

EMPLOYMENT TRIBUNALS

Claimants: (1) Dr Hamza Mazhar
(2) Dr Yusuf Hussain

Respondent: Chesterfield Royal Hospital NHS Foundation Trust

Heard at: Midlands (East) Region by Cloud Video Platform

On: 24 November 2022

Before: Employment Judge Legard (sitting alone)

Representation

Claimants: In person
Respondent: Mr Kennedy (of Counsel)

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video.

JUDGMENT

The Judgment of the Tribunal is as follows:

1. The Tribunal has jurisdiction to hear the claim, it being both just and equitable for time for the presentation of this claim to be extended until 14th March 2022.

REASONS

1. Background

- 1.1 This matter was set down for a Preliminary Hearing in order to determine whether the claim should be dismissed on the grounds that the Tribunal

lacks jurisdiction to hear the claim because the same appears to be out of time.

- 1.2 By a claim form received by the Tribunal on 13th March 2022 the Claimants bring complaints against the Respondent alleging direct race and sex discrimination and harassment.
- 1.3 The Respondent is an NHS Foundation Trust providing healthcare services at, amongst other places, Chesterfield Royal Hospital. The Claimants are both male and self-identify as British-Pakistani. At the material time, both were undergoing training placements as trainee general practitioners. These placements ran for a period of two years from August 2019 until August 202.
- 1.4 The Respondent concedes that they satisfy the definition of 'employee' for the purposes of EqA (s.83(2)).

2. Issues

- 2.1 The issues were identified by EJ Adkinson on 16th August 2022 as:
 - Was the claim made to the ET within 3 months (plus EC extension) of the act to which the complaint relates?
 - If not, were the claims made within a further period that the ET thinks is just and equitable?

3. Findings of fact

- 3.1 I heard sworn oral evidence from Dr Mazhar and he was cross-examined. With the agreement and understanding of Mr Kennedy, a document entitled 'Equality Act Time Limit Exception Request' was taken as Dr Mazhar's statement in support of the Claimants' position and it was by reference to this document that he was cross-examined. I have also read and been referred to a number of documents in an agreed bundle comprising 143 pages. I found Dr Mazhar to be an impressive and truthful witness.

3.2 I set out the thrust of the Claimants' case below but, in doing so, make it quite clear that I have restricted all my findings of fact to only those matters relevant to the 'time' issue. It will be for the Tribunal to make findings of fact on the substantive issues in due course at the final hearing.

3.3 The Claimants allege that they were the victims of direct discrimination and harassment on the grounds of both their sex and/or race principally at the hands of Ms Lambie-Fryer, Head of Operations (in respect of whose acts the Respondent is vicariously liable). In greater detail, both complain of the following (all of which are said to have occurred on 2nd July 2021):

- Being reprimanded by Ms Lambie-Fryer for failing to adhere to CV-19 social distancing rules whilst queuing for food in a dining hall. They say that other non-BME colleagues in the queue, behaving in the same or similar way, were not reprimanded;
- Ms Lambie-Fryer applied racial stereotypes to them both by implying to others, including Mr Bradbury the Security Advisor, that they were aggressive, intimidatory and potentially unsafe in the presence of women;
- Ms Lambie-Fryer making unjustified use of CCTV for recognition purposes;
- Being described by Ms Lambie-Fryer as 'tall, dark and coloured';
- Causing reputational damage to them both by Ms Lambie-Fryer circulating an email to divisional leaders and Infection Control accusing them of unprofessional behaviour.

3.4 The Claimants further complain about an alleged failure by the Trust to investigate their complaints in accordance with or by reference to their Equality & Diversity/Grievance policies but both accept that these alleged failures were not connected to either their race or sex and accordingly do not form part of the claim itself.

3.5 On or about 8th July 2021 the Claimants raised an informal grievance in respect of the dining room incident. Later that same month, this escalated

into a formal grievance and an investigation commenced. This investigation was undertaken by Mrs Lacey (MD Royal Primary Care) and her report, dated 15th December 2021, was not promulgated until 23rd December 2021, some 5½ months after the initial ‘dining hall queue’ incident and two days before Christmas. Within that report Mrs Lacey made various criticisms of Ms Lambie-Fryer but found that none of her actions were motivated by race. There were findings contained within that report about which neither Claimant had hitherto been aware and which now form part (they say an important part) of their claim. These include:

- The fact of the email sent to divisional heads and Infection Control;
- The reference to Ms Lambie-Fryer seeking to describe them both as ‘tall, dark and coloured’;
- The implication that they were a threat to young women.

3.6 The Claimants contacted ACAS on 5th January 2022 and entered into Early Conciliation (‘EC’) until 15th February 2022 on which occasion a certificate was issued. The claim form was received by the Tribunal on 13th March 2022.

3.7 By its response form, Respondent defends the claims, inter alia, on the ground that they are out of time and the Tribunal lacks jurisdiction to hear the same. Primary limitation, argues the Respondent, expired on or before 6th October and accordingly any act or omission complained of that precedes that date is out of time.

3.8 Without prejudice to the ‘time’ point, the Respondent defends the claim on the basis that:

- The instruction to socially distance by Ms Lambie was proportionate and reasonable;
- That both Claimants have at all times been treated consistently and fairly by the Respondent;

- The Claimant's grievances have at all times been the subject of a thorough and fair investigation;
- It has not discriminated against either or both Claimants because of their race or sex nor has either been the subject of unlawful sex or race harassment.

3.9 Both parties agree that the 'primary' time limit for the Equality Act complaints expired at midnight 5th October 2021. The Claimants presented their ET1 on 13th March 2022. The complaint was therefore lodged approximately 5 months outside the primary time limit.

3.10 The Respondent has both a Dignity at Work Policy as well as a Individual and Collective Grievance procedure. There is an expectation and understanding that all those employed within the Trust (from both a managerial and staff perspective) follow these policies and procedures.

3.11 The Respondent Dignity at Work policy stipulates, amongst other things, that where a complaint is sufficiently serious to warrant a formal investigation, then that investigation should be undertaken within a two month timeframe.¹ The policy further provides as follows:

- If this timeframe is to be extended the staff member should be informed of the reasons for the extension and how long this is envisaged to be. The staff member should be updated with regard to the progression of the investigation at weekly intervals, if the 2 month timeframe is extended;²
- Once the investigation is completed the employee making the complaint and the person against whom allegations [sic] will be advised of the findings by the Investigating Officer; at a meeting;³
- If the employee feels that the matter has not been resolved, following the formal stage of the procedure, they are entitled to appeal against the

¹ Para 6.4.5

² Para 6.4.5

³ Para 6.4.8

decision made and can access the relevant stage of the Trust's Individual and Collective Grievance procedure.⁴

3.12 The Trust's grievance procedure also refers to a 2 month timeframe for investigations. It also provides for a collective grievance where there is more than one individual wishing to raise the same complaint. Where it has not been possible for a grievance to be resolved through a formal stage then the matter may, in exceptional circumstances and with the consent of both parties, be referred to ACAS for conciliation.⁵ A request for such a reference must be made to the Director of HR within 10 days of the date of the final outcome letter.

3.13 The Claimants briefly sought legal advice in January 2022 following the receipt of the outcome letter but have been otherwise unrepresented. The early part of 2022 was a particularly frenetic and stressful time for them both as they were undergoing final training; medical exams and exit interviews. Neither was a member of the BMA or any other union.

4. Law

4.1 By reference to s.123(1) of the Equality Act a discrimination complaint 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.

By s.123(3) for the purposes of this section—

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⁵ Para 5.6.1

- (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.

- 4.2 In common with the unfair dismissal jurisdiction, the clock will be stopped during the period of early conciliation (i.e. the period between the Claimant contacting ACAS and receiving his EC certificate).
- 4.3 By comparison to the 'reasonable practicability' test, the just and equitable discretion is, of course, wider. Nevertheless such a discretion must be exercised with great care. There is no presumption in favour of an extension – on the contrary the onus is upon the Claimant to persuade the Tribunal to exercise the discretion in his or her favour. Furthermore it is important to stress that the exercise of that discretion is the exception as opposed to the rule and the time limit will operate to exclude otherwise valid claims unless the claimant can displace it - Robertson v Bexley Community Centre [2003] IRLR 434, CA and Chief Constable of Lincolnshire Police v Caston; Dept of Constitutional Affairs v Jones [2008] IRLR 128 and finally see para 10 and Laing J's judgment in Miller v MOD
- 4.4 Amongst other things the Tribunal may take into consideration are the factors that are to be found in s.33 of the Limitation Act 1980 (although s.33 should not be used formulaically or mechanistically as a check list: Adedeji v University Hospitals Birmingham NHS Foundation Trust, [2021] 1 WLR 2061). Those include the length and reason of the delay; the extent to which evidence may have been affected by the delay; the promptness in which a Claimant has acted; the conduct of either party. The Tribunal may also take into account the balance of convenience and the chance of success: see Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278.

- 4.5 Another factor (although by no means a conclusive one) is whether or not an individual was seeking internal redress before issuing his claim (*Apelogun-Gabriels v Lambeth BC [2002] IRLR 116 and also Robinson v The Post Office [2000] IRLR 804*). This issue must be looked at in its overall context and there is no rule that it (the pursuance of an internal grievance) can only be a good reason if allied to other factors and/or prejudice to the respondent: *Wells Cathedral School Ltd v Souter UKEAT/0836/20*. This is a case which I have read with particular care and especially HHJ Auerbach's helpful consideration of a wide range of authorities.
- 4.6 All cases make clear that that the pursuance of a grievance is but one factor to consider and far from conclusive. Indeed all relevant factors, including the balance of prejudice and the merits of the claim, must be considered – see *Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*.
- 4.7 The perceived weakness of the claimant's case may be a relevant factor when applying the 'just and equitable' test; however, it is inherently dangerous for a Tribunal to embark upon a consideration of the substantive merits of a discrimination complaint without evidence having been fairly and properly tested before it -: *Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132* (26 April 2022, unreported).

5. Submissions

- 5.1 Both Mr Kennedy and Dr Hussain made oral submissions and, in doing so, made passing reference to applicable caselaw.

Respondent

- 5.2 On the Respondent's behalf, Mr Kennedy reminds me that the claim is out of time and it therefore falls to the Claimants to convince me that I should exercise my discretion in their favour and that an extension of time is an exception as opposed to the rule.
- 5.3 Both Claimants are intelligent, well-educated men and ought reasonably to have known of their employment rights together with the time limits that govern the exercise of those rights. Following the dining hall incident on 2nd July 2021 both knew a sufficient amount in order to support a complaint of race and sex discrimination – there was no need for either of them to have waited out the internal grievance process before presenting their claim. Even if it is deemed reasonable for them to have awaited the outcome of the internal investigation, the delay thereafter (23rd December to 13th March) was itself unreasonable and militates against the exercise of the discretion. For example, they could have restricted the conciliation period to a single day. The so-called 'Keeble' factors do not support an extension.

Claimants

- 5.4 Dr Hussain contends that they were effectively caught within a 'catch 22' situation - essentially the Trust cannot, on the one hand, expect and encourage its employees to first exhaust internal grievance processes before contacting ACAS and on the other, having delayed the process for many months, then seek to strike out the claim on time limitation grounds in circumstances where the employee has done precisely that.
- 5.5 They followed the Trust's policies and procedures to the letter and those same policies led them to understand that a referral to ACAS should not take place until after the outcome of the internal investigation had been communicated to them. The responsibility for delaying the investigation rests solely with the Respondent. They acted promptly on receipt of the investigation outcome; contacting ACAS well within 10 working days. They were not aware that they could unilaterally foreshorten the conciliation period and acted reasonably in awaiting a certificate from ACAS before addressing their minds to the Tribunal claim. The short delay between the

end of the conciliation period and presentation (approximately 27 days) was due to the fact that they were in a particularly busy and stressful period of work; training; medical exams and exit interviews and also in order to research the relevant law and formulate the claim. They make the further point that it was not until they received the contents of internal investigation that a number of the allegations they now seek to make were properly crystallised.

6. Conclusions

- 6.1 From both a factual and legal perspective, these are relatively straightforward complaints of race and sex discrimination and harassment. That said, I have not sought to assess the underlying merits of the complaint. The trigger event was the incident on 2nd July 2021 but it is clear that the complaint extends to Ms Lambie-Fryer's subsequent conduct. For example the use of CCTV to confirm the Claimants' identity; the email sent later that day to Divisional Heads and Infection Control; the words she allegedly used to describe the Claimants ('tall, dark and coloured') and her conversation with the Head of Security in which she implies (it is alleged) that the Claimants' might be a threat to young women. This is, say the Claimants, evidence of a racial and sexual stereotyping and targeting by the same manager.⁶
- 6.2 The primary time limit expired at midnight on 5th October 2021 and the claim is therefore prima facie out of time by approximately 5 months. ACAS conciliation occurred too late to afford either Claimant the benefit of an extension of time.
- 6.3 I therefore turn my mind as to whether it would be just and equitable for time to be extended. These are not claims sprung on the Respondent from the depths of history and there is no suggestion that the cogency of the

⁶ A full list of issues is helpfully set out at paragraph 46 of EJ Adkinson's Order dated 16th August 2022

evidence had been compromised by the failure to present the claim within the primary time limit.

- 6.4 Crucially, however, in this case is the fact that the Claimants deliberately delayed the presentation of their claim until such time as the internal grievance process had been exhausted or, at least until they had received an outcome. The fact that a Claimant chooses to pursue a complaint and seek redress by way of an internal grievance process is, of course, insufficient by itself to justify an extension under the just and equitable discretion – the abundant caselaw on the subject makes that quite clear. However, one needs to consider the wider circumstances in which the grievance process was played out on the facts of this particular case.
- 6.5 In this case the Claimants were positively encouraged to pursue an internal grievance process. They followed the Respondent’s policies to the letter. By its own admission, it was the Respondent that was wholly to blame for the delay in promulgating an outcome and in respect of that delay there was little by way of explanation or excuse. There was an abject and unexplained failure by the Respondent to follow their own Dignity at Work or grievance policies, specifically in terms of timeframe and keeping the Claimants in the loop. In these circumstances it would, in my Judgment, be unconscionable for the Respondent to gain a ‘jurisdictional’ advantage over the Claimants for having done so.
- 6.6 The Claimants acted promptly upon receipt of the investigation outcome, promulgated on the final working day before the Christmas and New Year hiatus. There is certainly no suggestion whatsoever of them having dragged their feet. They contacted ACAS on 5th January which is significantly less than 10 working days later. It was not unreasonable for them to await receipt of EC certificate and they could not be expected to know that they might have been able to reduce the conciliation period to a single day. The fact that the primary time limit may have expired does not make it necessarily any less likely that the Respondent would engage in meaningful conciliation.

- 6.7 There were a number of aspects to their claim about which they were unaware until receipt of the investigation outcome letter and it is right to say that the substance of their claim did not fully crystallise until receipt of the same. Importantly, as Dr Mahzar made clear in his evidence before me, the email sent to Divisional Heads by Ms Lambie-Fryer now forms a key component of their complaint and that was not something that they had previously been aware. Similarly the allegations concerning their description by Ms Lambie-Fryer as ‘tall, dark and coloured’ and being a threat to young women were matters that only came to light as a consequence of the investigation process. It is not therefore accurate to say that the Claimants were aware of all relevant facts that could give rise to their complaint no later than 2nd July 2021.
- 6.8 I accept the Claimants’ reasons for the (approximate) 27 day delay between receipt of EC certificate and the presentation of the claim. The Claimants were young doctors in their final year of training and undergoing an intensive period of testing. They were not legally represented and took time to ensure that the claim form was properly formulated.
- 6.9 Mr Kennedy was unable to identify any prejudice to the Respondent that might arise were time to be extended beyond the obvious prejudice of having to expend time, money and administrative resource in defending the complaint. The matters that form the substance of the complaint were themselves the subject of a broadly contemporaneous complaint and investigation – there will, I have little doubt, be a written record of the investigation; including interviews and relevant email correspondence. The initial complaint is itself in writing. This is not a factually complex case. The final hearing is listed in January 2024 but, as Mr Kennedy realistically concedes, this is a consequence of the Tribunal listing difficulties for which neither Claimant ought to be penalised. In any event there is no suggestion that any witnesses’ recollections will have faded by then.

- 6.10 Mr Kennedy makes a number of good points but overall the factors supporting the exercise of the just and equitable discretion significantly outweigh those that militate against it. In the circumstances, I find that there are strong grounds for the Tribunal to exercise its discretion and, having taken all matters into consideration, I find that it would be just and equitable in all the circumstances to extend time in order to allow the complaints of race and sex discrimination and harassment to proceed to a full hearing.
- 6.11 The parties have invited me to issue standard case management orders which I will do shortly. The list of issues identified by EJ Adkinson on 16th August 2022 (see paragraphs 44-65 inclusive) are those that fall to be determined at final hearing. Noting the length of time between now and the final hearing, I would encourage both sides to consider judicial mediation in this case.

Employment Judge Legard

Date 24th November 2022