



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr I Pop

**Respondent:** St George's University Hospital NHS Foundation Trust

**Heard at:** London South Employment Tribunal      **On:** 14 January 2020

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

## Representation

Claimant: In person

Respondent: Ms M Stanley (counsel)

# RESERVED JUDGMENT

**It is the judgment of the Tribunal that:**

1. The race discrimination complaint is dismissed because the Tribunal does not have jurisdiction to hear it.
2. The holiday pay claim is struck out under Rule 37.

# REASONS

## BACKGROUND

1. The Claimant was employed by the Respondent as a staff nurse from 4 January 2016 to 30 September 2018.
2. By two claim forms presented on 28 December 2018, following a period of early conciliation from 6 November to 20 December 2018, the Claimant brought complaints of race discrimination and failure to pay holiday pay.
3. At a Preliminary Hearing (case management) on 31 May 2019 the Claimant clarified his race discrimination complaint and the issues were agreed as follows:

- 3.1. Has the Respondent subjected to the Claimant to the following treatment:
- 3.1.1. The decision by Ms Dillon and HR to investigate the Claimant because of a drug error [the case management summary says in August 2017, but in fact it is agreed the error happened on 5 July 2017 and the invitation to attend an investigatory meeting was sent on 25 July 2017].
  - 3.1.2. The decision made by Ms Dillon to award the Claimant a six-month informal warning on 28 August 2017.
  - 3.1.3. Having the six months warning hanging over him.
- 3.2. Was that treatment “less favourable treatment”, i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on the following comparators of Katarzyna Wegrzyn the nurse on duty with him at the time. She is of Polish origin but is a British citizen.
- 3.3. If so, was this because of the Claimant’s race which is Romanian and/or because of the protected characteristic of race more generally?
4. At the same hearing Claimant was ordered to clarify the holiday pay claim. In the claim form he said he was owed holiday pay on the termination of his employment. By the time of the case management hearing the Respondent admitted that he was owed holiday pay and paid two sums of £2,156,40 and £1,826.88. The Claimant was unable to say at the hearing what sums were outstanding. He was ordered to provide further information by 28 June 2019.
5. An open preliminary hearing was listed to take place on 17 July 2019, to consider whether the claims were presented in time. That hearing did not go ahead because of lack of judicial resources, but a short case management hearing took place before Employment Judge Tsamados. The open preliminary hearing was re-listed for 14 January 2020. The Claimant had not complied with the order to clarify his holiday pay complaint and the Respondent applied to strike out the complaint on that basis, but EJ Tsamados declined to consider the application on the basis that the open preliminary hearing had not gone ahead. The Claimant was given a further opportunity to provide further information about his holiday pay claim by 14 August 2019.
6. Prior to the re-listed hearing the Respondent applied, in the alternative, for deposit orders in respect of both complaints on the basis that they had little reasonable prospect of success.

## THE HEARING

7. The open preliminary hearing took place on 14 January 2020. A Romanian interpreter attended, at the Claimant’s request, but the Claimant spoke English throughout the hearing and said he only needed the interpreter in case there were things he did not understand. In the event he gave evidence in English,

without her assistance, and during the rest of the hearing only asked for her help with particular words once or twice.

8. It was agreed at the start of the hearing that the issues to be determined were:
  - 8.1. Whether the Tribunal has jurisdiction to consider the race discrimination complaint, i.e. is it out of time?
  - 8.2. Whether the holiday pay complaint should be struck out for failure to comply with case management orders and/or failure to actively pursue the complaint.
  - 8.3. If either complaint proceeds, whether a deposit order should be made.
9. The Claimant also agreed that the issues were as set out in the case management summary following the hearing on 31 May 2019.
10. In his evidence and submissions the Claimant argued that his claim was in time because he had discovered, via Freedom of Information requests, that there had been 146 drug errors in September 2018 and none of the staff involved had been given an informal warning. He wished to rely on those cases as comparators. In cross-examination he said that he believed at the time of being given the informal warning that Ms Dillon had discriminated against him. He accepted he could have brought a claim at the time, but said it was his choice to complain later. He believed that the three-month time limit ran from the last act of discrimination, and he relied on the drug errors in September 2018 as further acts.
11. As to the holiday pay complaint, the Claimant argued that he was unable to comply with the case management orders because he did not have the information he needed to calculate his holiday pay and he was not an accountant. He accepted that the Respondent had given him details of all shifts worked and the hourly rate, but he did not believe that the information was accurate because they had previously made a mistake about his holiday pay.

## THE LAW

12. 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;

...

13. It is well established that there is a difference between a continuing act for the purposes of s.123(3) and an act that has continuing consequences. A decision, such as a decision not to promote someone, may have continuing consequences but it will not constitute a continuing act unless the Claimant can show the existence of a discriminatory policy, rule or practice. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 the Court of Appeal made it clear, however, that Tribunals should not take too literal an approach to this issue and where (as in that case) there are allegations of numerous discriminatory acts over a long period, the Claimant may be able to establish that there is an ongoing situation or continuing state of affairs which constituted a continuing act. Ultimately, the Tribunal should look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer (Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548).

14. 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.

15. Rule 37 of the Employment Tribunals Rules of Procedure provides, so far as relevant:

- (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

...

- (c) for non-compliance with any of these Rules or with an order of the Tribunal;

- (d) that it has not been actively pursued;

...

- (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

...

## CONCLUSIONS

### The race discrimination complaint

16. The Claimant's case is based on a misunderstanding of the law. The three-month time limit runs from the "act to which the complaint relates". The only acts of discrimination relied upon are the decision to investigate, in July 2017,

and the decision to issue an informal warning on 28 August 2017. “Having the warning hanging over him” is not a separate act of discrimination, or a continuing act, but rather the consequence of the decision to issue the warning. In any event it was a six-month warning so it expired on 28 February 2018. The claim form was presented on 28 December 2018 so the race discrimination complaint is, on any view, substantially out of time. The drug errors the Claimant seeks to rely on in September 2018 were not further instances of alleged race discrimination; they are, at most, further evidence on which he may wish to rely to prove that the Respondent’s conduct in July and August 2017 was discriminatory. They do not affect the time limit.

17. I am therefore satisfied that the complaint is out of time. The Tribunal only has jurisdiction to consider it, therefore, if it is just and equitable to do so. The Claimant has not put forward any reason for the delay in presenting his claim, and accepted that he could have done so in 2017. The delay is lengthy and there is a real possibility that the cogency of the evidence would be affected. It is for the Claimant to show that it is just and equitable to extend the time limit and he has not done so.

18. This complaint is therefore dismissed.

The holiday pay complaint

19. Since this claim was presented the Respondent has made substantial payments in respect of holiday pay. The Claimant has not even asserted that there are sums outstanding, let alone quantified the amounts that he says are owed. It is for him to establish that there is holiday pay still owing, and he has failed to do so, in breach of two orders of the Tribunal. He has had ample opportunity to clarify this complaint and the Respondent has given him all the information he might need to do so. In accordance with Rule 37, I consider it appropriate and proportionate to strike out the complaint on the basis that the Claimant has not complied with two orders of the Tribunal and/or the complaint has not been actively pursued.

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**Employment Judge Ferguson**

Date: 15 January 2020