EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Madhavan**

Respondent: **Great Western Hospitals NHS Foundation Trust**

Heard at: **Bristol** **On:** **10 April 2018**

Before: **Employment Judge Mulvaney**
Members Mr H Adam
Ms J Cusack

Representation
Claimant: **Mr E Kemp**
Respondent: **Ms N Motraghi**

JUDGMENT

The claimant's claim of race discrimination is dismissed, the claim having been presented out of time and the Tribunal concluding that it would not be just and equitable to extend time.

REASONS

1. This case was remitted to the Employment Tribunal from the Employment Appeal Tribunal. The Employment Tribunal was directed to consider again the question of whether the claimant's race discrimination claim was out of time, Mr Justice Supperstone having determined that the Employment Tribunal failed to give adequate reasons for its refusal to extend time on just and equitable grounds.

2. The issue remitted for consideration by the EAT was:

   2.1. Whether it would be just and equitable to extend time for the claim, (the claim being out of time), and
   2.2. If time is extended, to consider the substantive claim.

3. The issue was remitted by the EAT for re-hearing on the same evidence that was adduced before the Employment Tribunal at the hearing on 30 November – 11 December 2015, and on no further evidence being admitted. No further evidence was heard at the remitted hearing today and the Tribunal's considerations have been based on evidence heard at the original hearing; submissions made at the original hearing; and further submissions made today.

4. The claimant's race discrimination claim is based on an allegation of direct race discrimination under Section 13 of the Equality Act. The claimant contended that she had been paid at the incorrect pay point as a consequence of, firstly, a decision made in respect of the acting up allowance paid to the claimant between 2005 and 2008. That decision was made on 1 April 2005. Secondly, she contended that she had been wrongly provided with a non-pensionable payment in 2008 rather than a pensionable payment on her appointment to the role of Trust Consultant in that year. That decision was made on 1 April 2008. The claimant relied on Dr Charlotte Cannon as her comparator, a white British Trust Consultant employed by the respondent. The claimant is of Indian origin.

5. The claimant's ET1 was issued on 22 May 2015 and time started to run from the date that the pay decisions were made, so her claim in respect of the acting up pay decision has been submitted ten years out of time and in respect of the Trust Consultant pay decision, seven years out of time.

6. The law relating to time limits in discrimination claims is set out at Section 123 of the Equality Act 2010 and that provides:

> *"Proceedings on a complaint may not be brought after the end of 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."*

7. Mr Justice Supperstone of the EAT in his Judgment on the present case referred to the wide discretion the EAT has in determining whether or not to extend time. He referred to the Court of Appeal decision in the case of ***Robertson and Bexley Community Centre t/a Leisure Link [2003] EWCA Civ 576*** as authority for the Tribunal being entitled to consider all relevant circumstances. He referred to Auld LJ's statement at paragraph 25 of that Judgment:

> *"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 a 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. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against the Tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated such an appeal should only succeed where the Appeal Tribunal cannot identify*

an error of law or principle making the decision of the Tribunal below plainly wrong in this respect."

8. The claimant's representative referred to a recent Judgment of the Court of Appeal in the case of ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640***. Legatt LJ, who gave the leading judgment in that case referred to the very wide discretion given to the Tribunal by the wording used in Section 123 of the Equality Act which does not specify a list of factors to which the Tribunal must have regard. He said that it might be useful for the Employment Tribunal to consider the factors listed in Section 33(3) of the Limitation Act 1980 but said that the Tribunal is not required to deal with the issue by way of a checklist approach.

9. Lord Justice Legatt made the following points:

    9.1.1. The 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). (19)

    9.1.2. Consideration of the length of and the reasons for the delay should not be read as a requirement that the Tribunal must be satisfied that there was good reason for the delay or that time cannot be extended in the absence of an explanation for the delay from the claimant. (25)

    9.1.3. Some weight can be attached to the fact that a claimant was pursuing an internal process which might have resolved the complaint. (32)

10. It was not disputed that the onus is on the claimant to persuade the tribunal that time should be extended. The claimant did not deal in her evidence at the previous hearing with the reasons why the claim had been submitted late but did refer to steps taken to pursue internal complaints about her pay and set out her evidence on the merits of her claim. The Tribunal is required to consider the balance of prejudice and can consider the merits of the claim as part of the circumstances relevant to the exercise of its discretion.

11. We have considered the circumstances of the late submission of this claim and have focussed principally on the following factors which were the main points of the submissions raised before us today. These were: the merits of the claim; the length of and reasons for the delay; and the balance of prejudice to the parties in allowing or refusing an extension of time.

Merits of the Claim

12. Both representatives acknowledged today that the claimant's claim of race discrimination based on pay is extremely complex. It turns on national NHS terms and conditions, local terms and conditions, pay policy documents which applied at the relevant times and the interpretation of terms by those managing the respondent's pay system.

13. Supperstone J in the EAT judgment accepted that Dr Cannon is an appropriate comparator to the claimant's discrimination claim. It is possible that a difference in the method used to calculate Dr Cannon's pay at the same material points in her career to that used to calculate the claimant's pay at the equivalent points might be sufficient to shift the burden of proof on to the respondent to explain that difference. Due to the complexity of the principles being applied and the differences in the circumstances that applied to Dr Cannon and the claimant at the material times, it is not possible to say with certainty that it would do so.

14. If on consideration of all the evidence, the claimant were to discharge the initial burden on her, the onus would then shift to the respondent to explain the difference in the pay calculation, to counter an inference that its actions were discriminatory.

15. At the previous hearing the respondent was only able to provide an explanation of the pay decisions from one witness, Elaine Middleton, an individual who had not been employed at the time that the decisions were made and who could only refer to documents to explain the decisions because the individuals who had made those decisions were no longer in the respondent's employment. Miss Middleton's evidence was that there appeared to have been mistakes made in both Dr Cannon's and the claimant's pay calculations. She could only guess at the reasons behind those errors and that was apparent from the table attached to her witness statement in which she had given her views and comments on the decisions made on both the claimant's and Dr Cannon's pay at the relevant times. Her overall conclusion was that the calculations on both the claimant's and Dr Cannon's pay had resulted in overpayments to both consultants. In the light of the conflicting evidence from the parties relating to the pay decisions, it is clear that there is an issue between the parties as to how the pay calculation was done in each case; an issue between them as to whether there was a difference in the calculation method applied and if so, an issue between them as to whether the reason for any difference shown was an unlawful discriminatory one.

16. It is not possible to conclude that the merits of the claimant's race discrimination claim are sufficiently established to justify extending time to enable it to proceed. When considering the merits of a claim as one of the factors relevant to a possible just and equitable extension of time limits, the Tribunal is not required to analyse detailed evidence as it would at a full merits hearing. This is not a case where the respondent concedes that there was a difference in treatment, or less favourable treatment of the claimant in relation to pay decisions made in 2005 and 2008. As recognised by Supperstone J, the evidence on both sides is detailed and complicated.

17. If less favourable treatment were established, the reasons for that treatment would have to be considered. The claimant's representative contends that as the respondent relied on Miss Middleton's evidence for its defence at the original hearing then it would simply be a matter for the Tribunal at the final hearing to assess whether her explanation was inadequate and if satisfied that it was inadequate, to then consider whether an inference could be drawn that there were racial grounds for the decisions made.

18. If the claimant were to proceed with her claim after today the respondent would be forced to rely on the conjectures of Ms Middleton to explain historical pay decisions. The reason that it would be in that position would be because of the claimant's delay in pursuing her case, which means that the respondent cannot produce first hand evidence from the decision makers themselves. To the extent that the merits of the claimant's case are potentially heightened by the respondent's inability to adduce the relevant evidence due to the time-lapse, we concluded that this factor should not weigh in favour of the claimant.

Length of the delay and the reasons for it

19. There was a substantial period of delay in this case: the claims were brought ten years and seven years respectively after the relevant decisions were made. We found in our original Judgment on the evidence heard, that the claimant had had access to advice from the BMA and had been in receipt of legal advice from July 2014. She was aware of the time limits in Employment Tribunal cases and she had access to the internet.

20. The claimant referred in her witness statement to the steps she had taken to follow internal procedures and processes prior to submitting her claim, although this evidence was not put forward by her as an explanation for the delay. It is true that the claimant raised a series of complaints to the respondent about her pay from 2006 onwards. These complaints were investigated and addressed by the respondent but not upheld.

21. In February 2013 the claimant raised a formal grievance about her pay which concluded on 9 July 2014 at which point the respondent wrote to her to tell her that that was the end of the matter. Rather than issuing proceedings at that point the claimant raised a second formal grievance alleging race discrimination in relation to her pay on 30 October 2014. Although this was the first time that the claimant had first raised race discrimination in relation to her pay formally, her witness evidence shows that she had raised race discrimination in this context informally in May 2008. It had been investigated at that time and not upheld.

22. The second grievance had not concluded by the time the claimant issued her claim in May 2015.

23. We considered the ***Abertawe*** case and Mr Kemp's submission that we did not have to be satisfied with the adequacy of the reason for the delay in order to decide to extend time. We acknowledged that delay and the reasons for it form only two of the factors to be taken into account when exercising our discretion. We accepted that if the merits of the claim were established and the cogency of the evidence unaffected, even where there was a very lengthy delay, the full circumstances of the case could lead us to decide that time should be extended. However, the length of the delay in this case is highly significant because of its impact on the respondent's ability to reasonably defend the claim.

24. We concluded that the following of the internal procedures for the period of time in question was an inadequate explanation for the delay. The claimant had sought internal resolution of her pay complaints, both informally and

formally, on numerous occasions and had been unsuccessful on numerous occasions. When she finally submitted her Tribunal claim for race discrimination based on the pay decisions, she had begun another formal grievance about her pay which had yet to be concluded, suggesting that exhausting internal procedures was not the explanation for her delay. The claimant is a highly intelligent individual. She has shown that she is very capable of seeking redress where she considers that she has been unfairly treated. She could have made enquires of her advisors and she could have brought proceedings significantly earlier than when she finally did so in 2015. This was not a situation like that of Ms Morgan in the ***Abertawe*** case where ill-health was a factor in the delay as was delay by the respondent in addressing the claimant's internal grievances and where the period of delay was significantly shorter than in this case. There was no adequate explanation for the delay in this case and the delay was substantial.

Balance of Prejudice

25. We found on the facts at the original hearing that the respondent's personnel involved in the original decisions on the claimant's pay made in 2005 and 2008 were no longer employed by the respondent and so there was no first-hand evidence available to be called by the respondent as to method applied and as to what informed the pay decisions at the relevant time.

26. The claimant's representative contended that it was not apparent that the respondent had made efforts to contact their former employees to obtain their evidence. However, we concluded that in an organisation the size of the Trust, even if it had been possible to trace the personnel involved, it is unrealistic to expect a Finance Officer to be able to recall the reasons behind a decision made on one individual's pay seven or ten years previously.

27. The reason that time limits are applied relatively strictly in Tribunal cases, notwithstanding the wide discretion afforded in discrimination cases, is that the cases often turn on the particular facts of the case and oral as well as documentary evidence is crucial to a fair determination of the issues. The claimant's case of race discrimination does not turn on her own oral evidence to any significant extent. She has to establish a difference in treatment based largely on documentary records but then the burden is on the respondent to explain any difference shown. If the respondent does not have access to the personnel who could provide that explanation, which may not be apparent from the face of the document, it is prejudiced in its ability to defend the claim.

28. The prejudice to the claimant if we do not extend time is that she cannot pursue her claim. That could have financial implications for her and if the merits of her case were clearer, this would weigh strongly in her favour. However, on the evidence and on the circumstances of this case we concluded that the merits were not clearly established; that there was inadequate explanation given by the claimant for an extremely lengthy period of delay in submitting her claim to the Tribunal; and that that delay rendered it impossible for the respondent to be able to produce evidence from the relevant personnel to properly defend the claim. We concluded that in these circumstances, the greater prejudice, would be to the respondent in allowing a claim to proceed.

29. For those reasons the Tribunal has decided that it is not just and equitable to extend time in this case and the claimant's race discrimination claim is dismissed.

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Employment Judge Mulvaney

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Date 18 May 2018