EMPLOYMENT TRIBUNALS

Claimant: **Mr A Bains**

Respondent: **Sussex Partnership NHS Foundation Trust**

Heard at: **Bristol Employment Tribunal (by video)** **On: 20 June 2025**

Before: **Employment Judge Ferguson**

Representation
Claimant: Ms K Karabo of Equality 4 Black Nurses, non-legal representative
Respondent: Mr J Jupp KC

RESERVED JUDGMENT

It is the judgment of the of the Tribunal that:

1. The Claimant's application to amend the claim is refused.

2. The claim is dismissed on the basis that it has been brought out of time and the Tribunal does not have jurisdiction to consider it.

REASONS

INTRODUCTION

1. By a claim form presented on 21 June 2024, following a period of early conciliation from 9 April to 21 May 2024, the Claimant brought complaints of race discrimination, victimisation and detriment because of making protected disclosures. The claim form also referred to a breach of contract claim but the Claimant has since confirmed this is not pursued.

2. This hearing was listed to determine:

   2.1. Whether the claim has been brought in time in accordance with section 48 of the Employment Rights Act and/or section 123 of the

Equality Act and, if not, whether it is appropriate to grant an extension of time to allow all/any of the complaints to continue in accordance with the statutory provisions which apply to each claim;

2.2. Whether there are no reasonable prospects of some/all of the Claimant's complaints succeeding and, if so, whether it is appropriate to strike some or all of them out under rule 38;

2.3. Whether there are little reasonable prospects of some/all of the Claimant's complaints succeeding and, if so, whether it is appropriate to make a deposit order in respect of them, limited to £1,000, under rule 40;

2.4. What further case management directions might be appropriate for any final hearing and when that hearing should take place.

3. It was also agreed that I should determine first the Claimant's application to amend the claim (see below).

4. The hearing took place as a remote video hearing. Despite directions having been given for the exchange of witness statements on the issue of time limits, no witness statement had been produced for the Claimant and he attended the video hearing using his mobile phone, from the grounds of a hospital where he currently works. It would not have been appropriate for him to give evidence in that environment. Following discussion with the Claimant's representative it materialised that the Claimant had prepared a witness statement, which had not been sent to the Respondent or the Tribunal. The hearing was adjourned for the statement to be provided and for the Claimant to find a private room in the hospital, which he managed to do. Although it was far from ideal, the Respondent did not oppose him giving evidence and I allowed him to do so.

5. I received written submissions from both parties and I heard oral submissions.

PROCEDURAL BACKGROUND

6. The Claimant was employed by the Respondent from 10 October 2022 until 1 December 2023 as a CAMHS Clinical Liaison Specialist.

7. In summary, the Claimant alleges that from the beginning of his employment he experienced discrimination and harassment from colleagues and managers, particularly Ms McKimm and Mr Hayward. It is not disputed that relations between the Claimant and Ms McKimm were very difficult. The Respondent admits that on one occasion Ms McKimm called the Claimant "a dick", but says it was a heat of the moment comment and she apologised straight away. The Claimant and Ms McKimm raised grievances against each other. Ms McKimm made a formal Dignity at Work complaint against the Claimant and an investigation report was produced in September 2023. The Claimant resigned on 8 September 2023. In October 2023 he was invited to a disciplinary hearing and on 9 November 2023 the Respondent referred the Claimant to the NMC in relation to concerns raised in the investigation. The disciplinary hearing took place on 30 November 2023. The allegations against

the Claimant were not upheld, but it was considered appropriate for the NMC to investigate concerns about the way the Claimant communicates with others.

8. On 25 March 2024 the Claimant submitted a grievance about the Respondent referring him to the NMC. The grievance was rejected on 17 May 2024. The Claimant submitted an appeal on 23 May 2024. This was also rejected, but the Respondent accepts the outcome may not have been sent to the Claimant.

9. The Claimant has been represented by Equality 4 Black Nurses ("E4BN") since March 2024 at the latest. E4BN is an organisation that provides support for nurses facing employment challenges. The Claimant's point of contact throughout was Ms Neomi Bennett. She submitted the grievance on the Claimant's behalf on 25 March 2024. She was named as the Claimant's representative on the claim form and represented him at the case management hearing on 5 March 2025. She was not available for today's hearing so her colleague, Ms Karabo, acted for the Claimant. Ms Karabo explained she is a law student and has a paralegal qualification.

10. The claim form was presented on 21 June 2024. The particulars of claim submitted with the claim form listed complaints of victimisation, detriment due to protected disclosure, direct race discrimination and harassment. The document refers to a grievance in March 2024 not being upheld, but this was not itself alleged to amount to a detriment, direct discrimination or harassment. The latest act complained of was the referral to the NMC on 9 November 2023.

11. The Respondent responded to the claim and on 25 November 2024 applied for it to be struck out on the basis it had been brought out of time. The Claimant's representative responded to that application, acknowledging that the claim had been brought out of time and arguing that stress suffered by the Claimant significantly contributed to the delay in submitting the claim. She relied on a GP letter dated 11 October 2024 which states:

> "Mr Anoop Bains asked me to divulge his medical condition and situation to you in relation to his employment tribunal claim application.
>
> He was issued a sick note for work related stress between October 18th 2023 and November 29th 2023.
>
> He tells me he was supposed to submit his claim for his employment tribunal by March 2024 but due to stress, he could not submit it at the stipulated time but later in 2024.
>
> He was hoping you would consider his circumstances in order for his claim to be considered."

12. A telephone case management hearing took place on 5 March 2025. The complaints and issues were clarified and agreed in a list of issues. The list of issues identified 7 alleged detrimental acts, as set out in the particulars of

claim, relied upon as direct race discrimination, harassment related to race, victimisation and/or detriments due to protected disclosures. The alleged acts took place from August 2022 and ended with the NMC referral on 9 November 2023.

13. Today's hearing was listed to determine the issues as set out above. The case management order also records as follows:

> "On its face, the claim appeared to be out of time. Ms Bennett accepted that, but alleged that the last act of discrimination had been the rejection of the Claimant's grievance on 17 May 2024. That, however, had not been raised as an allegation of detriment and/or discrimination. If the Claimant applied to amend to include it now, he was likely to be met with arguments that the complaint was out of time. That was a matter for Ms Bennett to consider with the Claimant. If an application to amend was made, it was likely to be considered at the start of the Preliminary Hearing which has now been listed. Any application would need to be set out clearly and in sufficient time so as to enable the Respondent to respond to it."

14. On 14 May 2025 the Claimant submitted an application to amend the claim to include two further acts of alleged discrimination/ detriment:

14.1. The rejection of his grievance on 17 May 2024, and

14.2. The failure to respond to the grievance appeal submitted on 23 May 2024.

It was asserted in the application that although these events occurred before the claim was submitted "they were inadvertently omitted due to the Claimant's lack of legal representation and ongoing stress-related ill health at the time."

15. The Respondent opposed the application to amend.

CLAIMANT'S EVIDENCE

16. The Claimant's witness statement states:

> "12. I assert that the discrimination and victimisation were ongoing, from my early months at SPFT until the grievance outcome in May 2024.
>
> 13. I was off sick from October 2023 with work-related stress and could not file my ET1 until 21 June 2024. I submit that the claim is in time due to the continuing act doctrine and/or should be allowed under the just and equitable extension rule."

17. In cross-examination the Claimant accepted that his sickness absence ended, as set out the GP letter, on 29 November 2023 and that he returned to work very briefly before his employment ended on 1 December 2023. He also accepted that he had carried out some work in the period between the end of

his employment and submitting his claim on 21 June 2024. His schedule of loss states that he started work as a taxi driver from 11 weeks after the end of his employment (i.e. from around 16 February 2024).

18. The Claimant said he believed he had first contacted E4BN in December 2023. He had also contacted Citizens' Advice. He accepted he had mentioned the possibility of an Employment Tribunal claim in his appeal against the disciplinary outcome submitted on 4 January 2024.

THE LAW

Amendment

19. As confirmed by the Employment Appeal Tribunal in Vaughan v Modality Partnership [2021] ICR 535, the Tribunal has a broad discretion in determining applications to amend. The key test is that set out in Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650:

> "In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."

20. In applying that test, the Selkent factors may be relevant, namely the nature of the amendment, the applicability of time limits and the timing and manner of the application. Other factors may also be relevant, depending on the circumstances of the case.

21. As to the applicability of time limits, in Abercrombie and others v Aga Rangemaster Ltd [2014] ICR 209 Underhill LJ, with whom the rest of the Court agreed, said:

> "…the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and the old, the less likely it is that it will be permitted. It is thus well recognized that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted.
>
> …
>
> Mummery LJ says in his guidance in *Selkent Bus Co Ltd v Moore* [1996] ICR 836 that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in employment tribunal proceedings) is a relevant factor

> in considering the exercise of the discretion whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and a fortiori in a relabeling case – justice does not require the same approach." (paras 48-50)

22. Whilst the Tribunal should not embark on a detailed consideration of the merits on an amendment application it can do so when the case is hopeless and even in a case where the case is not hopeless but it is obviously weak, provided it proceeds "with care and caution and, if it is relying on its general view of the strength of a proposed complaint as a point against granting the amendment, then it must identify a reasoned basis for doing so on which it is properly entitled to rely, bearing in mind that it does not have before it the full evidence that the tribunal would have at a full hearing, and the need to avoid becoming drawn in to conducting a mini- trial. But, if it reaches that view properly, then questions of weight and balance are then for it to decide, and the EAT can only intervene on grounds of perversity". (Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132 at [70] to [73], [84]).

Time limits

23. Section 48 of the Employment Rights Act 1996 provides that an employment tribunal cannot consider a complaint of detriment because of a protected disclosure 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.

24. Ignorance or mistaken belief as to rights or time limits will not render it "not reasonably practicable" to bring a claim in time unless that ignorance or mistaken belief is itself reasonable. It will not be reasonable if it arises from the fault of the employee in not making inquiries that he or she should have made, or from the fault of the employee's solicitors or other professional advisers in not giving all the information which they reasonably should have done (Wall's Meat Co Ltd v Khan 1979 ICR 52).

25. Section 123 of the Equality Act 2010 provides, so far as relevant:

> **123 Time limits**
>
> (1) Subject to sections 140A and 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;
>
> …

26. The Tribunal has a broad discretion in deciding whether it is just and equitable to extend time under s.123 (Southwark London Borough v Alfolabi [2003] IRLR 220). Factors that may be considered include the relative prejudice to the parties, the length of the delay, the reasons for the delay and the extent to which professional advice was sought and relied upon. The onus is on the claimant to show that it is just and equitable to extend the time limit.

CONCLUSIONS

Application to amend

27. There can be no doubt that the amendment seeks to add two entirely new complaints. Although the rejection of the grievance was mentioned in the claim form, it was not alleged to be a detriment or an act of discrimination. That was reinforced by the Claimant's response to the Respondent's strike-out application, which accepted that the claim was on its face out of time. It was also confirmed at the telephone case management hearing, where the latest act complained of was agreed to be the referral to the NMC on 9 November 2023. The first time it was suggested that the rejection of the grievance was a further (or continuing) detriment or act of discrimination was at the case management hearing in March 2025.

28. The Respondent submits that the purpose of the amendment is ill-founded. I agree, but for slightly different reasons. The Respondent says it is ill-founded because there is no pleaded basis for a connection between the new claims and the existing claims. Whether or not that is correct, and I note that normally the question of whether there is a continuing act is a matter to be determined on the evidence, if the purpose of the amendment is to "bring the whole claim in time", as it appears to be, it is ill-founded because the application to amend is itself so significantly out of time.

29. Time limits are not determinative of the application to amend, but in this case I consider they are a very weighty factor. These are new complaints that the Claimant could easily have included in his original claim or, in respect of the failure to deal with the grievance appeal, could have been added sooner. The application to amend was made a least eight months out of time. Allowing the amendment would, unless the issue of time limits were left to the final

hearing, permit the Claimant to circumvent the statutory time limits. The reference to a new claim being "closely connected with the claim originally pleaded" in Abercrombie must refer to a case where the original claim is itself in time. Leaving the issue of time limits to the final hearing is not an appropriate solution in this case, where it would have the effect of requiring the Respondent to defend the whole claim in circumstances where the Tribunal may not have jurisdiction to consider any of it.

30. The explanation that these complaints were "inadvertently omitted due to the Claimant's lack of legal representation and ongoing stress-related ill health at the time" is not plausible or sufficient. The particulars of claim demonstrate a good understanding of the Equality Act 2010, the Employment Rights Act 1996 and the different causes of action pursued. It does not require any more detailed knowledge of the law to assert that the rejection of the grievance was a further detriment or act of discrimination, if that is what the Claimant believed at the time. Nor is the Claimant's ill health an adequate explanation. There is no medical evidence of ill health beyond the period of sickness absence which ended on 29 November 2023. The Claimant was well enough to carry out some paid work from around mid February 2024. It is much more likely that the reason the complaints were omitted is that the Claimant did not believe at the time that his grievance was rejected because of his alleged protected disclosures/ acts or that it had anything to do with his race. It obviously does not follow from the fact that the grievance itself alleged race discrimination that the rejection of it was an act of discrimination. The Claimant has not alleged that he has acquired new information that changed that view. The reason the allegations are being made now appears to be solely because the Claimant faces the prospect of the claim being dismissed on the basis it is out of time.

31. As to the balance of injustice and hardship, the impact on the Respondent if the amendment is allowed is very substantial. Either the time limit issue is left to the final hearing, which for the reasons already given would place a huge burden on the Respondent, or an extension to the time limit is granted at the time of amendment, which would leave the question of continuing act to the final hearing. That would also leave the Respondent in the position of having to defend the whole claim when it is very possible that the majority of it is out of time and the Tribunal does not have jurisdiction to consider it.

32. The injustice and hardship to the Claimant, on the other hand, is minimal. Allowing the amendment does not improve the Claimant's argument on time limits. He would be left with a claim that is either entirely or mostly out of time unless the Tribunal decides an extension applies. Further, it is a reasonable assumption from the fact that this complaints were not brought in the original claim that the Claimant did not believe in the allegations and/or considered they were unlikely to succeed. He could have sought to amend to include them at any stage, but did not do so until nearly a year after the claim form was presented. The Claimant has not pointed to anything in the rejection of the grievance or the alleged failure to respond to the appeal that suggests those decisions were made for reasons other than the ones given at the time.

33. In all the circumstances I conclude that the balance falls on the side of rejecting the amendment application.

Jurisdiction (time limits)

34. Since the last act relied upon in respect of all causes of action took place on 9 November 2023, the ordinary time limit for bringing a claim expired on 8 February 2024. The Claimant did not commence early conciliation until 9 April 2024 so does not benefit from any extension of the time limit. The claim was brought on 21 June 2024, over four months out of time.

35. As to the detriment complaints, the Claimant has not established it was not reasonably practicable for him to bring the claim in time. He had sought advice from both E4BN and Citizens' Advice. He had in mind a possible Tribunal claim by early January 2024. As already noted, there is no medical evidence that his mental health prevented him from bringing a claim. He has not asserted that he was unaware of the time limit for bringing a claim and even if he was not aware, that ignorance would not be reasonable given the availability of information online and the Claimant's access to advice. The fact that the Claimant pursued a grievance is also not a sufficient reason for the delay given that he did not submit his grievance until around six weeks after the time limit had expired. Even if it was reasonable for the Claimant to wait for the outcome of the grievance, which I do not accept, there is no explanation for the fact that the claim was not brought until more than a month after the grievance was rejected on 17 May 2024.

36. It is for the Claimant to prove it is just and equitable to extend the time limit for his complaints under the Equality Act 2010. He has not done so. The lack of a good reason for the delay in bringing the claim is an important factor.

37. Further, in determining complaints of race discrimination and victimisation, the cogency of evidence as to the reasons for the Respondent acting as it did is bound to be affected by the passage of time. A delay of more than four months, in the context of a three-month primary time limit, is substantial. The Respondent asserts that several of the key individuals the Claimant complains about, including Ms McKimm and Mr Hayward, are no longer employed by the Respondent. That is likely to make its defence of the complaints more difficult.

38. It is not possible to assess the merits of the complaints on the information available, but it certainly cannot be said that there is such strong evidence of race discrimination or other prohibited conduct that it would be just and equitable to extend the time limit.

39. I conclude that the Claimant has not established either basis for extending the time limits, and therefore the Tribunal has no jurisdiction to hear the claim. It is dismissed.

Approved by:

Employment Judge Ferguson
Date: 24 June 2025

JUDGMENT SENT TO THE PARTIES ON
8 July 2025

Jade Lobb
FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

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