINARY ISSUE

The claims were submitted out of time and are dismissed.

## REASONS

### *Introduction*

1. These written reasons are provided at the request of Mr Kumar. As usual, some editing has taken place to clarify the oral reasons given on the day of the hearing, and to quote in full the relevant legal tests and passages of evidence.
2. This preliminary hearing was listed is to consider whether Mr Kumar's complaints were presented out of time. By way of background, he works for the Trust as a consultant orthopedic surgeon and has brought complaints of disability discrimination and as a whistleblower – or more precisely, a claim to have suffered detriments at work as the result of making protected disclosures.
3. The factual background to the case was set out in the case management order of Employment Judge Ferguson, which followed the previous hearing on 3 May 2023. Summarising it, the whistleblowing claim arises out of complaints he made to his manager during 2020 that his place of work was not safe and was not doing

enough to stop the spread of Covid, that there was, for example, no adequate social distancing or ventilation. Because of those complaints, he says, an anonymous allegation was made against him in November 2020 that he undertook an operating list while unwell. This resulted in disciplinary action, which concluded in June 2021 with a final written warning. He appealed against that decision and his appeal was rejected in “June, July or August 2021.” The exact date is not in fact mentioned in the claim form or the response, so these important details were presumably gathered by Judge Ferguson in the course of the last hearing.

4. The complaints of disability discrimination arise out of the Long Covid from which Mr Kumar now suffers. Even the identity of the relevant condition was not specified in the statements of case on each side, although the response form notes that an Occupational Health report was prepared on him in October 2020 while he was recovering from Covid, and that it recommended a phased return to work until mid-December 2020. As a result, he says that there was a failure by the Trust to make reasonable adjustments for his condition. That is the only type of disability discrimination claimed.
5. In their response to the claim, the Trust raised this time-limit issue. They also stated that they were in the process of investigating a complaint he made on 6 January 2022 and did not want to prejudice that process by setting out their position too fully. Hence, they argued both that it was premature for them to respond but too late for Mr Kumar to complain to the Tribunal.

#### *The legal tests*

6. Different legal tests apply to the two different claims. These tests were set out in the case management summary at paragraph 3 but for completeness the rules are as follows.
7. The right not to suffer detriments for making a protected disclosure is contained in section 47B Employment Rights Act 1996, and by section 48 there is a right to complain to an Employment Tribunal. That section continues:
  - (3) An employment tribunal shall not consider a complaint under this section unless it is presented—
    - (a) before the end of the period of **three months** beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
    - (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was **not reasonably practicable** for the complaint to be presented before the end of that period of three months.
  - (4) For the purposes of subsection (3)—
    - (a) where an act extends over a period, the “date of the act” means the last day of that period, and
    - (b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer ... shall be taken to

decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

(4A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a). [Emphasis added]

8. Section 207B then provides:

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

9. So, the general rule is that a claim to have suffered a detriment for making a protected disclosure must be presented within three months of the act or failure in question, or the last in the series; it can be extended where the Tribunal is satisfied that it was not reasonably practicable for the claim to have been presented in that time, (and that it was then presented within a further reasonable period) and in every case the time spent in early conciliation through ACAS is also added on.

10. For claims of discrimination, the relevant test is set out at section 123 Equality Act 2010:

(1) Subject to section 140B proceedings 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**.

...

(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. [Emphasis added]

*The key dates*

11. The key dates for the time limit issue are as follows:
  - a) Early conciliation began on 27 January 2022
  - b) Early conciliation ended on 2 March 2022
  - c) Claim form (ET1) submitted on 31 March 2022
12. Since the ET1 was presented within a month of the end of early conciliation, the key date is the date on which early conciliation began. The subsequent time spent in early conciliation and up to the time the ET1 was submitted are not counted. Any act or failure which took place on or before 27 October 2022, three months earlier, are therefore out of time. So the question becomes, why was early conciliation not begun by 28 October 2022?

*Procedure at this hearing*

13. Given that the last alleged detriment was the rejection of Mr Kumar's appeal, which occurred in "June, July or August 2021", it is clear that this claim was submitted substantially outside the normal three-month time limit. Mr Kumar was therefore ordered at the last hearing to provide a witness statement setting out "the reason(s) for the claim being presented out of time and any factual matters relied upon to establish that the tests for extending time are met."
14. He was also required to provide an impact statement, setting out further information about his disability, and a schedule of loss explaining the amount he was seeking in compensation. He combined these responses in an email to the Tribunal on 5 June 2023, which ended:
  3. Time Limits/Jurisdiction.

My formal complaint was lodged on 6/1/22 with the Trust. The Trust has an obligation to finish the internal investigation within a certain timeframe. Unfortunately the Trust has failed in that regard, the internal investigation is still not completed.

Considering that, I would like to request that all aspects of my claims should be considered.
15. That is therefore his only evidence on this issue.
16. The case management summary also provided that "If the claimant wishes to rely on any documents relevant to the time limit issue copies should be sent to the respondent at the same time." For this hearing I had a bundle of 81 pages, 40 of which are Tribunal paperwork. The remaining 41 pages comprised:
  - a) the email just mentioned,
  - b) a reply from the respondent,

- c) Mr Kumar's written complaint of bullying and harassment made on 6 January 2022,
  - d) the Occupational Health report dated 14 October 2021,
  - e) his inpatient records at hospital, when he was admitted with Covid on 22 October 2020 and again on 5 November 2020,
  - f) correspondence from his consultant in the chest clinic from 6 November onwards recording his fatigue and ongoing difficulties.
17. Mr Jones, for the Trust, did not seek to cross-examine Mr Kumar about this brief statement, and the hearing proceeded on the basis of submissions. That appeared to me a reasonable position to adopt in the circumstances. This was the second preliminary hearing and Mr Kumar had had the opportunity to set out his evidence in writing more extensively if he had wanted to. He chose to rely on the fact that the internal process was still ongoing when he brought his claim, and it would be unfair in those circumstances for the Tribunal not to accept it.
18. Mr Jones set out his position first, at my request, to make it easier for Mr Kumar to respond. He noted that at page 75 is a letter dated 25 March 2021 from Mr Kumar's consultant to his GP which noted that:
- "Mr Kumar is back at work in some capacity, operating lists have been shortened and he is not participating on the on-call rota."
19. That was therefore the last date on which it could be argued that there had been a failure to make reasonable adjustments, these being the adjustments in question. Mr Kumar accepted that that was correct. Hence, by the time he submitted the claim form on 31 March 2022, over a year had passed since the reasonable adjustments had been made.
20. As to the detriment claim, the last act relied on was the rejection of Mr Kumar's appeal against the final written warning, and the latest that could have taken place was on 31 August 2021. There was then a delay until 27 January 2022 when early conciliation began. He submitted a written complaint about the disciplinary proceedings which had been taken against him on 6 January 2022 (page 46) but that was already out of time, so there was no merit in arguing that this internal complaint had prevented him from submitting the claim earlier. Mr Jones also referred me to a number of authorities, as mentioned below.
21. In responding to these points Mr Kumar introduced some new evidential points. They should of course have been set out in his witness statement, but in the event they were not controversial, in that Mr Jones did not consider that they would affect the outcome, and he did not seek to exclude these points or to cross-examine Mr Kumar about them.
22. Mr Kumar therefore added that on 7 May 2021, at 4pm, he had a meeting with Trust's Director of HR. This was an informal discussion, in accordance with the Trust's process. It lasted more than an hour and he was told that the Director would respond to him. She did not. He waited until June or July, then went to see

the CEO directly, without appointment, to say that no one was taking his concerns seriously. After that the CEO emailed HR to say that this was to be made formal. Later, he received the relevant form on which to set out his complaint, which he submitted on 6 January 2022. After that he contacted ACAS about early conciliation.

## Legal Principles and Conclusions

### *Detriment claim*

23. Starting with the detriment claim, in **Palmer and anor v Southend-on-Sea Borough Council** 1984 ICR 372, the Court of Appeal held that “reasonably practicable” does not mean “reasonable”, which would be too favourable to employees, and does not mean “physically possible”, which would be too favourable to employers, but means something like “reasonably feasible”. The burden of proof is on Mr Kumar to show that it was not reasonably feasible to have presented the claim within the normal period.
24. That case also held that in general, pursuing an internal appeal against dismissal cannot by itself justify extending the time limit. It is however a factor for the Tribunal to take into account.
25. Here, however, the last act was on or before 31 August 2021, about three months earlier than the 28 October 2021 deadline. That was after Mr Kumar’s informal complaint, but before his formal complaint. However, he has not suggested that he did not know about his right to bring a claim, let alone that he did not know about the relevant time limits, so there is no basis on which I can conclude that it was not reasonably practicable to have presented his claim on time.
26. Mr Jones did refer me to the case of **John Lewis Partnership v Charman** EAT 0079/11, a case in which an employee had been waiting for the outcome of his internal appeal before submitting a claim for unfair dismissal. In that case it was only when Mr Charman’s appeal against dismissal was rejected that he began to explore whether any time limits applied, he then found out that he was already out of time and submitted his claim form promptly. In those circumstances the Employment Appeal Tribunal upheld a decision that it had not been reasonably practicable for him to present his claim on time. He had been unaware that a time limit existed and his lack of awareness was reasonable in the circumstances. But that lack of awareness has not been suggested here.
27. Even if it had, Mr Kumar accepts that he uses IT at work and could have searched online to find out about the process. At any time from June 2021, when he received the final written warning, he could have looked into this process. The fact that he had raised concerns in May 2021 (before this warning was given) and was waiting for a response, is not enough for me to conclude that commencing early conciliation during the ensuing months, before the end of November 2021 (three months after the appeal outcome) was not reasonably practicable.

*Discrimination*

28. Turning to the test for discrimination, time can be extended where it is just and equitable to do so, but that does not simply mean that it should be extended whenever an employee has a good case. This was considered in **Robertson v Bexley Community Centre** [2003] EWCA Civ 576, where Lord Justice Auld held that:
- “25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify 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 discretion is the exception rather than the rule.”
29. This was reiterated quite recently by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** 2021 EWCA Civ 23, which again emphasised that the main questions were:
- a) the length of the delay;
  - b) the reasons for the lateness; and
  - c) the potential prejudice to the other party.
30. No real prejudice has been suggested by the Trust and so it is the first two points which have to be considered. The period of lateness is from (at the very latest) 25 March 2021 to 28 October 2022, the last date when an act or failure would have been in time. That is a substantial delay of over seven months. And the longer the period of time the stronger the reason needing to justify the delay.
31. Again, Mr Kumar relies on the delay by the Trust in completing their internal complaints process but that does not seem to be a complete answer by any means. Firstly, there was no mention in the internal complaint about these reasonable adjustments. Instead it concentrated on the disciplinary action taken against him. The resolution sought was that “The trust must withdraw the letter issued to me in June 2021 [i.e. the final written warning] and offer me an apology.”
32. Secondly, even if the informal complaint he made on 7 May 2021 did include reference to reasonable adjustments, that was still nearly two months after they had all been carried out. The only explanation put forward for the subsequent delay of many months was that he was waiting for a response to this internal complaint, but since this aspect was not mentioned in his written complaint that argument is deprived of any real force. But even if the written complaint had mentioned this, it is not enough simply to wait for an employer to respond, however slow their processes. There is an onus on the individual employee to inform themselves about time limits, just as in connection with the reasonably practicable test. At any time from March 2021 if not before, Mr Kumar could have presented a claim to an employment tribunal. Once again, he has not suggested that he was

advised, either by the trust or any outside adviser, that he could not do so until the internal process was concluded, or that he was unaware of time limits, let alone that he was unable to find out about them.

33. In those circumstances it cannot be said that the test in **Bexley** has been met i.e. that he has satisfied me that an exception should be made so that discretion should be exercised in his favour. That conclusion may appear a harsh one, particularly for a consultant who has worked throughout the Covid pandemic and suffered his own ill health as a result, but it must follow in his circumstances from the relevant legal tests.

Employment Judge Fowell  
Date **1 August 2023**

JUDGMENT & REASONS SENT TO THE PARTIES ON  
Date **31 August 2023**

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