



# EMPLOYMENT TRIBUNALS

**Claimant:** Dr Williams

**Respondent:** Ashford and St Peter's Hospital NHS Foundation Trust

**Heard at:** London South Employment Tribunal by video hearing

**On:** 24 June 2024

**Before:** Employment Judge Robinson

## Representation

Claimant: Ms Lawrence-Russell (Trade Union Representative)

Respondent: Ms Criddle KC (Counsel)

# RESERVED JUDGMENT

The judgment of the Tribunal is that all claims are struck-out because:

1. They have not been brought within 3 months of the act complained of (as required by section 123(1)(a) of the Equality Act 2010),
2. Even if there was conduct extending over a period (section 123(3)(a) of the Equality Act 2010), that period ended in July 2021, which is outside the 3 month time limit, and
3. I do not consider it just and equitable to extend that time limit (under section 123(1)(b) of the Equality Act 2010).

# REASONS

## Introduction

1. The claimant, Dr Williams, has been employed by the Respondent, Ashford and St Peter's Hospital NHS Foundation Trust, as a Consultant Cardiologist since 1 May 2013.

2. ACAS early conciliation ran from 27 February 2022 until 14 March 2022. The claim form was presented on 14 April 2022.
3. The Claimant has brought a variety of claims, and had an application to amend his claim to add further claims refused at the 8 April 2024 Preliminary Hearing. In summary, the claims are:
  - a. Harassment related to race
  - b. Direct race discrimination
  - c. Direct disability discrimination
  - d. Discrimination arising from disability
  - e. Victimisation

## **Background**

4. The purpose of this hearing was to deal with the issue of whether the Claimant's claims had been brought in time and, if not, whether time should be extended.

## **List of Issues**

5. The List of Issues for today's hearing was set out by Employment Judge Hart at the 8 April 2024 Preliminary Hearing. However, there was an error in the dates in that list, where 21 November 2022 was given as the cut-off date when that should have been 28 November 2021. I have based that 28 November 2021 date on:
  - a. ACAS were notified on 27 February 2022
  - b. ACAS certificate was issued on 14 March 2022
  - c. Claim presented on 14 April 2022
6. Three months less one day from the date that ACAS was contacted takes us back to 28 November 2021.
7. This List of Issues for me to determine at this hearing is therefore:
  1. *Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 28 November 2021 may not have been brought in time. Which complaint/s occurred on or after 28 November 2021 and therefore are in time?*
  2. *Were the complaints that occurred before 28 November 2021 conduct extending over a period?*
  3. *If so, was the claim made to the Tribunal within three months (plus early conciliation period) of the end of that period?*
  4. *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*

- a. *Why were the complaints not made to the Tribunal in time?*
- b. *In any event, is it just and equitable in all the circumstances to extend time?*

## **The Law – section 123 of the Equality Act 2010**

8. Section 123 of the Equality Act 2010 relating to time limits for these types of claims provides that they must be brought within the period of three months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. Time spent undergoing early conciliation with ACAS does not count for the purposes of the three month time limit. However, essentially a claimant must make contact with ACAS within the period of three months of the date of the act to which the complaint relates.

## **The Law – the “just and equitable” test**

9. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 the Court of Appeal clarified that there is no requirement to apply the Limitation Act checklist (or any other checklist) under the wide discretion afforded tribunals by s.123(1), although it was often useful to do so. The only requirement is not to leave a significant factor out of account (paragraph 18).
10. In addition, there is no requirement that a tribunal must be satisfied that there was a good reason for any delay. The absence of a reason (or the nature of the reason) are factors to be taken into account (paragraph 25).
11. Considering the relative prejudice to the parties and having regard to the overriding objective will always be considerations in exercising judicial discretion.
12. In the case of Robertson v Bexley Community Services [2003] IRLR 434 the Court of Appeal stated that time limits are exercised strictly in an employment law context and that:  
  
*“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 the discretion is the exception rather than the rule.”*
13. This is in essence a matter which is in the Tribunal’s discretion and the onus is on the Claimant to convince the Tribunal to exercise that discretion.

## **Findings of Fact and Conclusions**

14. My findings and conclusions relate only to the time limit issues I had to

consider. I have made these findings on the balance of probabilities having:

- a. heard oral evidence from the Claimant,
- b. heard oral evidence from Ms P Bains on behalf of the Respondent, and
- c. reviewed the documentary evidence.

Which complaints occurred after 28 November 2021 and are in time?

15. There is a List of Issues that was discussed and agreed at a number of previous Preliminary Hearings on 11 August 2023, 26 October 2023 and 8 April 2024.
16. This case has been extensively case-managed, in order to determine what are the issues. The Claimant and his Trade Union representative have been at each of these Preliminary Hearings and had ample opportunity to set out the allegations that are being made.
17. The latest amended List of Issues runs to 13 pages (pages 185-197 of the bundle). The vast majority of the allegations relate to matters from 2020 which are clearly, by themselves, long out of time.
18. In the long list of allegations, there are only a few that relate to a time in 2021. They are:
  - a. failure to have regard to Occupational Health reports in January and February 2021,
  - b. the outcome of the addendum to the original grievance which was provided in February 2021,
  - c. the investigation process, which was completed in April 2021, and
  - d. requiring the Claimant to undertake mediation/reconciliation sessions in July 2021.
19. However, all four of those matters are out of time too given they take place before the cut-off date of 28 November 2021.
20. There is just one reference to a matter occurring after the cut-off date of 28 November 2021. It relates to the Claimant discovering in January 2022 that Ms Rankin (Chief Executive of the Respondent) had made an enquiry (in July 2021) about the Claimant with Occupational Health. That is the only matter potentially post-dating the cut-off date of 28 November 2021. However, it actually relates to an enquiry made by Ms Rankin in July 2021, but which the Claimant became aware of in January 2022.
21. In considering this matter, I have relied upon the recent decision of the EAT (Worcestershire Health and Care NHS Trust v Allen [2024] EAT 40) in which it was held that:

*“for there to be conduct extending over a period there must have been ongoing discriminatory conduct. It is not enough that incidents are linked, and later events would not have occurred but for the earlier events, there must be something in the conduct that involves continuing discrimination.”*

22. Even if Ms Rankin made enquiries with OH in July 2021, it seems clear to me from the documentary evidence (page 540 of the bundle in particular) that the doctor to whom the enquiry was made (Dr Hashtroudi) has confirmed that there was no attempt to obtain any confidential medical information relating to the Claimant. Dr Hashtroudi confirms that the nature of the enquiry was about them; not about the Claimant. This is not linked to the previous alleged discrimination complained of by the Claimant.
23. Even if I were to conclude that this matter took place in January 2022 (when the Claimant discovered it), there is nothing in the Respondent’s conduct that (as per the Worcestershire Health and Care NHS Trust v Allen case) that *“involves continuing discrimination”*. In any event, I find it more likely that this matter should be interpreted as occurring when the request to Dr Hashtroudi was made (July 2021) and is therefore out of time too.
24. It is my conclusion that the Claimant has sought to allege that his January 2022 discovery of Ms Rankin liaising with OH is somehow discriminatory conduct, in order to seek to manufacture an ongoing course of conduct to get around the fact that the claim has been made out of time.
25. I therefore conclude that the Claimant has made no complaints that occurred after 28 November 2021.

Were the complaints that occurred before 28 November 2021 conduct extending over a period?

26. I find that the Claimant has made a number of allegations dating back to April 2020 and up to July 2021 that, if proven, would amount to conduct extending over a period.

If so, was the claim made to the Tribunal within three months (plus early conciliation period) of the end of that period?

27. On this question, I find that the claims were not made within the three month time limit (even taking account of early conciliation) because the cut-off date is 28 November 2021 and the last act complained of was in July 2021.

If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

28. For this issue, I have considered in particular why the claim was not presented in time.

29. When giving evidence under oath, the Claimant provided no credible explanation for waiting until April 2022 to bring his claim. I acknowledge that the Claimant has a diagnosis of bipolar affective disorder but in his witness statement and in his oral evidence he did not mention this condition once as being a factor in why he delayed in bringing his claim.
30. In any event, the Claimant has been represented by the General Secretary of the Equal Justice Union throughout all of the matters complained about, going back to April 2020 and through the grievance and investigation processes. The Claimant is also a doctor i.e. a qualified professional, who I would expect to have an understanding of time limits, particularly given the Trade Union involvement.
31. When asked repeatedly in cross-examination why a claim was not brought in April or July 2021 (or even in 2020 when the majority of the Respondent's conduct complained about took place), the Claimant simply repeated that he believed that there were continuing acts, so time limits were not an issue.
32. I do not consider that the Claimant's general feeling that he is not being treated well by the Respondent is sufficient to constitute ongoing discriminatory treatment.
33. I have factored in to my decision-making that the Claimant will of course suffer the disadvantage of having his claims struck-out. However, I have also taken account of the impact on, and prejudice to, the Respondent. The Respondent is an NHS trust which would be adversely impacted by a 13 day hearing that is taking place four years after most of the events complained about. I accept Ms Bain's witness evidence that many of the individuals have moved on and would not be available for the hearing, and nor would those individual's potentially relevant emails and documents.
34. The length of the delay is of course not entirely due to the Claimant, but he has contributed to it by not bringing his claim promptly, and within the statutory time limit.
35. These time limits have been set by Parliament in order to limit the delay between acts complained of and a hearing at which they can be heard.
36. Finally, I have also had regard to the overriding objective, in Rule 2 of the Employment Tribunals Rules of Procedure 2013. Part of dealing with cases fairly and justly is about requiring parties (particularly represented ones) to adhere to time limits and not just assume that a Tribunal will exercise its discretion in their favour.
37. In addition, the parties themselves are obliged assist the Tribunal in furthering the overriding objective. It is my conclusion that the Claimant and his representative have not done so in this case because they could have assisted

with “*avoiding delay*” (Rule 2(d)) and “*saving expense*” (Rule 2(e)) by bringing the claims sooner and within the required statutory time limits.

38. For all of the above reasons, and having considered all of the factors I consider relevant and those that were made by the Claimant in his oral evidence, I have exercised the wide discretion afforded to Tribunals in relation to the “*just and equitable*” extension and determined that time limits should not be extended in this case.

39. All of the Claimant’s claims are therefore struck-out.

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Employment Judge **Robinson**

Date: **28 June 2024**

JUDGMENT & REASONS SENT TO THE PARTIES ON

**9 July 2024**

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FOR THE TRIBUNAL OFFICE