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## EMPLOYMENT TRIBUNALS

*Claimant*

*Respondent*

Mr J Thiruchelvam

AND

The Royal Free London  
NHS Foundation Trust

### PRELIMINARY HEARING

HELD AT: London Central ON: 29 April 2019

BEFORE: Employment Judge Brown (Sitting alone)

*Representation:*

For Claimant: In person  
For Respondent: Mr A Currie, Solicitor

### JUDGMENT AT A PRELIMINARY HEARING

The Judgment of the Tribunal is that:

1. There is no reasonably arguable basis for the contention that the Respondent's alleged acts during and before October 2017 were so linked with acts during and after May 2018 as to constitute a continuing act or ongoing state of affairs. The Claimant's race discrimination complaints regarding acts during and before October 2017 were presented out of time.
2. It is not just and equitable to extend time for discrimination complaints about acts done during and before October 2017.
3. The Claimant's discrimination claims relating to acts during and before October 2017 are therefore struck out because the Tribunal does not have jurisdiction to hear them.

## REASONS

1. The Claimant brings complaints of constructive unfair dismissal, direct race discrimination and breach of contract against the Respondent, his former employer.
2. At a Preliminary Hearing on 26 March 2019 Employment Judge Palca ordered the Claimant to serve a schedule of acts of race discrimination on the Respondent, setting out the acts relied on, the dates of those acts and the alleged perpetrator (amongst other things). The Claimant has done so. It was agreed at this hearing that his revised schedule, at pages 66-77 of the Respondent's bundle of documents, is the schedule of acts of race discrimination on which the Claimant relies in these proceedings.
3. Employment Judge Palca also ordered that there be a Preliminary Hearing today. One of the issues to be decided at the Hearing was: "Regarding jurisdiction in relation to discrimination, whether the Claimant's assignment to work at Northwick Park Hospital between 6 June 2017 and 17 May 2018 amounted to a break in continuity in relation to the Claimant's assertion that he was subject to discriminatory conduct extending over a period of time by reference to s.123 Equality Act 2010."

### Relevant Law

4. By *s123 Equality Act 2010*, complaints of discrimination in relation to employment may not be brought after the end of:
  - a. the period of three 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.
5. By *s123(3) EqA 2010*, conduct extending over a period is treated to be done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it.
6. In *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530, the Court of Appeal held that, in cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for a Claimant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken' in order to establish a continuing act. The Claimant must show that the incidents are linked to each other, and that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period'. The question is whether there is "an act extending over a period," as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed'. Paragraph [52] of the judgment.
7. Employment Tribunals can decide at a Preliminary Hearing whether acts of discrimination are out of time and therefore not permitted to go to a full

Hearing or, on the other hand, whether they could form part of an act extending over a period and, therefore, should be allowed to proceed to a Final Hearing, where the question of whether they do form part of such a continuing act will be determined.

8. In deciding this question at such a Preliminary, Tribunals apply the tests set out in *Lyfar v Brighton & Sussex University Hospital Trust* [2006] EWCA Civ 1548 and *Aziz v FDA* [2010] EWCA Civ 304. In *Aziz* the Court of Appeal said that the test to be applied at the Preliminary Hearing was to consider whether the Claimant has established a prima facie case. The Employment Tribunal must ask itself whether the complaints were capable of being part of an act extending over a period. Another way of formulating the test to be applied at the Preliminary Hearing is this: the Claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs. One relevant, but not conclusive factor in deciding whether there is a prima facie case of a continuing act, is whether the same, or different, individuals were responsible for the discriminatory acts.

9. Where a claim has been brought out of time, the Employment Tribunal can extend time for its presentation where it is just and equitable to do so. In *Robertson v Bexley Community Centre T/a Leisure Link* [2003] IRLR 434 the Court of Appeal stated that there is no presumption that an Employment Tribunal should extend time unless it can justify a failure to exercise the discretion. Quite the reverse; a Tribunal cannot hear a complaint unless the Claimant convinces the Tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule. In exercising their discretion to allow out of time claims to proceed, Tribunals may have regard to the checklist contained in s33 *Limitation Act 1980* as considered by the EAT in *British Coal Corporation v Keeble & Others* [1997] IRLR 336. Factors which can be considered include the prejudice each party would suffer as a result of the decision reached, the circumstances of the case and, in particular, the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with any requests of information, the promptness with which the Claimant acted once he or she knew of the facts giving rise to the course of action and the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

### **Findings of Fact**

10. I heard evidence from the Claimant. I also heard evidence from Gareth Jones for the Respondent.

11. The Claimant contends that, from 2009 to 2014, the Respondent excluded the Claimant from thyroid surgery and limited his involvement in complex face and neck surgery. Throughout that period, he contends that the Respondent treated him less favourably than it treated another surgeon, Mr Wayne Halfpenny and did not support him in respect of Mr Halfpenny. The

Claimant also contends that, throughout that period and continuing until 2017, the Respondent prevented his progression and undermined him, subjected him to unfair processes and biased reports, appointed others to provide the service that the Claimant provided, ignored his concerns despite his grievance being successful, threatened to investigate the Claimant further and failed to carry out appraisals appropriately.

12. There were some concerns raised by the Claimant's colleagues about his relationship with them, as well as his clinical practice, from at least 2014. The Claimant contends that these concerns themselves were acts of race discrimination.

13. He has set out at his complaints of race discrimination in his schedule to the Tribunal at pages 66-77 of the Respondent's bundle. I refer to that schedule for the full detail of the Claimant's complaints against the Respondent.

14. The Claimant was appointed as a Consultant Oral Maxillofacial Surgeon within the Respondent's Head and Neck Department in August 2007. He continued to be employed by the Trust until his resignation with notice, with effect from 19 August 2018.

15. The Claimant's colleagues' concerns about his practice were said to relate to the Claimant's lack of insight in to the limits of his capabilities and his environment with regard to managing and performing complex surgery. Ultimately, an investigation by Mr Cyrus Kerawala, an external Consultant Maxillofacial Surgeon, reported in December 2014 and supported some of those concerns, pages 80-91 of the Respondent's bundle. The Claimant raised a grievance about various issues, including the fact that he had not been one of a number of surgeons chosen to carry out thyroid surgery at the Respondent Trust and had not been TUPE transferred to the University College London Hospital to carry out complex head and neck cancer surgery. The grievance was completed in March 2015 and was not upheld.

16. The Respondent Trust began to consult with the National Clinical Assessment Service (NCAS) about how to manage concerns about the Claimant's surgery and capabilities. NCAS is a national NHS organisation which supports NHS organisations to assess and manage concerns about medical staff and to remediate these where possible.

17. In 2015 the Trust worked with the Claimant to manage the concerns about his practice, by attempting to set up an NCAS-assisted "Back on Track" programme. This was intended to assess and mediate concerns about the Claimant's practice in an external clinical setting, through a placement at another NHS organisation.

18. In July 2015 an incident occurred in which a patient suffered post-operative bleed following an operation by the Claimant. This was investigated as a serious incident investigation but, ultimately, Dr van Someran, Associate Medical Director of the Respondent, wrote to the Claimant on 10 June 2016

confirming that she had decided not to proceed with disciplinary action against the Claimant, although stating she had some concerns about his judgment which were consistent with previous concerns, Bundle pages 116-119.

19. Following the outcome of the investigatory process, the Trust then reengaged with NCAS and the Claimant to set up the previously proposed Back on Track placement at Northwick Park Hospital. A formal referral to NCAS was agreed and signed by both the Trust and the Claimant on 25 October 2016, Bundle pages 123-139.

20. After further discussions and negotiations, a Back on Track action plan was agreed between the parties at the end of May 2017, pages 140-153. A secondment agreement was concluded for the Claimant to carry out his placement at Northwick Park Hospital in June 2017, pages 154-159.

21. The host organisation under the Back on Track plan was Northwick Park Hospital. One of the development objectives set out in the Back on Track plan was a phased return to both emergency on call work and supervision of juniors, page 144.

22. Features of the secondment agreement concluded with the Claimant included paragraph 1.3, “..During the secondment the employee will report to Mr Bhavin Visavadia at the host (the “Supervising Manager”). The day-to-day direction and supervision of the Employee and his conduct and actions shall be exclusive responsibility of the Host during the secondment.” P154

23. The secondment agreement defined the Host as London North West Health Care NHS Trust, Northwick Park Hospital.

24. Another feature of the secondment agreement was as follows, “Paragraph 5.1. The Employee shall be entitled to annual leave during the period of the Secondment in accordance with his contract of employment. Other than in respect of annual leave which has been agreed between the Employer and an Employee prior to the Agreement Date, the Employer shall not agree to the Employee taking annual leave during the Secondment except with the prior approval of the Supervising Manager, such approval not to be unreasonably withheld or delayed.” P155.

25. By Paragraph 8.1, the secondment agreement provided, “The employee agrees to bear any additional travel and subsistence costs associated with this agreement.”

26. The Claimant initially agreed to carry out the Back on Track programme from the 6 June 2017 for 6 months through the placement at Northwick Park Hospital. The placement was fully funded by the Respondent Trust and was devised to improve the Claimant’s clinical management, planning and organisation of surgical cases, including identifying areas needed further development, improving team working skills, leadership and professional performance. The Claimant was given a structured working schedule which included frequent coaching and mentoring sessions with staff at Northwick

Park, followed by feedback and assessments. Under the agreement the Claimant was to perform his duties, report and be under the day to day direction and supervision of Mr Bhavin Visavadia, the Supervising Manager, who was Clinical Director for Head and Neck services at Northwick Park. For the duration of the Back on Track programme, the Claimant was, in fact, under the supervision of 3 Consultant Supervisors who provided direct clinical supervision, mentorship coaching and pastoral care, both informal and formal assessment, documentation and administration and ad hoc support. They were: The Supervising Manager; Mr Mahesh Kumar, Consultant Maxillofacial Head and Neck and Reconstructive Surgeon who acted as the Claimant's Clinical Supervisor; and Michael Gilhooly, Consultant Oral and Maxillofacial Surgeon, who was the Claimant's mentor. None of those people was employed by the Respondent Trust. They operated independently of the Respondent Trust in their working lives.

27. In the Claimant's schedule of discriminatory acts, acts 1 - 32 were said to have taken place between 20 January 2009 and July 2016. Paragraphs 34-38 were said to have taken place after May 2018; that is, after the Claimant returned to the Respondent's hospital following his Back on Track process.

28. Paragraph 33 related to the Back on Track process. The Claimant explained to me that he is complaining about the Back on Track agreement itself, which he says was not supportive and was assessment-based, rather than being supportive in a way that other processes had been to comparators in the Trust. The alleged perpetrators of this act were Vivienne van Someran, Jane Hawdon and Natalie Ware.

29. It was not in dispute that Vivienne van Someran left the Respondent Trust in December 2016 and that, thereafter, Jane Hawdon was the person with responsibility for managing the Back on Track process.

30. The Claimant also told me that his complaint at paragraph 33 regarding the Back on Track process relates to a meeting on 19 October 2017, when he met Jane Hawdon and Natalie Ware along with his own representative. He says that, at that meeting, the Claimant raised various issues about the operation of the secondment. He considered that an interim report which had been prepared by Mr Bhavin Visavadia was unfair in its criticisms of the Claimant's practice, was unfair in not permitting him to do on-call work and in proposing that the terms of the secondment be revised to aim for the Claimant returning to on-call work at the Respondent's hospital, rather than in the host hospital, page 173. He also contended that Mr Visavadia was not fair in the way that he treated the Claimant's holiday leave requests. The Claimant pointed to notes of the meeting on 19 October 2017 wherein it is recorded that he raised on-call payments and annual leave.

31. The Claimant made clear to me that he is not, and was not, contending that Mr Visavadia was discriminating against the Claimant in any way. Rather, the Claimant now contends that Jane Hawdon discriminated against the Claimant during this meeting by not challenging or changing Mr Visavadia's

decisions, which decisions, the Claimant contends, were simply unfair. He contends that it was Ms Hawdon who discriminated against the Claimant, even though Mr Visavadia was his Supervising Manager, with day-to-day direction and supervision of the Claimant at that time, and Ms Hawdon was not.

32. Looking at the Claimant's schedule, the alleged perpetrators of the acts at paragraphs 1-32 were as follows: Wayne Halfpenny, a former Consultant Maxillofacial Surgeon at the Trust; Richard Harrison, a former Medical Director at a predecessor organisation to the Trust, who sadly died in 2012; Ian Mitchell, a former Deputy Medical Director at the Trust who retired in 2017; Averil Dongworth, a former Chief Executive of a predecessor organisation until 2011; Michael Gaukroger, a former Consultant Maxillofacial Surgeon at the Trust until April 2016; Dan Rossouw, a Consultant Orthopaedic Surgeon at the Trust; Kaveh Shakib, a Consultant Maxillofacial Surgeon at the Trust who has resigned and will no longer be employed by the Trust from 30 April 2019; Cyrus Kerawala a Consultant Maxillofacial Surgeon who carried out the investigation for the Trust, reporting in December 2014, but was not employed by the Trust; Vivienne van Someran, a former Consultant Paediatrician and Associate Medical Director at the Trust who left in December 2016; Natalie Ware, Head of Workforce at the Royal Free Hospital; Gareth Jones, Deputy Director of Employment Services for the Trust; Suzanne Althausser, Divisional Director for SAS Division at the Royal Free Hospital and Simon Whitley, Consultant Maxillofacial Surgeon at Barts Health and not an employee of the Trust.

33. With regard to the allegations which postdate the Claimant's return to work, the following 3 perpetrators are relied on: Jane Hawdon, the current responsible officer and a Consultant Neonatologist at the Trust; Deepak Komath, Consultant Oral Maxillofacial Surgeon and Clinical Lead at the Trust; and Julie Kerr, who is an Operations Manager at the Trust.

34. The Claimant does not rely on any further alleged discriminatory treatment by the Respondent between 19 October 2017 and his return to work at the Respondent in May 2018.

35. In paragraph 34 of his schedule of alleged discriminatory treatment, he complains that there was a failure to support him on his return to work at the Respondent. He explained, in evidence, to the Tribunal that this constituted a failure to allow the Claimant to take over face and neck surgery from a locum who had been appointed in January 2018. The Claimant explained that he had extended his Back on Track programme by 3 months at Northwick Hospital, in order to take advantage of an opportunity to perform complex face and neck surgery. He says that, when he returned to the Respondent in June 2018, he considered that the Respondent ought to have allowed him to undertake such surgery, rather than allowing the locum who had been appointed in January 2018 to do that work.

36. The one instance of discrimination, therefore, alleged during the Back on Track programme is the meeting on 19 October 2017.

37. In evidence to the Tribunal, the Claimant confirmed that he was aware of his ability to bring a claim to the Employment Tribunal and that he had considered doing so in about 2015-2016. He said that he had decided, instead, to follow the Back on Track programme.

38. It was not in dispute that the Claimant had raised a grievance during his employment and, therefore, he was capable of raising complaints about discrimination. The Claimant had Union representation from at least 2014 and was represented by solicitors Hempsons in his correspondence with the Trust for much of 2016.

### Discussion and Decision

39. I have found, on the facts, that the Claimant was seconded to Northwick Park Hospital between 6 June 2017 and 14 May 2018. I have found that the arrangements for that secondment were finalised by a Back on Track agreement at Bundle page 140 and a secondment agreement at Bundle page 154.

40. In so far as the Claimant complains about the terms on which his secondment was arranged, those were crystallised on the date that the secondment and Back on Track agreements were concluded, in June 2017.

41. During the period of the secondment and Back on Track agreement, the Claimant alleges only one act of discrimination by the Respondent's employees towards him. He does not allege that Northwick Park was discriminatory towards him; he specifically says that his Supervising Managers there did not discriminate against him. I consider that it is tendentious for the Claimant to contend that, in October 2017, Ms Hawdon discriminated against him by failing to rectify or challenge a decision of a manager which the Claimant says was NOT itself discriminatory - and in the circumstances that that (non discriminating) manager was responsible for his day-to-day direction and supervision, not Ms Hawdon. It stretches credulity for the Claimant to contend that Ms Hawdon would have treated a comparator in the same circumstances differently. In other words, that Ms Hawdon would have overruled or challenged the decision of a manager who had day-to-day direction of a comparator of a different race, at a different hospital.

42. In any event, that alleged act of discrimination by Ms Hawdon is, by its very nature, different to the other acts of discrimination alleged against the Respondent. It is an alleged failure to challenge an external body's decisions in relation to the Claimant. It is to be contrasted with the Claimant's other allegations: the Respondent's own alleged acts in failing to support the Claimant, or failing to permit him to undertake particular surgery, or subjecting him to investigations, or to an unfair secondment/Back of Track agreement.

43. That is the only alleged discriminatory act of the Respondent during the 9 month Back on Track secondment, when supervision and direction of the Claimant, including decisions about his holiday, were handed over to a third



party. I consider that there is no prima facia case that that alleged act is linked to the earlier, or later, acts of the Respondent, so as to form part of a continuing act or to constitute an ongoing state of affairs.

44. Even if I am wrong in that, I consider that the Claimant alleges no further acts of discrimination by the Respondent between October 2017 and May 2018. During that period, the Claimant underwent a very successful secondment, away from the Respondent, for 7 months. The individuals involved in that secondment were not alleged to have been responsible for any discriminatory acts. There was a separation of the Claimant from the Respondent throughout the period October 2017 to May 2018. There is no prima facia link between any acts when the Claimant went back to work at the Respondent in May 2018 and those in October 2017 and earlier.

45. The Claimant contends that the period of Back on Track remediation was successful; he says that he was able to undertake complex face and neck surgery during it, which the Respondent had not permitted him to do previously. That enabled him to return to work successfully at the Respondent's hospital and, afterwards, to secure alternative work with a different employer.

46. Seeing that there was no continuing act during the period from October 2017 to May 2018, the alleged acts in October 2017, and before, are out of time.

47. I have considered whether it is just and equitable to extend time for their presentation. I decided that it would not be just and equitable so to do. I have taken in to account a number of factors in coming to my decision. Many of the allegations are historic, going back as far as 2009, and they relate to a number of alleged perpetrators who are no longer employed by the Trust. Indeed, one of them has sadly died. I consider that there is a real risk that the cogency of evidence would be affected by the very considerable delay in bringing the claims. I take into account the fact that the Claimant was aware of his ability to bring an Employment Tribunal claim and contemplated doing so in 2015/2016. He had the assistance of his trade union in 2014 -2015 and solicitors in 2016. The Claimant took the considered decision not to bring a claim to the Tribunal in 2015/2016, but to follow the Back on Track programme instead.

48. It would not be just and equitable to extend time for the Claimant to bring claims now, which the Claimant decided not to pursue at an earlier stage, at a time when the matters would have been fresher in the Respondent's witnesses' minds.

49. That being the case, the alleged acts of discrimination before the Claimant returned to work in May 2018 have been presented out of time. The Tribunal has no jurisdiction to consider them and I strike them out.

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Employment Judge Brown

Dated: 9 May 2019

Judgment and Reasons sent to the parties on:

14 May 2019

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For the Tribunal Office