



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Nair

**Respondent:** University Hospitals of North Midlands NHS Trust

**Heard at:** Birmingham Employment Tribunal      **On:** 16 January 2025

**Before:** Employment Judge Kight

## **Representation**

**Claimant:** Mrs Reeya, claimant's partner

**Respondent:** Mr Crow, Counsel

**JUDGMENT** having been sent to the parties on **17 January 2025** and written reasons having been requested by the claimant in accordance with Rule 60(4)(b) of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

# REASONS

## **INTRODUCTION**

1. By ET1 dated 8 December 2023, following a period of ACAS EC between 7 July and 15 August 2023 the claimant presented a claim for race discrimination.
2. The specific acts of discrimination relied upon in the claim form were not fully particularised but it was established at a previous Preliminary Hearing conducted by EJ Bansal on 2 September 2024 and confirmed at the outset of this hearing that they related to the acts of or failures to act by members of the respondent's staff in the period when the claimant was attending work which was between 3 March 2021 and 21 July 2021. The last possible date therefore for the last act of discrimination complained of was 21 July 2021.
3. The hearing was to determine whether the tribunal had jurisdiction to hear the claimant's claim.
4. The tribunal was provided with a bundle of documents containing 160 pages which included a witness statement for the claimant, who also gave oral evidence at the hearing. The tribunal received a skeleton argument from the respondent and heard oral submissions from counsel for the respondent, Mr Crow, and from Mrs Reeya, the claimant's partner.

**LAW**

5. Section 123(1) of the Equality Act 2010 (**EqA 2010**) states that proceedings on a complaint of discrimination 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.

6. In terms of how a tribunal should approach the question of exercising its discretion on a just and equitable basis, the tribunal is assisted by the guidance set out in case law, as follows:

7. In **Abertawe Bro Morgannwg University Local Health v Morgan [2018] EWCA CIV 640** Leggett LJ said:

*18. it is plain from the language used (“such other period as the employment tribunal thinks just and equitable”) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike Section 33 of the Limitation Act 1980, Section 123(1) of the Equality Act does not specify a list of factors to which the tribunal is instructed to have regard, and they will be wrong in those circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in Section 33(3) of the Limitation Act 1980 the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under Section 7(5) of the Human Rights Act 1998.*

*19. That said, 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).*

8. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA** the Court of Appeal set out guidance on how to approach the application of the list of factors referred to in **British Coal Corporation v Keeble [1997] IRLR 336**. In **Adedeji** the Court of Appeal cautioned that **Keeble** does no more than suggest that a comparison with S.33 might help ‘illuminate’ the task of the tribunal by setting out a checklist of potentially relevant factors; it certainly did not say that that list should be used as a framework for any decision. The Court of Appeal emphasised that the “Keeble” factors should not be taken as the starting point for tribunals’ approach to ‘just and equitable’ extensions and that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the

particular case that it considers relevant, these may well include factors considered in Keeble – for example the length of, and the reasons for, the delay is always likely to be a relevant consideration but ultimately the question is what is just and equitable.

9. This means the exercise of the discretion to extend time because it is just and equitable to do so involves a multi factual approach, considering all the circumstances of the case in which no single factor is determinative of the starting point.
10. It is well known that in the judgment of the Court of Appeal in **Robertson -v Bexley Community Centre [2003] IRLR 434** it was said that in relation to the exercise of discretion, *'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.'* However, that does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. In the same judgment Lord Justice Auld said *'The tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision'*.
11. The law does not require exceptional circumstances, it simply requires, that an extension of time should be just and equitable (**Pathan -v- London South Islamic Centre EAT 0312/13**).
12. In terms of relevant factors, as well as the length of delay and the reasons for it, other relevant factors will usually include the balance of prejudice between the claimant and the respondent. In **Miller and ors v Ministry of Justice and ors and another EAT 0003/15** Mrs Justice Elisabeth Laing set out five key points derived from case law on the 'just and equitable' discretion. In terms of the balance of prejudice, she explained that the prejudice that a respondent will suffer from facing a claim which would otherwise be time-barred is 'customarily' relevant. Elisabeth Laing J elaborated that there are two types of prejudice that a respondent may suffer if the limitation period is extended: (i) the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and (ii) the forensic prejudice that a respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.

## **FACTS AND CONCLUSIONS**

13. In this case the 3-month primary limitation period ended on 20 October 2021. Whilst ACAS early conciliation can extend time, this is only when ACAS are contacted before the end of the primary limitation period. That did not happen in this case as ACAS were not contacted until 7 July 2023. This means that the claim was presented some 25 months after the expiry of the primary limitation period.
14. As such, for the tribunal to have jurisdiction to consider the claimant's claim the tribunal must decide whether, pursuant to s.123(1)(b) EqA 2010, the claim was presented within such other period as it considers just and equitable.

15. To determine this the tribunal considered the facts as to what happened between the claimant's last day working at the respondent (21 July 2021) and the presentation of the claim on 8 December 2023.
16. Sadly, on 27 July 2021 the claimant suffered significant burns injuries to his body following self-immolation which the respondent accepts was a suicide attempt. This resulted in him being admitted initially to Wythenshawe hospital where he was placed on a ventilator for approximately one month, before on 30 September 2021 being transferred to Queen Elizabeth Hospital in Birmingham for ongoing treatment and rehabilitation. The claimant was discharged from hospital on 13 October 2021 but continued to receive outpatient treatment for his physical injuries, attending regular outpatient appointments for various treatments such as wound dressing and latterly scar management. He also had further surgery to assist his recovery in January 2024.
17. There is limited medical evidence which relates to the state of the claimant's mental health throughout this period of physical rehabilitation. The tribunal was informed there are no GP records because the claimant did not see his GP about his mental health and the records from the plastics outpatient clinic make no reference. The claimant described his mental health during this period as being "completely broken" and that he "lost [his] mind". His statement described him not talking to anyone and not eating and drinking much.
18. The medical evidence relating specifically to the claimant's mental health was letters of 5 April 2023 and 26 February 2024 which referred to the claimant twice being kept in hospital pursuant to section 2 of the Mental Health Act and a letter dated 14 October 2024 written by Bethany Harrison, the claimant's care coordinator at the Early Intervention team for North Staffordshire.
19. That letter provided more of a chronology about the state of the claimant's mental health, namely that the claimant was admitted to a psychiatric intensive care unit between 4 April and 3 May 2023 when he was discharged to the care of the Early Intervention Team. Between May 2023 and October 2023, he was said to have engaged minimally and in October 2023 started taking anti-depressant medication which resulted in some improvement before a relapse on 23 February 2024.
20. In January 2023, the claimant told his wife Mrs Reeya, about things which had happened to him whilst working for the respondent back in 2021. Mrs Reeya contacted the respondent on 10 January 2023, to try to find out what had happened and report the issues to the respondent. Mrs Reeya subsequently corresponded with the respondent and attended a meeting with Mr Bethell Divisional Nursing Director on 5 April 2023 (the day after the claimant had been admitted to psychiatric intensive care). In response to Mr Bethell's follow-up letter, on 13 June 2023 Mrs Reeya wrote again to the trust setting out some of the details of things about which the claimant had complained to her. Those details subsequently formed the basis of the claimant's tribunal claim.
21. On 7 July 2023 Mrs Reeya contacted ACAS. It is safe to conclude that by this point in time, even if they had been unaware beforehand Mrs Reeya and the claimant were aware of the ability to present an employment tribunal claim. Mrs

Reeya was said to have found out about ACAS when the claimant was admitted to hospital in April 2023.

22. On 10 August 2023 Mrs Reeya attended a further meeting with Ann-Marie Riley, Chief Nurse. An ACAS EC certificate was issued to the claimant on 15 August 2023. That certificate also refers to employment tribunal applications.
23. The respondent sent a further letter following up on the August meeting on 27 October 2023.
24. The claim was then presented several weeks later, on 8 December 2023.
25. Those being the facts in terms of chronology, it is the claimant's case that he was unable to present his claim any sooner due to a combination of his severe mental ill health preventing him from being able to discuss what had happened to him earlier or to act in respect of it and a lack of awareness of the appropriate process.
26. Mr Crow for the respondent pointed to the fact that whilst it is clear the claimant was unwell, it is not clear how and during which periods it prevented him from being able to present a claim. In addition, at points when he was said to be severely mentally unwell the claimant was able to provide enough information to Mrs Reeya for her to act from January 2023. In terms of knowledge of process, Mr Crow submitted that the claimant and Mrs Reeya had access to internet resources to be able to investigate what to do throughout this period and that Mrs Reeya could and did in fact identify the process in July 2023 but still did not present a claim for several more months.
27. The tribunal was satisfied on the evidence that in the primary limitation period the claimant's physical health and hospital admission was a significant hindrance to his ability to present a claim. However, it becomes more difficult in the absence of clear supporting medical evidence for the tribunal to be satisfied that following his discharge in October 2021 and throughout the whole of 2022 and most of 2023 the claimant's health conditions, be them physical or mental, continued to be such a hindrance for that to amount to a reason why the claimant, with support from Mrs Reeya, did not present a claim about his treatment until December 2023.
28. Even if it were such that the claimant was unable to even speak about his time at work with the respondent until January 2023, the claimant was able to tell Mrs Reeya about his concerns then in sufficient detail for her to raise them with the respondent.
29. By April/May 2023 Mrs Reeya was aware of ACAS and by July had contacted them in tandem with her ongoing communications with the respondent directly. It is clear that there was an awareness of the ability to present a claim to the employment tribunal and the tribunal finds more likely than not some awareness of time limits once Mrs Reeya had contacted ACAS. There was a further delay of several months after Mrs Reeya and the claimant were clearly able and were actively seeking redress when the claim could have been presented. The ET1 when it was presented in December 2023 did not contain more information than what Mrs Reeya had raised to the respondent directly.

30. As such, whilst the tribunal is sympathetic to the very difficult circumstances the claimant and Mrs Reeya were in, although the claimant's ill health and reasons for the lengthy delay are relevant factors, they alone do not justify an extension on a just and equitable basis.
31. The tribunal must also consider the balance of prejudice. This case is one where not extending time will prevent the claimant from pursuing any claim against the respondent in the tribunal altogether, which could be considered as the ultimate prejudice. However, Mr Crow for the respondent has identified several important and relevant matters of forensic prejudice which would affect the respondent's ability to defend the claim beyond the simple fact of having to defend a claim which has been significantly delayed.
32. First there is the preservation of evidence. Although the respondent did carry out some investigation, in 2023, into matters raised by the claimant via Mrs Reeya it is yet to receive full particulars of the specifics the claimant is alleging he was subjected to. This alone has hindered the respondent's ability to defend the claim because it has been unable to properly interrogate the specifics – even more so because it is now being asked to consider matters which were said to have happened almost four years ago. Memories of those who remain at the trust are likely to have faded considerably by this point in time such that it would be extremely difficult if not impossible for the respondent to present cogent and reliable witness evidence as to what the reasons or purposes were for the conduct complained of and the extent to which they were related to race.
33. It became clear, in 2023, that at least one of the alleged perpetrators is no longer employed by and easily contactable by the respondent, which is likely to cause the respondent considerable problems in being able to answer allegations relating to that individual. Whilst it is unknown whether this would have been an issue for the respondent even if the claimant had presented the claim within the primary limitation period or at least sooner than he did it is more likely than not that the delay has exacerbated the problem. There may also be other employees from the time who the respondent would have wished to call as witnesses to defend the claim but who are now no longer employed by the respondent or have any clear recollection of events again adding to the difficulties the respondent would face in defending the claimant's claim.
34. These issues, when combined with a likely lack of contemporaneous documentation, since the claimant's evidence was that there was no written complaint about the matters now being asserted at the time, means that the respondent's ability to respond to the allegations is significantly hindered by the delay in these proceedings being brought. The tribunal notes that there may be some contemporaneous evidence of unwanted conduct as the claimant alluded to, but this only goes so far in proving a case of the type pursued by the claimant.
35. Given the scope of the forensic prejudice that would be caused to the respondent were it required to defend the claim the tribunal considers that the balance of prejudice against the respondent outweighs the prejudice that would be caused to the claimant in not being able to pursue his claim.
36. So, adopting the multi-factoral approach required and taking all relevant factors into account, (in this case the length of and reasons for delay including the

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nature of the claimant's ill-health, the effect of the passage of time on the evidence and the balance of prejudice) the tribunal is not satisfied that it would be just and equitable to extend time in this case.

37. As such, the tribunal does not have jurisdiction to hear the claimant's claim and it is dismissed.

Employment Judge **Kight**  
04<sup>th</sup> February 2025