



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr I C Ofoha

**Respondent:** North Cumbria Integrated Care NHS Foundation Trust

**HELD AT:** Manchester **ON:** 8 November 2024

**BEFORE:** Employment Judge Fearon

## REPRESENTATION:

**Claimants:** Mr Hersee, lay representative

**Respondent:** Mr English, solicitor

## RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant does not have the relevant 2-years' service to claim unfair dismissal and therefore the unfair dismissal claim is dismissed.
2. It was reasonably practicable for the Claimant's claim for unlawful deduction of wages to have been brought within the required time period and as it was not brought within the required time period the claim is dismissed.
3. The claimant's claim for race discrimination was not presented within the applicable time limit. It is not just and equitable to extend the time limit. The claim is therefore dismissed.

# REASONS

## Introduction

1. The claimant was employed by the respondent as a radiologist from 16 November 2020 until 12 April 2021 when his employment was terminated on grounds of capability. The claimant presented a claim on 1 May 2024 for unfair dismissal, other payments and race discrimination. The claimant alleges he was subject to race discrimination by several of the respondent's employees throughout his employment with the respondent. It is clear from Section 15 of his claim form, that the claimant accepts his claim was submitted out of time and he there sets out the basis on which he submits his claim should be allowed to proceed.
2. Judge Holmes directed that the respondent's response need only state whether the claims are resisted and set out the respondent's position on the claim being out of time and that the respondent did not need to respond to the merits of the substantive claim. The respondent in its grounds of response confirmed the claimant's claims were denied and they set out their position on time limits. The claim was listed for a public preliminary hearing to determine whether the claims brought have been brought out of time and where that is the case, whether to extend time so as to give jurisdiction to the tribunal over the allegations.

## The Issues for the Tribunal to decide

3. The issues to be determined were:
4. Does the claimant have the relevant 2 years' service to claim unfair dismissal?
5. Time limits – money claims “other payments”
  - 5.1 Why were the complaints not made to the Tribunal in time?
  - 5.2 Was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
  - 5.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within such further period as the Tribunal considers reasonable?
6. Time limits - discrimination
  - 6.1 Why were the complaints not made to the Tribunal in time?
  - 6.2 In any event, is it just and equitable in all the circumstances to extend time?

**Evidence**

7. I considered documents which the parties introduced in evidence in an agreed bundle of 690 pages which includes the witness statement of the claimant dated 24 October 2024. I heard sworn evidence from the claimant.

**Findings of Fact**

8. The claimant is Nigerian. He moved from Nigeria to the UK and on 16 November 2020 he started his employment with the respondent. The claimant was assigned a mentor at the start of his employment with the respondent, who was a senior radiographer. The claimant alleges that his mentor and other employees of the respondent treated him unfairly from the outset of his employment.
9. The claimant admits he made mistakes during his employment which were raised as performance and conduct issues. In oral evidence he confirmed he accepts the criticisms the respondent made of his performance were justified, but says the difficult and hostile circumstances in which he was working led to him making poor decisions.
10. The respondent invited the claimant to a disciplinary meeting to take place on 28 January 2021. He asked his mentor to accompany him to that meeting. The claimant's mentor, at that time, told the claimant about the Society of Radiographers (SoR) who may be able to assist him. The SoR is a trade union and UK professional body for radiographers. The claimant joined the Society of Radiographers straight away in January 2021 after being told about them by his mentor. He asked the SoR to assist him with the issues he had in his employment with the respondent, with how he was being treated by the respondent and with his disciplinary hearing. During oral evidence the claimant confirmed he told the SoR he was being unfairly treated by his manager and had been discriminated against, had not been supported by the respondent as an international recruit and had been treated differently to colleagues who had made similar mistakes to him. The SoR would not assist the claimant in relation to the disciplinary issues and meeting as they were issues arising before the claimant joined the SoR. The claimant says the SoR didn't mention the employment tribunal to him as he'd not lost his job at that time. The claimant did not seek any other advice at that time about his discrimination complaints and complaints of unfair treatment.
11. The outcome of the disciplinary meeting in January 2021 was that the claimant was downgraded to a band 4 radiographer. He was invited to a further disciplinary meeting on 19 February 2021 and on 12 February 2021 was provided with the documentation for that meeting. The claimant sought assistance at this time from The Nigerian Radiographers in Diaspora (NIRAD), a professional organisation. Dr Emmanuel Ehiwe, of NIRAD helped the claimant on a voluntary basis. I find the

claimant discussed his discrimination complaints with NIRAD: as he confirmed in oral evidence, he told them about the events which occurred with colleagues and how he had been treated differently. NIRAD advised the claimant to apologise to his employer; the claimant says this is because Nigerians have a deferential attitude to their employers and they took that position when assisting him. The claimant did not seek any other advice at that time about his discrimination complaints and complaints of unfair treatment

12. The claimant was dismissed by the respondent with 1 week's notice and his employment terminated on grounds of capability on 12 April 2021. Following his dismissal the claimant had to move out of the respondent's accommodation and moved in firstly with someone he met online, then with a Nigerian friend for a short period. At that time the claimant was focused on finding somewhere to stay and on submitting his asylum application.
13. The Claimant's professional regulator, the Health & Care Professions Council (HCPC) also investigated concerns with his performance in his role. The claimant sought help with the HCPC preliminary hearing in June 2021 from a Nigerian who helped him on a voluntary basis. He said that person, at the HCPC hearing, raised that the claimant had not been given adequate support, had been unfairly dismissed and had been subjected to discrimination by the respondent. The Health & Care Professions Tribunal suspended the claimant from practice on 11 June 2021.
14. The Claimant first raised complaints of race discrimination directly with the respondent in his appeal statement dated 25 June 2021, submitted just prior to the hearing of his appeal against the respondent's decision to dismiss him, which took place on 28 June 2021. The claimant did not attend that hearing and the respondent advised the claimant by letter dated 13 July 2021 that his appeal against dismissal was unsuccessful.
15. Following his suspension from practice on 11 June 2021, the claimant sought advice from a solicitor about his asylum application. He needed advice urgently as his suspension from practice would impact on his right to live and work in the UK. The claimant says he was vulnerable to deportation within 30 days without primary employment (and his primary employment had ended on 12 April 2021 although he had appealed). During oral evidence the claimant confirmed he told this solicitor about how he had been treated by the respondent in relation to issues of discrimination and unfairness. He says, "she never mentioned anything about any employment tribunal at all, although that was not her area of specialisation". The claimant did not follow up with this solicitor or any other legal professional at that time about any employment tribunal claim against the respondent.
16. A Nigerian person the claimant met online referred the claimant to Mr Hersee for assistance with the claimant's asylum application. The claimant first contacted Mr

Hersee around the end of 2021 to prepare for his asylum proceedings and he also discussed with Mr Hersee the issues he had had during his employment with the respondent. The claimant told Mr Hersee at the end of 2021 he would deal with any employment issues once his asylum had been granted. Mr Hersee advised the claimant he needed to deal with the HCPC and work issues before the asylum application was resolved as it could take years for asylum to be granted.

17. Mr Hersee assisted the claimant at the weekends, and they discussed his employment issues as well as his asylum application. Mr Hersee mentioned to the claimant the possibility of bringing employment tribunal proceedings and informed the claimant there were strict time limits to bring such proceedings. The claimant admits he was aware at that time of discriminatory comments made about him linked to his race, Nigerian. Mr Hersee advised the claimant to speak to a lawyer about the racist conduct which he did. The claimant says the lawyer advised his case "wasn't strong enough". The claimant says even had the lawyer advised he had a viable case, he was too stressed at that time dealing with the asylum process and HCPC proceedings to cope with bringing employment tribunal proceedings.
18. In oral evidence the claimant confirmed that in November/December 2022 he contacted a legal advice centre about a possible claim in the employment tribunal but they didn't get back to him. He didn't follow this up with them as he was focused on his hearing on 9 December 2022. He also confirmed in oral evidence that he asked the SoR for further advice at that time and told them about the discrimination and unfairness issues, but they didn't really help him again and therefore he stopped his subscription with them.
19. The HCPC removed the claimant's suspension from practice on 9 January 2024. From 9 January 2024, the claimant was able to practice with restrictions in place. He then started applying for jobs and whilst he felt ready to face bringing employment tribunal proceedings, he wanted to find a job to get back to work and practice first before dealing with any claim. The claimant was stressed in March 2024 after a job offer withdrawn.
20. The claimant contacted ACAS on 28 March 2024 and the ACAS certificate was issued on 2 April 2024. The claimant presented his claim form on 1 May 2024. The claimant confirmed in oral evidence that in April 2024 he was focused on enrolling for university and applying for jobs. He says once he had these matters sorted out, he then focused on submitting his employment tribunal claim.
21. The claimant's medical records confirmed had a MED3 (sick note) issued for stress at work on 18 March 2021 and was noted to have stress related problems on 14 June 2021. These dates coincide with the disciplinary and appeal proceedings/hearings taking place at around those times. On 7 January 2022 it is recorded the claimant tested positive for Covid and on 9 January 2022 the covid test result was negative. An entry for 22 March 2023 records a stress related

problem and difficulty sleeping. Amitriptyline 10mg was prescribed. In December 2023 the claimant was having still having difficulty sleeping. An entry in his medical records for 29 December 2023 notes the claimant's blood pressure was borderline raised following which he was given a 24 hour blood pressure monitor on 16 January 2024. An entry in January 2024 refers to the 24 hour blood pressure monitoring results and an urgent A&E referral. He was subsequently prescribed medication in February 2024 to control his high blood pressure.

22. Prior to 29 December 2023 the claimant does not appear to have been aware of having significant blood pressure issues. There are records of stress in March and June 2021 and March 2023. Throughout the period from April 2021 to May 2024 the claimant dealt with the asylum proceedings and HCPC proceedings and was not prevented from doing so by any medical issue. The claimant admitted in oral evidence he focused on his asylum application and making sure he had somewhere to live; these he said were his paramount concerns.

## Law

23. Section 94 of the Employment Rights Act 1996 (ERA) confers on employees the right not to be unfairly dismissed. Section 108 ERA provides that section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.
24. The right not to suffer an unauthorised deduction is contained in section 13(1) of the Employment Rights Act 1996 (ERA).
25. Section 23 ERA gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction from wages.
26. Section 23 (2) provides subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made. Section 23 (3) where a complaint is brought under this section in respect of—(a) a series of deductions or payments, the references in subsection (2) to the deduction is to the last deduction in the series.
27. Section 23 (4) provides where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.
28. Section 123(1) of the Equality Act 2010 states: "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."

29. I was referred by the respondent to case law including the case of Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132. The respondent also referred me to British Coal Corporation v Keeble [1997] IRLR 336, in which case it was suggested that the Tribunal should consider the factors referred to in Section 33 of the Limitation Act 1980, although this is not a simple checklist and the Tribunal is not obliged to consider each one. The factors are:

(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 had co-operated 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.

(e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

## **Discussion and conclusions**

### Unfair dismissal

30. The claimant was employed by the respondent as a radiologist from 16 November 2020 until 12 April 2021. He lacks the necessary 2 years' service to present a claim of unfair dismissal and accordingly the Tribunal does not have jurisdiction to consider the claimant's unfair dismissal claim. Even if the claimant had the necessary 2 years' service, his unfair dismissal claim would have been out of time for the same reasons as set out below in relation to the money claims for "other payments".

### Other payments

31. The claimant's employment was terminated, with one week's notice, and ended on 12 April 2021. The claimant alleges that in his final pay he was not paid sums due to him under his contract, including for time spent isolating for covid reasons and for relocation expenses (although expenses may not be wages for an unlawful deductions claim and the claimant did not indicate this was presented as a breach of contract claim). The claimant did not bring this claim within the initial 3 month period to do so which ended on 11 July 2021. He did not contact ACAS within that

initial 3 month period so there was no extension to the time limit by reason of early conciliation.

32. The claimant says the reasons why he did not contact ACAS or bring his claim earlier were that he was ill and stressed and his priorities at the time were to deal with his asylum claim and to secure somewhere to live. I find that whilst the claimant was suffering with stress in March and June 2021, that did not prevent him from dealing with his asylum and HCPC proceedings. I find he chose to prioritise his asylum claim and to secure somewhere to live having left the respondent's accommodation following his dismissal. The claimant knew that he had not been paid sums he considered were due to him within that three month period. He was aware of sources of advice and legal assistance available to him including from the SoR and online. He had sought advice in relation to work issues even prior to his employment terminating and had sought advice and assistance after his employment ended.
33. I find that it was reasonably practicable for the claimant's claim for unlawful deduction from wages to have been brought within the required time period and as the claim was not brought within the relevant 3 month period the claim is dismissed.

#### Race discrimination

34. Any acts of discrimination which took place during the claimant's employment with the respondent will have taken place prior to 12 April 2021. I will assume in the claimant's favour that he would establish that any earlier discriminatory acts would be found to be part of a continuing act ending with the decision to dismiss. The claimant's appeal hearing took place on 28 June 2021 and the outcome was confirmed to him by letter dated 13 July 2021. 13 July 2021 is the last date that there could have been any potential act of discrimination and on that basis time limits ran from that date and the claim should have been brought by 12 October 2021. The claimant presented his claim on 1 May 2024, nearly 2 ½ years after the 3 month time limit for bringing his discrimination claim expired. He did not contact ACAS within the initial 3 month period so there was no extension to the time limit by reason of early conciliation. The claimant acknowledges in his claim form that his claim has been brought out of time.
35. In considering whether it would be just and equitable to extend the time limit under Section 123(1)(b) I take account of the following factors.

*The length of and reasons for the delay and the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action.*

36. The claimant presented his claim nearly 2 ½ years after expiry of the primary time limit for bringing his discrimination claim. The reasons he gives for the delay are



that he was not physically or mentally well enough to bring his claim any earlier and could not cope with any proceedings additional to the HCPC and asylum proceedings.

37. In his claim form the claimant accepts he knew the level of discrimination was at what he describes "an actionable level" a year after his employment with the respondent ended, so on that basis April 2022. I find that he was aware of the possibility of taking action before then.
38. The claimant was aware of acts of discrimination against him prior to his employment with the respondent terminating. On or about 28 January 2021 he was informed about the Society of Radiographers (SoR). He then he joined the SoR immediately and sought their advice and assistance with his disciplinary issues and how he was being treated unfairly and in a discriminatory manner. Whilst the SoR did not assist, the claimant was clearly aware of the possibility of taking legal action but did not then seek to obtain further professional advice elsewhere than from the SoR at that time.
39. The claimant was subsequently assisted by NIRAD in relation to the disciplinary hearing on 25 March 2021, the appeal against his dismissal and the HCPC proceedings. The claimant told NIRAD about his issues and had opportunity to explore that with them and seek further advice.
40. The claimant sought advice from a solicitor about his asylum application and also told that solicitor about how he had been treated by the respondent in relation to issues of discrimination and unfairness. The solicitor did not give him specific employment law advice as that was not her specialism. The claimant, however, did not follow up with her to seek recommendations for someone who could assist him nor to seek advice elsewhere in relation to his possible discrimination claim.
41. It is clear from the evidence that the claimant had plenty of opportunity to obtain advice about bringing his discrimination claim prior to the primary limitation period expiring. By his own admission however, he prioritised other things: in the period after termination of his employment in April 2021, he prioritised looking for alternative accommodation on leaving the respondent's accommodation; following his suspension from practice by the HCPC on 11 June 2021, he prioritised his asylum application in circumstances where he was worried about the possibility of imminent deportation.
42. The claimant had sufficient information and advice to bring his discrimination claim by the end of 2021. Mr Hersee told the claimant around the end of 2021 that he had a potential discrimination claim against the respondent and that there were strict time limits for bringing such claims. Even having been given this advice the claimant took no steps to seek further legal advice or to take steps to bring employment tribunal proceedings at that time. Mr Hersee advised the claimant to speak to a lawyer about the racism which he did. The claimant says the lawyer

advised his case “wasn't strong enough”, but he did not seek a further opinion elsewhere about the strength of his claim on receiving that advice.

43. In 2022 the claimant focused on the asylum proceedings and took no steps in relation to present his discrimination claim to the Employment Tribunal. In November/December 2022 the claimant asked the SoR for further advice and contacted a legal advice centre about a possible claim. They didn't get back to the claimant but he did not follow up on getting further legal advice or on taking steps to contact ACAS or present his claim form, despite by this time being well aware of the strict time limits for bringing his claim in the Employment Tribunal and knowing by that stage that his claim was already out of time.
44. The claimant did not take any steps throughout 2023 to present any claim to the Employment Tribunal relating to his complaints of race discrimination and he further delayed at the beginning of 2024. Once the HCPC lifted his suspension from practice in January 2024, the claimant focused on looking for work. He did not take steps to contact ACAS until 28 March 2024. The ACAS certificate was issued on 2 April 2024 and the claimant left it a further month before presenting his claim form as in April 2024 he was focused on enrolling for university and applying for jobs.
45. The claimant submits his ill health contributed to the delay, in particular his mental health and his blood pressure. I do not accept that the claimant's ill health was a major factor in the delay in him presenting his discrimination claim.
46. It is clear from the claimant's medical records in the evidence bundle that he had periods of ill health. Stress is noted in March and June 2021 with stress and difficulty sleeping noted in March 2023. The medical records suggest the claimant's health conditions arose for specific periods and did not endure in a chronic state for the entire period between the claimant first being aware of his cause of action and taking steps to bring his claim.
47. Prior to 29 December 2023 the claimant was not aware of having high blood pressure and therefore that cannot have had any impact on the delay in him bringing proceedings prior to that time. He was prescribed medication for his blood pressure in February 2024 and says that he felt calmer from 9 January 2024, when his suspension from practice was lifted, so blood pressure issues did not cause any period of delay from then.
48. None of the claimant's health conditions prevented him from engaging and dealing with his asylum proceedings nor the HCPC proceedings. Throughout the period of delay the claimant also engaged in maintaining his skills and qualifications for practice and engaged in seeking employment. I find that the claimant's health did not prevent him from acting promptly and did not contribute to the delay. I find the reason for the delay in the claimant commencing his claim was that he took conscious decisions at various stages to delay bringing a claim and to instead

prioritise other legal proceedings, job searches, professional training and living accommodation.

*The extent to which the cogency of the evidence is likely to be affected by the delay*

49. The material events the claimant alleges amount to discrimination on the grounds of his race took place from November 2020 to July 2021. The claim should have been brought by 12 October 2021, the claim was presented on 1 May 2024. The passage of time will inevitably affect memories of events which occurred approximately 3 to 3 ½ years before the claim was presented. The claimant complains of issues arising during his probationary period with the respondent and whilst documentation is available relating to the disciplinary proceedings, the witness evidence of the individuals involved in the alleged discriminatory acts will be material to the claim. It is almost 4 years since the events took place and memories will have faded. The respondent as a result of the claimant's delay has been prevented from investigating the issues with those individuals whilst matters and events were still fresh in their minds. It is likely to be a further year at least before this claim would be listed for a full hearing which will impact further the cogency of the witness evidence presented to the Tribunal at a stage of approximately 5 years after material events took place.

*Conclusions and balancing prejudice*

50. I find any health issue arising did not prevent the claimant from taking advice on and presenting his employment tribunal claim earlier than he did. The claimant was aware of the events during his employment (in 2020/2021) giving rise to a discrimination claim. The claimant was, from the evidence, clearly aware no later than the end of 2021 that there were strict time limits for bringing a claim. He did not act promptly on the advice given and the knowledge he had, to then take steps to present his claim. I find the reason for the delay in the claimant commencing his claim was that he took conscious decisions at various stages to delay bringing a claim and to instead prioritise other legal proceedings, job searches, professional training and living accommodation.
51. The respondent submitted that the claimant's claims have little or no reasonable prospect of success. I make no specific findings on the merits of the claim and only note that the claimant received advice from a solicitor that his claim "wasn't strong enough" and that the claimant took no steps to pursue his claim earlier than May 2024, which is surprising if he were confident in the strength of his claim.
52. In balancing the prejudice between the parties, I take account that the claimant will of course be prejudiced if time limits are not extended as he will lose the opportunity to bring his claim. That said he had plenty of opportunity to present his

claim in time and chose not to do so. The respondent was not made aware of the claim until May 2024. If the claim were allowed to proceed the respondent would be facing a claim which would otherwise be time barred. The delay in the claim being presented has prejudiced the respondent in that there has been a significant delay between material events and the respondent being able to investigate issues relating to the claim and gather evidence to defend the claim. The cogency of the evidence will have been affected by the delay in the claim being presented as witness memories will have faded whereas had the claim been presented in time, memories of those involved in material events would have been fresh, particularly in circumstances where the alleged discriminatory acts took place during the claimant's employment and he could have complained about them when they occurred or immediately following his dismissal. I find the prejudice to the respondent greater if the claim is allowed to proceed than the prejudice to the claimant if the time limits were not extended so that his claim were not allowed to proceed.

53. Taking account of all the circumstances I conclude that it is not just and equitable to extend the time limit. The discrimination claim is therefore dismissed.

Employment Judge Fearon

Dated: 22 November 2024

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 December 2024

FOR THE TRIBUNAL OFFICE

Notes

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