



# EMPLOYMENT TRIBUNALS

**Claimant:** Giovanni Battista Lo Bianco

**Respondent:** South Western Ambulance Service NHS Foundation Trust

**Heard at:** Exeter Employment Tribunal (Via VHS)      **On:** Thursday, November 3, 2022

**Before:** Employment Judge M. Salter

**Representation:**  
Claimant: Ms. Clarke, counsel.  
Respondent: Ms. Greenley, counsel.

## JUDGMENT

Although the Claimant's claim has been presented outside the statutory time limit provided for in the Equality Act 2010, it has been presented within such period as the employment tribunal considers just and equitable.

## REASONS

*References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.*

*References in round brackets are to the paragraph of these reasons or to provide definitions.*

### INTRODUCTION

1. These are my reasons given orally at the final hearing on Thursday, 3<sup>rd</sup> November 2022. As was explained to the parties, in accordance with Rule 62(3) of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Regulations") written reasons will not be provided unless they are asked for by any party at the hearing or by a written request presented within 14 days of the sending of the written

record of the decision. If no such request is made, then the tribunal will only provide written reasons if requested to do so by the Employment Appeal Tribunal or a court.

2. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (“the 2013 Rules of Procedure”). Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.
3. These reasons are produced at the request of the Respondent, who was represented throughout the hearing by counsel and solicitor.

## **BACKGROUND**

### The Claimant’s case as formulated in his ET1

4. The Claimant’s complaint is, in short, he was subjected to treatment by work colleagues that included mocking his Italian accent and making comments about his nationality. He complains about direct discrimination, and harassment (both related to race and of a sexual nature). The last act complained of was on 9<sup>th</sup> March 2021
5. The Claimant commenced ACAS conciliation on 10<sup>th</sup> September 2021, which ended on 14<sup>th</sup> October [150]
6. His Form ET1 [4], was presented to the tribunal on 12<sup>th</sup> November 2021,

### The Respondent’s Response

7. In its Form ET3, received by the tribunal 4<sup>th</sup> February 2022, the Respondent denies discrimination or vicarious liability for the actions of its employees, it also advances the statutory defence. [34]

#### Relevant Procedural History

8. The matter came before E.J. Livesey on 15<sup>th</sup> June 2022 for a case management Preliminary Hearing during which today's hearing was listed. It was accepted that all of the claimant's complaints had been presented out of time. At that hearing, both parties were represented by counsel.
9. There was quite some debate today about the effect of E.J. Livesey's order and what the Claimant's case was. Ultimately I determined the matters before me and gave an oral judgment at the time. I will not repeat that here, and no written reasons were requested for that judgment
10. After the Case Management Hearing, the Claimant produced further particulars of his claim [48]. This included allegations concerning comments about his driving; his status as an immigrant and discrimination and harassment linked to his personal relationships.
11. In its amended response the Respondent sought to strike out the claim of discrimination based on status as an immigrant [59]

#### TODAY'S HEARING

##### General

12. The matter came before me on 3<sup>rd</sup> November 2022. The hearing had a two-day time estimate. Both parties were represented by the same counsel who had attended Judge Livesey's hearing.
13. This was a remote hearing which was not objected to by the parties, being conducted entirely by the VHS video platform. A face-to-face hearing was not held because it was not practicable and no one requested the same it was conducted under rule 46 of the 2013 Rules of Procedure.
14. The parties agreed to the hearing being conducted in this way.

15. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no significant difficulties.
16. The participants were told that it was an offence to record the proceedings.
17. Evidence was heard from the Claimant via video link. I was satisfied that he was not being coached or assisted by any unseen third party while giving their evidence. He was sat in front and centre of the camera and all others in the room at the time were sitting behind him.

#### Particular Points that were Discussed

##### *Timetabling*

18. As indicated above there was a long discussion and submissions on the extent of today's hearing. Ultimately this led to me deciding the issue before me was to determine if the complaint had been brought within such other period as I thought just and equitable in accordance with s123 of the Equality Act 2010.
19. It was agreed that the last act complained of was the 9<sup>th</sup> March 2021 and that the claim, presented as it was on the 12<sup>th</sup> November 2021 had been presented out of time. ACAS conciliation took place between 10<sup>th</sup> September 2021 and 14<sup>th</sup> October 2021.
20. The Claimant accepted that if I did not extend the time for the presentation of the claim in relation to the last of the acts then the other claims would fall.
21. However, if the claim had been presented within such period as I consider just and equitable, then the issue of whether the preceding acts can be said to be conduct extending over a period would be a question for the tribunal at Final Hearing and, in any event, they would form background facts for the claim that was proceeding.

#### DOCUMENTS AND EVIDENCE

##### Witness Evidence

22. I heard evidence from the Claimant who gave evidence by way of written witness statements that I had read in advance of him giving oral evidence. He was cross-examined.

23. I also had a statement from Emily Claire Lo Bianco, the Claimant's daughter. The Respondent indicated it did not have any questions for Ms Lo Bianco, and so it was unnecessary for her to attend in person. I have taken into account those aspects of her witness statement that concern matters she saw, heard or did personally. I have not attached weight to those parts of her statement in which she simply sets out what her father told her what happened as I have heard evidence from her father on this.

Bundle

24. To assist me in determining the matter I have before me today an agreed bundle consisting of some 212 pages with additional pages being added separately. My attention was taken to a number of these documents as part of me hearing submissions and as discussed with the parties at the outset of the hearing, before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

**SUBMISSIONS**

25. I had written submissions from both parties. Since the skeletons are in writing it is unnecessary to repeat them here and they are referred to as appropriate in the conclusions. Both parties supplemented their arguments orally which I have considered with care but do not rehearse here in full.

**MATERIAL FACTS**

26. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all the evidence before me, taking into account relevant documents where they exist, the account given by Mr. Lo Bianco in evidence, both in his statement and in oral testimony.
27. So far as is relevant for the purposes of this judgment, at the time he presented his Claim Form, the Claimant was employed by the Respondent as an Emergency Care Assistant. He has since been dismissed from this role on grounds of ill health capability.
28. What transpired as being his last day at work was 9<sup>th</sup> March 2021, as he ultimately did not return to work before his employment was terminated in

September 2022. He is currently in his notice period and will be until mid-December 2022.

29. The Claimant complains of various alleged acts of discrimination over a period of time. The last of these acts occurred, he says, on the 9<sup>th</sup> March 2021. The limitation period for such a claim would expire on the 8<sup>th</sup> June 2021 (s123(1)(a) Equality Act 2010), subject to any extension of time granted by compliance with ACAS mandatory conciliation, and any exercise of the tribunal's discretion to extend time.
30. ACAS conciliation took place between 10<sup>th</sup> September 2021 and 14<sup>th</sup> October 2021. He was unaware that this had commenced (or concluded) as he says his union did not notify him that they had commenced this process on his behalf, or that the process had been completed until he was sent the certificate on 9<sup>th</sup> November 2021.
31. At the time his union commenced this process the Claimant was out of the country and he was clear he did not authorise this process.
32. He did not present his claim until Friday, 12<sup>th</sup> November 2021 [1].
33. On 23<sup>rd</sup> April 2021, the Claimant presented his grievance. This document refers to the Equality Act 2010. He was clearly therefore aware of the 2010 Act. His grievance was not heard until the day limitation expired (8th June 2021). Throughout this period he was taking advice from lawyers and union officials. Until November 2021, this was Thompsons and from that date, it became those whom the Claimant instructs now.
34. Between his leaving work in March 2021 and presenting his claim form the Claimant was seeing his GP and I have been taken to various extracts of his GP records which show an account of his health that differs, and sometimes is at odds, with the account has given in evidence before me: the documents show . The Claimant explained away this on the basis that his “aim was to go back to work” so minimised everything with his GP, and that he did not tell the truth to his GP.
35. At the time he presented his claim form the claimant has progressed though his grievance, and in evidence before me he told me he had taken a

conscious decision to not issue a claim until after his grievance was resolved as he wished to deal with the matters that way.

36. He had access to advice from lawyers: his currently instructed solicitors as well as union solicitors.
37. It was not suggested that he had received advice to delay the issuing of proceedings until he had completed his grievance or that he was told that he was not permitted to have issued until the internal process had been exhausted. There was no suggestion that he had received any negligent advice.

## THE LAW

### Statute

38. So far as is relevant the Equality Act 2010 states:

#### **123 Time limits**

- (1) Subject to 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;
  - (b) failure to do something is to be treated as occurring when the person in question decided on it.

### Case Law

39. Time limits were not just targets, they were 'limits' and were generally enforced strictly. A good reason for an extension generally had to be demonstrated (Robertson v Bexley Community Centre [2003] IRLR 434, CA), albeit the absence of a reason would not necessarily have been determinative (Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050, CA).

40. Tribunals had been encouraged to consider the factors listed within s.33 of the Limitation Act 1980 (British Coal Corporation v Keeble and ors [1997] IRLR 336, EAT), although it was not mandatory to do so; the length and reasons for the delay, the extent to which the Claimants had sought

professional help and the extent to which information was not known to them until later and the degree to which the Respondents ought to have been blamed for any late disclosure. Consideration also had to be given to whether the Claimants had dragged their feet once they knew of all of the relevant information and, if so, to what extent.

41. It used to be thought that the touchstone was the issue of prejudice and whether and to what extent delay had caused prejudice to either side but, as was made clear in Miller v MoJ UKEAT/0003/15, at paragraph 13 by Laing J, whilst that was another, important factor to take into account, it was not determinative.

## CONCLUSIONS ON THE ISSUES

### General

42. Having regard to the findings of relevant facts, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on whether the claim has been presented within such time as I consider just and equitable.

### Address any general issues such as credibility

43. I was concerned by the claimant's evidence that he did not write his statement just signed it, and the fact he could not remember much of the relevant period. I have given him all due leeway that I can with his evidence owing to the clear period of ill health in the second quarter of 2021.

### Findings on the Issues

#### *Issue 1: was the Claim Presented in Time?*

44. The Claimant accepts, as he must, that none of the acts complained of have been presented in time.
45. I am, therefore in a situation where I must consider the discretion contained within s123(1)(b) of the Equality Act 2010.

#### *Issue 2: as such, was the claim form presented within such other period as the employment tribunal considers just and equitable?*

46. Whilst Employment Tribunals have a wide discretion to allow an extension of time under this section, this does not however mean that the extension is automatic. There are also some essential legal considerations that flow from the statutory time limits framework itself, that form part of the general



backcloth in every case, in particular, the inherent importance attached to observance of time limits for litigating, and finality in litigation, even where, as here, there is considerable flexibility in the test that the tribunal must apply when deciding whether or not to extend time. It is also established that the onus is on a claimant to persuade a tribunal that there is some good reason why it would be just and equitable to extend time in the given case. The Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA, that:

*'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.'*

47. It would be wrong to think that exceptional circumstances are necessary, all that is required is that it is just and equitable to extend time: Pathan v South London Islamic Centre EAT 0312/13

#### Factors in General

48. In s123 Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list, and whilst a useful guide of some factors can be found in s33 of the Limitation Act 1980— Keeble; for tribunals, however, this is only a guide to some potentially relevant factors: Southwark London Borough Council v Afolabi [2003] ICR 800, CA and a mechanistic use of the so-called *Keeble* checklist is to be deprecated, what factors are relevant in the given case is case-sensitive, and so must be identified by the tribunal, case by case. These include:

- (a) the length of, and reasons for, the delay;
- (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
- (c) the extent to which the party sued has cooperated with any requests for information;
- (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
- (e) the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

#### Particular factors

49. There is no set list of factors that should be considered, however the parties have asked me to consider the factors of:

- (a) The reasons for non-compliance with the time limits (Respondent opening Note paragraph 2)
- (b) Length and reasons for the delay (Respondent opening note paragraph 10, paragraphs 34, 41-44 of the Claimant's skeleton argument);
- (c) Whether the delay has prejudiced the Respondent (paragraph 10 Respondent opening note, paragraph 34, 45-47, 51-52 of the Claimant's skeleton argument);
- (d) The Claimant's health (paragraphs 12-15 of the Claimant's skeleton argument);
- (e) The merits of the claims (paragraphs 35-36, 53-56 of the Claimant's Skeleton argument);
- (f) The pursuit of internal processes (paragraph 37 of the Claimant's skeleton argument);
- (g) The speed at which the Claimant acted once he was aware of the facts underlying his claims (paragraph 49 of the Claimant's skeleton).

50. As a matter of law, there is no particular feature that must necessarily be present in order for a just and equitable extension to be granted, nor that, if present, is automatically sufficient to warrant such a grant. However, some factors are, as it is put, customarily *relevant*. In every case, the implication of refusing to extend time will be that the claimant will not be able to have a complaint adjudicated on its merits, as they would, had time been extended. Conversely, the effect of granting an extension of time will be that a respondent will be obliged to defend a complaint on its merits, and exposed to the risk of losing, in a way that would not be so, were time not to be extended.

*The Length of the Delay*

51. The delay here was relatively significant. It was not just a matter of days or weeks. It was measured in months in respect of some allegations and years in others. At the shortest, the delay here is a little over 5 months from the 8<sup>th</sup> June 2021 until the 12<sup>th</sup> November 2021. It is against this backdrop I consider the other factors.

*The explanation for the delay*

52. The Court of Appeal in Morgan held that the discretion under S.123 EqA for an employment tribunal to decide what it 'thinks just and equitable' is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant.

53. I do consider, however, that the lack of a reason may, however, be a factor to consider.
54. Here the Claimant was aware of his rights from at least April 2021, and had medical issues that were pronounced until June or July but then, on the papers, I have seen, receded considerably (I have already commented on the claimant's evidence and how it differs from his medical records), he then took a conscious decision, after advice, to seek resolution from the internal process.
55. There was a considerable delay in that process with his first grievance meeting occurring on the day limitation expired (8<sup>th</sup> June 2021) as the delay dragged on the risk of him not satisfying a tribunal to exercise its discretion and extend time also increased, but he could see from that date that his employers were eventually engaging with his complaint and in October he exercised his right to a further appeal.

*Balance of prejudice*

56. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent with the prejudice that would occur to the Claimant if I did not extend time for a period ii consider just and equitable.
57. Whilst some prejudice will always be caused to the employer if an extension of time is granted given that the case would otherwise be dismissed. However, the prejudice caused needs to amount to more than simply that.
58. What prejudice has been caused here? From the Claimant's point of view, if the complaints were dismissed, he would obviously lose his rights to have them determined on their merits.
59. Many of the allegations concerned statements and oral communications, recollections of which would age with time, but this would have been the situation if a claim was issued on 7<sup>th</sup> June before the limitation expired because of the age of some of the allegations. In this matter, however, the Respondents were able to provide a fully pleaded response to these allegations when it entered its response, so it appears able to obtain instructions on these older allegations.

60. Beyond the obvious additional cost and expense of having to defend the complaints, in submissions or in cross-examination of the Claimant, the Respondents did not identify any particular evidential or other prejudice that they would have suffered if the claim was permitted to continue out of time,
61. I consider that the balance of prejudice here favours the Claimant in these circumstances.

*The Claimants' awareness of the relevant facts:*

62. The Claimant had knowledge of the facts his claims are well now to him, this is not a case where the conduct and actions of the alleged perpetrators was concealed or in any way hidden from the Claimant.

*Ignorance of the law*

63. this is not the case here that the claimant was unaware of the law, it is unarguable that he was aware of the Equality Act 2010 in April 2021

*Strength of case:*

64. In Lupetti v Wrens Old House Ltd 1984 ICR 348, EAT, the Appeal Tribunal noted that tribunals may, if they think it necessary, consider the merits of the claim, but if they do so they should invite the parties to make submissions. However, this is not necessarily a definitive factor: even if the claimant has a strong case, time may not be extended for it to be heard. In Ahmed v Ministry of Justice EAT 0390/14 an employment tribunal found that A, a legal adviser in the magistrates' courts, had been treated less favourably because of race. However, the tribunal considered that it was not just and equitable to extend the time to allow the claim even though its merits were strong, given that A had given no satisfactory explanation for why the claim was not presented in time and given the difficulty some witnesses had in recollecting what had happened. The EAT upheld the tribunal's decision.

65. The claimant's case on 9<sup>th</sup> March 2021 complaint is all documented, whether it occurred at all is not something that has to be determined having to weigh up the competing accounts of the parties: it is plain that the email was sent and that there were elements of it that are related to race. Any

connection between this email and other acts will be a matter for final hearing.

*Ongoing internal procedure*

66. In Apelogun-Gabriels v Lambeth London Borough Council and anor 2002 ICR 713, CA, the claimant presented a race discrimination claim that was out of time due to the fact that he had been seeking redress through the employer's grievance procedure. The Court of Appeal dismissed his appeal but took the opportunity to clarify the case law in this area. There is no general principle that it will be just and equitable to extend the time limit where the claimant was seeking redress through the employer's grievance procedure before embarking on legal proceedings. The general principle is that a delay caused by a claimant awaiting completion of an internal procedure may justify the extension of the time limit but it is only one factor to be considered in any particular case.
67. The grievances were relevant in two ways here; they reflected the Claimants' desire to pursue an internal process with a view to resolving their differences with their employer. Although that course of action was no longer a mandatory precursor to proceedings in the tribunal, it was still to have been encouraged. But secondly and more importantly, the grievances served to crystallise the allegations and put the Respondents on notice that the Claimants considered that their treatment had been discriminatory, that they had received advice, had contemplated proceedings and were pursuing internal procedures first. It gave the Respondents the opportunity to take steps to investigate and preserve evidence around the allegations.
68. I have heard the Claimant wished to resolve his complaints through the process of his employer's grievance process, and that is to be commended. I did not consider from the evidence I had heard that he was using this as a smoke screen for presenting his claim late, and concluded he was genuine in this assertion.
69. Speed he acted within three days of receiving his ACAS certificate from his union

Conclusions on the Complaints of

70. In determining whether the claim form has been presented within such time as I consider just and equitable, I do not mechanically work my way through the above factors and tally a score for each party then see who has the most points and let that determine which party wins. The approach is more nuanced than that and involves taking an overall view of the circumstances in the round. Whilst I consider this matter finely balanced I think that the Claimant has shown me, on the balance of probabilities, he has presented his claim form within such time as I consider just and equitable in light of the interplay between various facts above.

Employment Judge Salter  
Date: 2 December 2022

Reasons sent to the Parties: 8 December 2022

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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