



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Niranjn

**Respondent:** Liverpool Heart and Chest Hospital NHS Foundation Trust

**Heard at:** Liverpool (by video conference)

**On:** 6 October 2023

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

## REPRESENTATION:

**Claimant:** Mr P Hargreaves, Solicitor

**Respondent:** Ms A Niaz-Dickinson, Counsel

**JUDGMENT dismissing the complaint of unfair dismissal and a case management order refusing to amend the claim to include complaints of direct race discrimination** having been sent to the parties on 17 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 for both the judgment and case management order, the following reasons are provided:

## REASONS

### The Issues

1. The issues I had to consider at this preliminary hearing were:
  - (1) Whether the Tribunal should exercise its discretion to hear the claim outside the time limit on the grounds that it was not reasonably practicable to present the complaint in time and that it was presented within a reasonable time thereafter. It was agreed that the complaint of unfair dismissal was not presented within the statutory time limit.
  - (2) Whether to allow the claimant to amend his claim to include complaints of race discrimination.
2. I clarified at the start of the hearing the complaints of race discrimination the claimant wished to add. After an adjournment to take instructions, Mr Hargreaves identified six complaints, the last of which was about dismissal. I asked for confirmation that there was no complaint about the appeal.

3. I regret if the way that I asked this came across as a suggestion that the claimant should claim that the rejection of the appeal was race discrimination, as Ms Niaz-Dickinson put it, after withdrawing her submission that the claimant had added this complaint at my invitation. It was not my intention to make a suggestion, but to confirm that dismissal meant only the dismissal in October 2022 rather than encompassing also the rejection of the appeal.

4. In response to my question about whether there was a complaint about the appeal, it appeared to me that there was some uncertainty, so I suggested a further adjournment for Mr Hargreaves to take instructions. He returned from that adjournment saying that the claimant did want to complain that the rejection of the appeal was direct race discrimination. There were, therefore, seven complaints of direct race discrimination which the claimant was applying to amend to add to his complaint. These were as follows:

- (1) On 7 July 2021 the Medical Director apologised to the family of the deceased for the claimant's behaviour only and not anyone else's without the claimant's knowledge.
- (2) The decision to suspend the claimant on 30 July 2021, which the claimant understood to be the decision of the Medical Director.
- (3) The decision to only investigate the claimant over the incident, which the claimant understood to be the decision of the Trust Board.
- (4) On 13 October 2021 the Medical Director demanded the claimant apologise to the family and undertake a reflective process.
- (5) A decision to commence the disciplinary process in late December 2021.
- (6) The dismissal.
- (7) The rejection of the appeal.

5. In relation to the first four complaints, the claimant would be relying on actual comparators, being Mr Federvici and Mr Pousios, and, alternatively, on a hypothetical comparator. In relation to complaints (5), (6) and (7), Mr Hargreaves said that the claimant would rely on an actual comparator of Mr Federvici and, in the alternative, a hypothetical comparator.

6. I told the parties that I would hear evidence and submissions on both the time limit issue and the application to amend and then, in my decision making, I would decide first on the amendment application and then on the unfair dismissal jurisdiction points. This was, as I explained to the parties, since, if I dealt with the unfair dismissal jurisdiction point first and decided the Tribunal had no jurisdiction, there would be nothing left to amend.

## The Facts

7. The relevant events are as follows.
8. On 3 July 2021 there was an incident leading to the claimant's dismissal. There was the insertion of a chest drain in a patient. The claimant was the senior doctor present but the operation was done by a more junior doctor, Dr Federvici, who I was told is Ukrainian.
9. Mohamed Zeinah, a Cardiac Surgeon on call that day, was called in after the procedure, when the claimant had a massive bleeding from the heart. The patient died a few days later. The patient's consultant was Mr Pousios. I am told he is Greek. I was told that he was not present when the operation was carried out.
10. On 30 July 2021 the claimant was suspended and investigated. The claimant understands this to be a decision of the Trust Board, including the Medical Director.
11. On 1 November 2021 the claimant returned to work but then began a period of sickness absence on 29 December 2021.
12. In January 2022 there was a verdict of misadventure in respect of the incident in the Coroner's Court.
13. In July 2022 there was an Occupational Health report declaring that the claimant was unfit for work due to work-related stress.
14. In August 2022 the matter was referred to the GMC.
15. On 14 September 2022 the claimant was advised by the GMC that they were not taking the matter any further.
16. There was a disciplinary hearing in two parts in September and then on 20 October 2022. The claimant was represented during the internal proceedings by King's Counsel instructed by solicitors. The panel making the decision to dismiss consisted of Sue Pemberton (the Director of Nursing Quality and Safety, who the claimant understands to be on the Trust Board) and Dr Ghosh (Consultant Thoracic Surgeon at another Trust). The decision to dismiss the claimant was sent to him in writing on that day. The effective date of termination is 20 October 2022.
17. The claimant asked his legal team about the unfair dismissal process but was informed that, if an MHPS appeal was not followed, it would be looked at negatively. The claimant says he was unaware of the time limit for submitting an unfair dismissal claim at this point, and I accept his evidence about this.
18. On 1 November 2022 an appeal was submitted by the claimant's legal representatives. By this time the claimant was instructing and paying for legal assistance privately.
19. On 17 January 2023 there was a Medical Psychiatric Report following an examination on 16 December 2022 which had been commissioned by the claimant's insurers. PTSD was diagnosed. Under the hearing "Fitness for Work" the psychiatrist expressed the view that the claimant was not fit for work in any capacity. The

psychiatrist described symptoms which included low mood, significant sleep disturbance, difficulty with concentration, reduced energy and motivation.

20. The primary time limit for unfair dismissal and a discrimination complaint about the dismissal ended on 19 January 2023.

21. There was an appeal hearing on 24 May 2023. The panel consisted of Jonathan Matthews (Chief Operating Officer) and Mr Purohit (Thoracic Surgery Clinical Lead and Consultant Surgeon at another Trust). By an outcome letter dated 1 June 2023 the appeal was rejected.

22. The claimant contacted the CMA on 8 June 2023, his solicitors having ceased to act with the rejection of the appeal. The BMA arranged for an employment adviser to contact the claimant. The claimant had a conversation with the employment adviser, Mr Carver, on 10 June 2023. The claimant says this was the first time he became aware of time limits for Tribunal claims.

23. The claimant went to ACAS under the early conciliation process on 11 June 2023 and the certificate was issued on 13 June 2023. The claimant's claim to the Tribunal was presented on 19 June 2023. The claimant completed the form himself without legal assistance. There is no reference to race discrimination in the claim form. The claimant ticked box 9 saying that he was seeking a recommendation as a remedy for discrimination, but this is the only reference to discrimination at all on the claim form.

24. On 20 June 2023 more detailed reasons for the rejection of the appeal were provided.

25. On 19 July 2023 the Tribunal sent to the parties notice of this preliminary hearing on the issue of time limits and the reasonably practicable test.

26. On 4 August 2023 the claimant's GP wrote a letter summarising the claimant's medical history and writing that, due to the claimant's mental health issues, he was not in a position to approach the Tribunal service regarding his dismissal by his previous employers, though they had discussed it in surgery and, with ongoing support, he had now been able to address this.

27. On 6 August 2023 the claimant sent an email to the Tribunal applying to amend his claim. He wrote:

“It is my intention to be claiming discrimination based on race as well as unfair dismissal. On reading my form again I had not ticked discrimination in section 8 but only in section 9. I believe that I was disciplined and dismissed because of my ethnicity and colour in that the other doctors involved were white and not disciplined in any way and were believed over myself despite the fact that the operative procedure which subsequently led to a patient's death was undertaken by one of these doctors and not myself.”

28. On 12 August 2023 the respondent's response was accepted and sent to the claimant.

29. The claimant's current solicitors came on record for the claimant. This is a different firm of solicitors from those who acted for the claimant during the internal proceedings.

30. At this hearing on 6 October 2023 the claimant clarified the complaints of race discrimination he is seeking to add to his claim by amendment and I recorded these complaints in writing.

### **Law relating to the amendment application**

31. The law on this was common ground between the parties. The overall test is that I must take account of all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The factors identified in **Selkent Bus Co Ltd v Moore** [1996] IRLR 661 EAT will be relevant to this assessment, (although this is not a checklist). These are: the nature of the amendment; the applicability of time limits; and the timing and manner of the application. The merits of the complaint may also be a relevant consideration, but I must take proper account of the fact that at this stage the Tribunal does not have all the evidence before it and is not conducting the trial. Mr Niaz-Dickinson also referred me to the case of **Concentrix GVC Intelligent Contact Ltd v Obi** [2022] EAT 149, EAT for the need to consider forensic prejudice when considering an amendment application.

### **Conclusions on the amendment application**

32. My conclusions applying these legal principles to the facts are as follows.

33. The amendment sought is a substantial alteration to the original claim, which was of unfair dismissal only, other than a reference to bullying and harassment which were not linked to a protected characteristic and, therefore, did not raise a complaint within the Tribunal's jurisdiction.

34. The claimant seeks to add seven complaints of direct race discrimination. They relate in broad terms to matters leading up to the claimant's dismissal and appeal against dismissal but would raise additional factual matters and issues to those which would need to be considered for an unfair dismissal complaint.

35. The claim form contains nothing which could reasonably be understood as containing a complaint of race discrimination. I do not consider that ticking the box for a recommendation as a remedy for discrimination can be taken as indicating an intention to claim race discrimination. Discrimination is often used in a lay sense without this being related to a protected characteristic. The claimant did not tick the box in section 8 to indicate that he was claiming race discrimination. It would be debatable, if he had ticked that box but given no particulars of race discrimination, as to whether all or any of the complaints he now seeks to add by amendment would be regarded as further particulars of an existing complaint rather than an application to amend the claim. However, he did not tick the box for race discrimination. Most significantly, the claimant made no mention in any of the text on the claim form itself, or the accompanying details, to suggest he considered that anything relating to his dismissal or anything else was race discrimination.

36. I do not accept that the claimant always intended to claim race discrimination. I consider that, if this was his intention, he would have said something about this in his claim form.

37. I have taken account of the claimant's health issues, noting particularly that he had difficulties concentrating. However, these health issues did not prevent him completing some detail in his claim form. If he was able to do this, I consider he could have said something about race discrimination had he thought, at the time of the application, that this was a complaint he wished to make. I consider it more likely that the application to amend the claim to add race discrimination was because of a later thought, after the claimant had received the Tribunal's notice of a preliminary hearing to determine whether it had jurisdiction to consider his complaint, which was of unfair dismissal only, on the basis of whether it had been reasonably practicable to present the claim on time.

38. My conclusions on this are supported by the fact that the claimant did not mention at any time during internal proceedings, during which he was legally represented by solicitors and at hearings by a KC, that he thought he was being unfairly scapegoated on racial grounds. I also take into account that, by the time the claimant submitted his claim, he had received some employment advice from Mr Carver. Had the claimant thought at the time that he had been racially discriminated against, it seems likely to me that this would have been discussed with Mr Carver even if in broad terms, and the claimant advised to put race discrimination as well as unfair dismissal on his claim form.

39. No new information has come to light since the claimant presented his claim which has caused the claimant to re-evaluate the situation and make him think that there was direct discrimination in relation to the seven acts he identifies.

40. I consider there is no satisfactory explanation for the claimant not having presented his whole claim, including all the seven complaints of direct race discrimination, when he presented his claim on 19 June 2023. I would not consider it just and equitable to extend time to allow complaints which were out of time to proceed.

41. An application to amend was made on 6 August 2023. I conclude that this application covers complaints (2), (3), (5) and (6), but I do not consider that (1) and (4) can reasonably be taken to fall under the description of "disciplined and dismissed", although Ms Niaz-Dickinson generously took no particular point about these complaints. However, whether the application to amend to include complaints (1) and (4) was made on 6 August 2023 or today (6 October 2023) makes no material difference to my conclusions in relation to those complaints.

42. In relation to complaint (7) (which is about the rejection of the appeal), I conclude that the claimant, in writing about dismissal, can reasonably be understood as writing about the whole process of dismissal, including an appeal against that dismissal. If there was no complaint about the appeal, all the complaints of race discrimination would be clearly out of time. Had the claimant made a new Tribunal application on 6 August 2023, the complaint about the appeal would have been made in time. Unless the other complaints form part of a continuing act of discrimination with the rejection of the appeal, they would have been out of time even if presented at the time of the original claim form, which was presented on 19 June 2023, and they are even further out of time at the date they would be deemed to be presented, which

is the date of the application to amend (6 August 2023), except in relation to complaints (1) and (4) which can be considered to have been made on 6 October 2023.

43. The motivation (conscious or unconscious) of the decision maker must be considered when considering a complaint of direct race discrimination. The decision to dismiss and the decision to reject the appeal were taken by different people, both including an external decision maker. I consider there would be considerable difficulties in the claimant establishing that the rejection of the appeal was part of a continuing act of discrimination with the dismissal on the assumption, without deciding, that the dismissal in October 2022 was held to be an act of direct race discrimination. The claimant has not explained the basis for considering that the rejection of the appeal was an act of direct race discrimination.

44. Mr Hargreaves informed me that the claimant would rely on Mr Federvici as an actual comparator for the complaint about the appeal, with an alternative hypothetical comparator. Since one of the claimant's race discrimination complaints, if the amendment is allowed, would be that no disciplinary action was taken against Mr Federvici, it is difficult to see how Mr Federvici would be an appropriate actual comparator.

45. I do not have sufficient information at this stage to evaluate the chances of success in any of the complaints of race discrimination if they were allowed to proceed. However, the difficulties I have outlined in relation to continuing act and comparators seem to me to be relevant factors to weigh in the balance when deciding whether to allow the amendment.

46. I consider there would be prejudice to the respondent if the complaints of race discrimination were added by amendment. They would have to defend complaints of race discrimination going back to July 2021. Although there is considerable paperwork relating to the investigation and disciplinary process, until 6 August 2023, the respondent was not on notice that the claimant intended to claim that any steps in the process were taken on racially discriminatory grounds. Defending a claim of discrimination requires additional evidence and explanation of decision making from that required to defend a complaint of unfair dismissal.

47. On balance, taking into account all these factors, I consider that the injustice and hardship to the respondent of allowing the amendment would be greater than the injustice and hardship to the claimant of refusing it. If I allowed the amendments, the respondent would face the difficulty of defending race discrimination complaints years after the majority of the events complained of. If I do not allow the amendments, the claimant loses the opportunity of pursuing complaints which appear not to have occurred to him until some time between 19 June and 6 August 2023.

48. I have considered whether to allow the amendment in relation to the complaint about the appeal but not the other complaints, since this complaint would have been in time had a new claim form been presented on 6 August 2023. However, I have decided that the injustice and hardship of allowing the amendment to include the complaint about the appeal but not the other complaints would be greater than the injustice and hardship of refusing it. Although the Tribunal would be deciding only whether the rejection of the appeal was an act of direct race discrimination, I consider it likely that the Tribunal would need to consider much evidence of earlier matters to put this decision in context, involving the respondent giving evidence about events

some years previously. Since I decided that there was no good reason for the claimant not putting his whole case in his claim form on 19 June 2023, and the claimant has not given any real explanation as to why he considers the rejection of the appeal to be direct race discrimination, I am not satisfied that the claimant will suffer any real prejudice by not being allowed to pursue a complaint about the rejection of the appeal only.

49. For these reasons I reject the application to amend the claim to include complaints of direct race discrimination.

### **Law relating to the unfair dismissal time limit issue**

50. The initial time limit for an unfair dismissal complaint is three months beginning with the effective date of termination: s.111 Employment Rights Act 1996. The effect of the early conciliation procedure is that, if the notification to ACAS is made within the initial time limit period, the time is extended by the period of conciliation. If ACAS is not notified within the initial time limit period, the time spent in early conciliation has no effect on the time limit.

51. Section 111(2)(b) Employment Rights Act 1996 provides that, if it was not reasonably practicable for the complaint of unfair dismissal to be presented before the end of the three month period, the Tribunal can consider the complaint if it was presented within such further period as the Tribunal considers reasonable.

52. If a claimant is advised by solicitors and they give wrong advice, as a result of which a time limit is missed, it will normally be presumed that it was reasonably practicable to present the claim in time and no extension will be granted. In **Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53 CA, Lord Denning MR said: "If a man engages skilled advisors to act for him – and they mistake the time limit and present [the claim] too late – he is out. His remedy is against them".

### **Conclusions relating to the unfair dismissal time limit issue**

53. It is common ground that the claimant did not present the claim in time. It was not presented until about five months after the time limit had expired. The claimant did not notify ACAS under the early conciliation procedure until after the primary time limit had expired so the primary time limit is not extended by time spent in early conciliation.

54. The claimant appears to rely on the following reasons for not presenting his claim on time:

- Poor health;
- Ignorance of time limits;
- Legal advice he received.

55. Whilst the claimant had health problems, he was able to instruct legal representatives and participate in the appeal against his dismissal. I am not satisfied that health problems made it not reasonably practicable at the relevant time to present a complaint of unfair dismissal in time.



56. I have accepted that the claimant was not aware at the time he should have presented his claim of the time limits for presenting a claim. However, ignorance of time limits does not necessarily mean it was not reasonably practicable to present a claim in time. For example, if the claimant could reasonably be expected to find out about time limits, it might be reasonably practicable for them to present their claim in time. Most claimants have access to the internet. A quick internet search will tell someone about the time limits for bringing claims.

57. The claimant was legally represented at the time he was dismissed. He sought advice about complaining about unfair dismissal. If the claimant did not do his own research because he was relying on his legal representatives, poor advice (if there was poor advice) does not make it not reasonably practicable to present the claim on time. His recourse in that event would be against his legal representatives.

58. I conclude for these reasons that it was reasonably practicable for the claimant to present his complaint of unfair dismissal in time. The Tribunal does not, therefore, have jurisdiction to consider his complaint, which is dismissed.

Employment Judge Slater  
Date: 8 November 2023

REASONS SENT TO THE PARTIES ON  
9 November 2023

FOR THE TRIBUNAL OFFICE

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