EMPLOYMENT TRIBUNALS

Claimant: Dr S Mokhammad

Respondents: (1) General Medical Council
(2) HCL Doctors Limited
(3) University Hospitals Birmingham NHS Foundation Trust

Heard at: Birmingham Employment Tribunal (via video link)

On: 1, 2 February & 12 June 2023 (Judge alone)

Before: Employment Judge J Jones

Appearances
For the claimant: In person
For the first respondent: Miss L Amartey (counsel)
For the second respondent: Mr A Rozycki (counsel)
For the third respondent: Mr A Rhodes (counsel)

JUDGMENT

1. The claims of race discrimination against the First, Second and Third Respondent, and of discrimination on the grounds of religion or belief against the Third Respondent, are struck out as out of time. It would not be just and equitable to extend time to permit the claims, or any of them, to proceed.

REASONS

Background

1. By a claim form lodged on 18 February 2022, the claimant brought claims of unfair dismissal, race discrimination and discrimination on the grounds of religion or belief. This followed a period of early conciliation with each respondent from 20-21 January 2022.

2. The claimant's discrimination claims were based on the following protected characteristics. He was born in Afghanistan and is related to the ethnic group Pashtoon. He described his religion or belief as "non-practising Muslim".

3. The claims arise from an incident that occurred on 17 May 2017 when the claimant was working as a doctor on assignment from the second respondent ("HCL") with the third respondent ("UHB"), at the Queen Elizabeth Hospital (QE) in Birmingham. In summary, a fracas took place in the car park at the QE involving 4 car park attendants and the claimant. Some of the former made complaints against the claimant alleging that he had been aggressive and threatening and used foul and abusive language towards them and about their family members. The claimant complained that it was the car park attendants who were abusive to him. The first respondent ("GMC") became involved following UHB's referral of the claimant to that professional body in light of his alleged conduct during the incident.

4. A preliminary hearing for case management took place on 6 July 2022 when Employment Judge Connolly established that the claims made by the claimant under the Equality Act 2010 (EqA) were of direct race discrimination against all 3 respondents and discrimination on the grounds of religion or belief against UHB. The claim of unfair dismissal was dismissed upon withdrawal by the claimant.

7 Employment Judge Connolly ordered that there should be a preliminary hearing in public to consider:

   7.1 whether the claimant needed permission to amend his claim in order to include certain contested issues;
   7.2 if so, whether permission to amend the claim should be granted;
   7.3 whether any of the claims had been lodged out of time and if so, whether time should be extended to permit the claims to proceed.

   For simplicity, the first two of these issues will be referred to in these reasons as "the amendment point" and the third as "the time point". The respondents will be referred to as the GMC, HCL and UHB respectively.

5. The claims and issues were set out in a Case Management Order (CMO) signed by Employment Judge Connolly on 8 July 2022 (preliminary hearing file, p142). The parties were required to write to the Tribunal and the other parties within 7 days if they considered the list of claims and complaints was wrong or incomplete. The claimant wrote on 18 August 2022, setting out a number of amendments that he wished to make to the draft issues. The respondents were then required to confirm in writing to the Tribunal which complaints they alleged had not been raised by the claimant in his claim form and thus, in their view, required the Tribunal's permission to amend the claim, which they each did.

The hearing

6. The hearing was successfully conducted by video conferencing. All parties – and the claimant in particular as he had a stated disability – were reminded that adjustments could be made to the process and hearing timetable upon request. Breaks were taken regularly.

7. At the outset of the hearing, the Tribunal went through each listed issue/

allegation against each respondent with the claimant as they had been set out in the CMO, recording the claimant's requested amendments and confirming that he was content that the issues, as amended, reflected the claims he wished to bring to the Tribunal. The respondents then each confirmed their position in relation to the amendment point.

8. Having carried out that exercise, the list of issues was as follows. The numbering below reflects the numbering in the CMO for ease of reference. Text in red denotes amendments that the claimant wished to make to the list of issues and underlined text shows those allegations (or parts of allegations) which the respondents respectively asserted were not in the claim form and that the claimant therefore required the Tribunal's permission to amend to include.

Claims against the GMC

48. As against the GMC, the claimant alleges that they directly discriminated against him because of his race as follows:

48.1 After a referral by the Trust on 26 May 2017 and on or before 1 August 2017, they initiated an investigation into conduct allegations against the claimant arising out of the incident on 17 May 2017;

48.2 Between August 2017 and May 2018, they provided details of the allegations against the claimant which they were investigating to (a) hospitals at which he had worked, in particular, St.Helen's & Knowsley Teaching Hospitals, Coventry Hospital, Good Hope Hospital and Queen's Hospital Burton and/or (b) to an agency for whom he worked, the ID medical locum agency;

48.3 On 10 May 2018 they referred the conduct allegations to the MPT;

48.4 In or about October 2018, they provided details of the allegations against him to St.Helen's & Knowsley Teaching Hospitals and the West Midlands Deanery for GP training (leading to a period of suspension from training);

48.5 On 26 January 2019 they published details of the warning issued by the MPT on their website and retained it on their website despite the fact it was under appeal by the claimant;

48.6 Prior to the High Court hearing on 4 August 2021, they provided information to St.Helen's & Knowsley Teaching Hospitals and the West Midlands Deanery for GP training that the claimant had brought a claim for judicial review against them.

Claims against HCL

50. As against HCL, the claimant alleges that they directly discriminated against him because of his race as follows:

50.1 between 17 and 25 May 2017 they failed to adequately investigate the incident which had taken place on 17 May 2017, in particular, they failed to obtain CCTV footage;

50.2 on 17 May 201 7, they terminated the claimant's assignment with the Trust at the Queen Elizabeth Hospital when they should have resisted the Trust's request instruction that they do so and/or pressed for a fuller Investigation;

50.3 failed to pay the claimant for his shift on 17 May 2017 and for an unidentified number of shifts between 24 April and 16 May 2017 because they insisted that the claimant obtain a signature from a Trust employee when he was unable to do so;

50.4 failed to offer the claimant any other shifts at alternative locations after 17 May 2017;

50.5 Between August 2017 and May 2018, they provided details of the allegations against the claimant which the GMC were investigating to (a) hospitals at which he had worked, in particular, Coventry Hospital, Good Hope Hospital and Queen's Hospital Burton and/or (b) to an agency for whom he had previously worked, the ID medical locum agency;

50.6 In or about October 2018, they provided details of the allegations against him to the West Midlands Deanery for GP specialty training (leading to a period of suspension from training);

50.7 Prior to the claimant's hearing before the MPT on 14 January 2019, provided the GMC with the claimant's written complaint to them about the incident 17 May 2017 without the claimant's permission;

50.8 In or about January 2020, because they were a partner organisation in the GP Specialty training and/or employed his supervisors, they were responsible for a deliberately false entry in his training portfolio to the effect that he had attended 2 teaching sessions out of 12 when he had attended 10 sessions.

Claims against UHB

53. As against the Trust, the claimant alleges that they directly discriminated against him because of his race or because of religion or belief as follows:

53.1 On 17 May 2017, the Deputy Medical Director of the Trust, Dr Kayani, terminated his assignment at the hospital immediately and without adequate investigation into the incident;

53.2 On 17 May 2017 and in the weeks thereafter, Dr Kayani failed to provide the claimant with a written record of the allegations against him. of the meeting he had with the claimant that day and/or of the reasons for the termination of his assignment;

53.3 On 26 May 2017, Dr Kayani referred the claimant to the GMC.

8 In relation to the claim of discrimination on the grounds of religion or belief, the claimant clarified that the complaints against UHB (as set out at 53.1 – 53.2 above) were claims of discrimination on the ground of religion or belief in the alternative to direct race discrimination. The basis of those claims, he said, was that, on 17 May 2017, he told Mr Kayani that he was

from Afghanistan, and this led Mr Kayani to make the assumption that he is a fundamentalist Muslim when in fact he is a non-practising Muslim. It was because of this perceived fundamentalist religion or belief that he said Mr Kayani went on to treat him less favourably in the ways outlined, which UHB denied.

9 The tribunal was provided with a joint file of documents 878 pages in length, although many of the documents were not referred to during the hearing by either party. References in these reasons to page numbers are references to pages of that file, unless otherwise stated.

10 The claimant produced a witness statement upon which he was cross-examined. Although English is not his first language, the claimant speaks it well and was clear at the case management preliminary hearing that he did not wish to have the assistance of an interpreter. The claimant represented himself and was accompanied to the hearing by a solicitor, Mr Tim Johnson, who was there to observe the proceedings and take a note only.

11 HCL called Ms Katie Lubomski-Wiggan, Head of Compliance, as a witness and UHB called Mr Javid Kayani, Medical Director (Corporate), formerly deputy Medical Director, to give evidence.

12 Counsel for the GMC and HCL submitted skeleton arguments prior to the hearing. By agreement, all 4 parties provided their closing submissions in writing.

13 The Tribunal adjourned the hearing on the second day when the evidence ended to permit the parties to submit their closing arguments in writing. The Tribunal's intention was to reconvene having completed its deliberations following the receipt of the closing submissions, to give its decision to the parties orally. Unfortunately, it was not possible to reconvene in April 2023 as originally listed and on the alternative date of 13 June 2023, the claimant was unwell and requested a postponement. To avoid further delay, the Tribunal therefore provided its decision in writing.

Findings

14 Based on the oral and documentary evidence the Tribunal made the following findings of fact relevant to the amendment and time limit points.

14.1 The claimant was born in Afghanistan related to the ethnic group Pashtoon. After being educated in Pakistan and Russia, he relocated to the UK in 2002 and has been registered as a doctor with the GMC since 2011.

14.2 HCL is an agency offering locum cover for all grades and specialties of health care professionals to both the NHS and the private sector across the UK.

14.3 HCL engaged the claimant from 4 June 2016 as an agency worker to work on assignments as a locum doctor at hospitals in the UK. On 24 April 2017 the claimant was booked by HCL and commenced an assignment for UHB at the QE hospital as a locum SHO (senior house

officer).

14.4 On commencing his assignment the claimant purchased a 3 month car park pass. However, the claimant was unable to use his pass to park in the car park on site because the barrier would not open, showing the car park as full. The claimant was forced to buy a single use ticket in order to park, causing him to be delayed getting to work.

14.5 On 17 May 2017 the claimant was again unable to use his pass to access the car park. He bought a single use ticket and went to the car park site office to discuss the situation with the car park staff. This led to an incident which was described by the High Court as "ugly and explosive". This incident ("the car park incident") led to four car park attendants making written statements the same day in which they alleged that the claimant had used aggressive, threatening, abusive and/or offensive language towards them. The claimant also complained about the behaviour of two of the car parking attendants.

14.6 The complaints were relayed to UHB's Medical Director, Dr David Rosser, who delegated the matter to Dr Javid Kayani, then the deputy Medical Director. Dr Kayani met with the claimant and terminated the claimant's assignment at UHB the same day. He did not take any notes at the meeting he had with the claimant and UHB's Head of Security, which was short. Dr Kayani's memory of that meeting with the claimant is now hazy and, when he gave evidence to the Tribunal, he could not place the claimant as the person he had met back in 2017.

14.7 Dr Kayani referred the claimant to the GMC on or around 26 May 2017 alleging that his fitness to practise may have been impaired as a result of his alleged conduct during the car park incident.

14.8 At the same time, Jackie Knowles of HCL was in telephone and email contact with the claimant about the car park incident (p264-270). She advised him that she would need to be in contact with his Responsible Officer.[1] There followed an email from the claimant marked for the urgent attention of the HCL directors dated 26 May 2017 in which he complained about the termination of UHB's investigation into the car park incident, the termination of his assignment with UHB and the lack of a written explanation about it (p261). The letter ended "if you cannot resolve these problems then I have no option but to take to legal way to resolved these issues" (sic).

14.9 In June 2017 the claimant entered into email correspondence with HCL in connection with outstanding pay for shifts worked at UHB before his assignment was terminated. There was an issue about whether the claimant's timesheets would be accepted by UHB for payment because they were unsigned. The claimant sent an email to HCL dated 23 June 2017 entitled "pay all my money immediately". In it, the claimant advised that he was in contact with his solicitor and would take further action if the money was not paid within a week.

14.10 On 1 August 2017 the GMC wrote to the claimant (p195) notifying

[1] The senior doctor overseeing his GMC registration, fitness to practice and re-validation

him that they would be conducting an investigation into the car park incident and disclosing the evidence submitted by the four car park attendants. In the letter the GMC advised the claimant that, legally, it would need to tell the Department of Health and organisations that he provides medical services to about the investigation. The claimant was required to provide information to facilitate this disclosure in a work details form which he completed and returned to the GMC on 7 August 2017. Upon receipt of the letter of 1 August 2017, the claimant formed the view that he was being discriminated against by the GMC.

14.11 On 21 August 2017 the GMC confirmed to the claimant in writing that it would be disclosing information to his employers about the concerns they were investigating (p249).

14.12 In August 2017 the claimant worked for approximately a month as a locum at Good Hope hospital on assignment from ID Medical. His assignment was not extended and he was advised by the consultant that employed him that the disclosure by the GMC of the pending investigation was the reason for this.

14.13 Similarly, in late 2017 the claimant had what was due to be a four month assignment at University Hospitals Coventry & Warwickshire NHS Trust but this was terminated early in December 2017. When the claimant asked why, he was told it was because the GMC had disclosed to ID Medical that he was subject to investigation.

14.14 On 14 May 2018 the GMC concluded its investigation and advised the claimant that his case had been referred to the Medical Practitioners Tribunal (MPT) (p420) for hearing.

14.15 The claimant commenced GP training in or about August 2018 through the West Midlands Deanery. He was placed on rotation at Burton Hospital where the claimant told the Tribunal he encountered bullying and discrimination from some staff. The claimant attributed this to the fact that HCL had advised Burton Hospital of the issues he had had at UHB. The claimant viewed this disclosure as discrimination by HCL (p603).

14.16 The claimant was excluded from his training placements at Burton and then at St Helen's & Knowsley Teaching Hospitals in light of the GMC pending investigation but the latter lifted his suspension by letter of 29 November 2018 (p600).

14.17 The MPT hearing took place between 14-25 January 2019. This led to the imposition on the claimant of a warning for misconduct to remain in place for 2 years (p617).

14.18 The claimant applied for judicial review of the MPT's decision, serving papers on the GMC and MPTS on 29 April 2019 (p650).

14.19 The High Court (Ms Margaret Obi) refused the claimant leave to apply for judicial review on the papers on 10 October 2019. The claimant requested an oral hearing, following which HHJ Cooke again refused leave on 22 June 2020. The claimant appealed against this decision to the Court of Appeal.

14.20 The Court of Appeal (Lady Justice Davies) granted limited permission for the claimant to apply for judicial review on 30 April 2021.

14.21 There was a hearing in the High Court of the claimant's application for judicial review on 4 August 2021. On 28 October 2021 HHJ Richard Williams handed down his judgment quashing the warning that had been issued by the MPT.

14.22 The claimant represented himself throughout the judicial review proceedings with support from friends, most of whom were doctors and not legally qualified. He obtained information about the procedure to be followed from research he carried out on the internet.

14.23 The claimant "took a break" after he received the High Court judicial review decision before he started researching how to make a discrimination claim in December 2021. (Claimant's closing submissions, paragraph 10).

14.23 The claimant contacted ACAS to commence early conciliation on 20 January 2022, lodging his claims for discrimination with the Tribunal on 18 February 2022.

The law

Amendments

The applicable time limits

15. The applicable time limit for claims of discrimination is set out in section 123 of the EqA which reads as follows:

> **123** (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.

16. Time limits in employment claims are often described as "jurisdictional". What this means is that, if a time limit is not complied with, an Employment Tribunal does not have the power under the law to go on and decide the case. The case therefore cannot proceed. The time limits for Tribunal claims are short and the Tribunal can, therefore, extend time in exceptional circumstances to avoid injustice. The tests to be applied by a Tribunal to permit an extension of time are different in different types of case. In discrimination claims, the test is whether or not the Tribunal considers it "just and equitable" to extend time. This is a question of discretion for the Tribunal but that discretion must be exercised carefully having fully considered all the circumstances of the case. There is case law describing the principles that apply to the Tribunal's decision-making process, as follows.

17. First, there is no presumption that Tribunals should extend time – it is the claimant who must persuade the Tribunal that it is just and equitable to do so: **Robertson v Bexley Community Centre** [2003] IRLR 434.

18. Generally, the remedy of Employment Tribunal proceedings is considered to be sufficiently well known that ignorance of such recourse will not normally be accepted as an excuse for non-compliance with any time limit (**Partnership Ltd v Fraine** UKAEAT/0520/10, **John Lewis Partnership v Charmaine** UKEAT/0079/11 and **Walls Meat Co Ltd v Khan** [1979] ICR 52). The statutory time limits are to be considered sufficient for a claimant to investigate their options promptly and issue proceedings within the necessary 3-month period.

19. It can be a useful exercise to consider the factors set out in section 33 Limitation Act 1980 in considering the exercise of discretion in relation to time limits. These factors are: the length of and reasons for the delay, the extent to which the cogency (i.e. reliability) of the evidence is likely to be affected by the delay, the extent to which the respondent has cooperated with any requests for information, the promptness with which the claimant acted once they knew of the facts giving rise to the claim; and the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action. This list of factors is a useful guide but should not be applied slavishly (**Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA, Civ 27).

Amending claims

20. A Tribunal has the power to permit a claim or response to be amended under its general case management powers given by rule 29 of the ET Rules of Procedure 2013. It is a matter for the exercise of the Tribunal's discretion, exercised always in accordance with the overriding objective of dealing with cases fairly and justly (rule 2).

21. The leading case about amendments is **Selkent Bus Co Ltd v Moore** [1996] ICR 836 (restating the test derived from **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650)). Mummery J stated in that case that a Tribunal's discretion should be:

> *"exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions… the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it … It is impossible and undesirable to attempt to list [the factors to be considered] exhaustively, but the following are certainly relevant: … the nature of the amendment, whether the claim is out of time and if so, whether time should be extended under the applicable statutory provision; and the extent of any delay and the reasons for it".*

22. When considering the nature of the amendment, it is useful to consider whether it falls into the category of the correction of a clerical error or addition of factual details to existing allegations, or is the addition or substitution of a label for facts already pleaded, or the more substantial

type of amendment involving the making of an entirely new factual allegation which changes the basis of the existing claim. This exercise should not lead to a formal classification of a proposed amendment but rather should enable the Tribunal to consider the extent to which the amendment is likely to involve "substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted" (**Abercrombie & ors v Aga Rangemaster Ltd** [2013] IRLR 953, CA.)

23. A Tribunal may consider the merits of a new or amended claim when weighing up the balance of hardship. There will be less prejudice suffered by a claimant in the loss of a weak claim. Care must be taken, however, not to place too much weight on the perceived merits of a claim, and in particular a discrimination claim, at a preliminary stage when oral evidence has not been heard and tested. **Kumari v Greater Manchester Mental Health NHS Foundation Trust** [2022] EAT 132.

24. In summary, the Tribunal's task is to balance the prejudice, injustice and hardship that would be occasioned by granting or refusing the amendment against that which might result if it was refused – **Vaughan v Modality Partnership** [2021] ICR 535.

25. Once made, an amendment does not date back to the date of the original claim: **Galilee v Commissioner of Police of the Metropolis** UKEAT/0207/16. At its earliest, for the purposes of considering limitation, it is likely to be considered to have been made when the application for an amendment was submitted.

26. **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650 is authority for the proposition that, if a claim is out of time and the Tribunal declines to extend time, then the claim is at an end and the Tribunal has no jurisdiction to consider other matters, such as applications to amend. On this basis, Counsel for UHB urged the Tribunal to consider the time point before the amendment point.

27. However, in **Sakyi-Opare v The Albert Kennedy Trust** (UKEAT/0086/20) the EAT held that a Tribunal had erred in dismissing a claim as out of time without first determining an amendment application, where that amendment, if granted, may have given rise to a legitimate argument that the original claim was not out of time because there were acts extending over a period which ended after the presentation of the claim.

28. The facts of the present case differ to that in **Sakyi-Opare** because, as the claimant accepted, amended or unamended, his claims are out of time and, if they are to continue, the Tribunal will need to exercise its discretion in his favour to permit them to proceed on the basis that it would be just and equitable to do so.

29. That said, the Tribunal considered that there may be matters arising from the proposed amendments which the claimant might consider arguably material to the exercise of the Tribunal's discretion to extend time. Leaving the technical "**Cocking** jurisdiction point" to one side, therefore, the Tribunal decided to take a pragmatic approach and consider the amendment point first, and then the time point in relation to each respondent.

Conclusions

The claims against UHB (R3)

30. The Tribunal considered the position of UHB first, its involvement in the matters raised by the claimant having occurred first in time.

31. The amendment point : in the claim form the claimant stated "my contract of job was terminated by duty director of Hospitals as he was same ethnic group as car park attendants, without any explanation of allegations, without providing any written letter of termination of contract" .

32. The claimant's proposed amendments to his claims against UHB, as set out at paragraph 53.1 and 53.2, were, in summary, that his assignment had been terminated without an adequate investigation and that he had not been provided with a written explanation of the decision.

33. The Tribunal concluded that these proposed amendments were minor in nature and closely linked to the factual allegation the claimant had always made against UHB – namely that the decision to terminate his assignment was discriminatory. There was little factual dispute about the reasons for UHB's decision, or the way in which it had been communicated, which was a matter of record. It would not prejudice the respondent to have to respond to these additional features of the complaint, alongside its defence to the clear allegation already in play.

34. The Tribunal concluded that adding these "investigation" and "written explanation" allegations probably did require permission to amend and the Tribunal gave/ would have given that permission.

35. The time point : the Tribunal considered this point in relation to the claims against UHB, as amended, and set out in paragraphs 53.1-53.3 of the CMO.

36. These claims are very substantially out of time. UHB took no further action in relation to the claimant after referring the case to the GMC on 26 May 2017. The claimant believed this was discriminatory conduct at the time. The claim against UHB in February 2022 (and amended by application made in July 2022) was therefore brought well over 4 years' late.

37. The reasons for the delay given by the claimant were that he decided to await the outcome of the judicial review proceedings before lodging a Tribunal claim because "I must first provide evidence to show I am innocent". He said that this was what he had been told by the MPS which was why he did not contact employment solicitors. The claimant did not say who at the MPS so advised him or when that advice was given and there was no documentation in support of this assertion. Given the passage of time, the lack of any detail to support the claimant's contention and the fact that the MPS was advising the claimant on professional conduct not employment law matters, the Tribunal did not find this evidence sufficiently reliable to be accepted.

38. The claimant also argued that he did not know of Tribunal time limits but

accepted that, like those for judicial review, he could have looked them up on the internet. When he submitted his claim, the claimant said he believed it was in time because it was within 3 months of the judicial review outcome. The claimant explained the reference to an extension of time in his claim form as having been inserted on the advice of others who told him that time was likely to be an issue.

39. The claimant further made reference to the severe impact that these events had on his mental health. Whilst he produced no medical evidence in support of this, the Tribunal accepted that the events had taken their toll on him in the way he described. There was no specific evidence of him being impaired in his ability to bring a claim to the Tribunal on health grounds, however, and the Tribunal noted that he had conducted complex High Court and Court of Appeal litigation and continued to work during much of the time in question.

40. The Tribunal found, having considered the evidence carefully, that the claimant had made a decision to focus first on the GMC and then the judicial review proceedings in an effort to clear his name. He had concluded that it was only with a decision in his favour on that issue that he stood a chance of proving discrimination and so made the strategic choice to wait before issuing his Tribunal claim. He at least suspected when he issued the claim that it was out of time. This was why he requested an extension of time in the claim form.

41. In the case of UHB there was already evidence that the delay had caused damage to the cogency of the evidence, based on the testimony of Dr Kayani. The Tribunal noted that the claimant cross-examined Dr Kayani in detail in relation to who said what at the meeting on 17 May 2017 and in particular how much, if any, of the conversation was conducted in Arabic. It was clear to the Tribunal that, if permitted to proceed, the claim against UHB for race, and especially religious discrimination, would turn on individuals' recollections of a conversation that, by the time a final hearing was convened, took place approaching 7 years ago.

42. In all the circumstances, the Tribunal was not satisfied that it would be just and equitable to extend time and permit the claim against UHB to proceed. There was a real risk that a fair trial of those claims would not be possible in view of the passage of time. The Tribunal having no jurisdiction to consider those claims, therefore, they were struck out as out of time.

The claims against the GMC (R1)

43. <u>The amendment point</u> : in its unamended form, the claim against the GMC was two-fold. First, that it had discriminated against the claimant because of his race when referring the allegations against him to the MPT and secondly, in publishing the warning against him on their website when it was subject to a pending judicial review.

44. The proposed amendments to the claims against the GMC also fell under two broad headings. First, the claimant wished to argue that the GMC had discriminated against him in initiating an investigation in the first place. Secondly, the claimant complained about disclosures made to third party

employers or the West Midlands Deanery (48.2, 48.4 and 48.6) about their investigations into the Claimant's fitness to practice.

45. The Tribunal concluded that both types of amendment were of a nature that they required the Tribunal's permission. They were not mere clarification of previous claims made but new claims, and in the case of the third party disclosure allegations, were based on new facts.

46. In relation to the first amendment (paragraph 48.1) the Tribunal decided that the balance of hardship fell in favour of giving permission to amend. The factual background to this allegation would already be given to the Tribunal in order for it to decide issue 48.3. The GMC investigation process is a highly regulated matter, with decisions recorded and documentation kept.

47. In relation to the third party disclosure amendments, the Tribunal concluded that it would not be in the interests of justice to grant permission to amend. The claimant's suggestion that he was not aware of the facts giving rise to these claims until he received disclosure of documentation in or about August 2022 was not borne out by the contemporaneous correspondence. This revealed that he had been told as early as 1 August 2017 of the GMC's responsibility to notify others of the allegations against him. As a GMC registered doctor, the claimant would have known, or ought to have known, that, although very upsetting and stressful for individual doctors under investigation, the regulatory regime is such that information about such matters is and must be widely and openly shared in order to promote patient safety. These claims would involve the potential involvement of additional witnesses from third party organisations and would certainly add to the breadth of the evidential enquiry that the Tribunal would need to carry out. The Tribunal did not receive a cogent explanation as to why those complaints had not been brought sooner.

48. <u>The time point</u>: as amended to include allegation 48.1, the claim against the GMC crystallised with the decision to publish details of the warning on its website on 26 January 2019. That was 3 years before the commencement of proceedings, a very substantial delay. If the Tribunal was to have jurisdiction to consider the claims against the GMC, it was again for the claimant to persuade the Tribunal that it would be just and equitable for time to be extended.

49. For the reasons already given in relation to the claims against UHB, the Tribunal was not so persuaded. In the specific case of the GMC, the High Court considered the process and decision-making of the GMC in some detail at the hearing on 4 August 2021. According to its decision (p666) the High Court did not find that the GMC at fault for having investigated the claimant in the first place, nor that their decision to do so, or to later refer the matter to the MPT, was inappropriate or tainted by race discrimination. Indeed, the claimant did not invite the High Court to do so. The judicial review focussed on the way in which the panel analysed the oral testimony of the witnesses and recorded its reasons. The claimant now seeks to challenge the GMC's decision-making on a different basis in a new jurisdiction. It would not be just and equitable to permit him to do so when the claim could have been brought within time. The opportunity to fairly trying those issues has been significantly impaired by the delay.

The claims against HCL (R2)

50. The amendment point: the claimant began his claim against HCL on the basis that it discriminated against him by terminating his assignment at UHB and failing to offer him any further work (50.2 and 50.4). Allegation 50.2 includes the words that HCL should have "pressed for a fuller investigation" from UHB. The Tribunal found that this allegation was closely linked to allegation 50.1 in which the claimant wished to add that HCL itself should have investigated the car park incident before terminating his assignment. Whilst the Tribunal concluded that this was a new complaint that required permission to be included, the amendment could be made without extending the factual matrix under discussion too widely, or causing undue prejudice to HCL. Accordingly, the Tribunal granted permission for allegation 50.1 to be included in the claim.

51. Allegation 50.3 was a wholly new claim, relating to a failure to pay for shifts carried out in 2017 without a Trust signature on time sheets. The claim was the subject of email correspondence at the time and a claim could have been brought then, as was threatened, or at the very least set out in the claim form. The Tribunal would struggle to determine it fairly now over 6 years later and with little, if any, documentary evidence available. It would not be appropriate to amend the claim to include this allegation.

52. The Tribunal declined to provide permission to amend to include allegations based on the alleged discriminatory disclosure of information to third parties (50.5 & 50.6) for the reasons already set out in relation to the GMC. The claimant was made aware at the time that information was being shared with third parties, as it had to be and chose not to take action about it at the time.

53. In relation to allegation 50.7, the claimant told the Tribunal that he was aware that his statement had been disclosed to the GMC at the MPT hearing in January 2019. He provided no explanation as to why he did not include this complaint in his claim form, or as to why HCL's disclosure to the GMC was less favourable treatment because of his race. The thrust of the complaint appeared to be about a breach of confidentiality rather than race discrimination. Accordingly, the Tribunal declined to grant permission for allegation 50.7 to be pursued.

54. The claimant needed permission to include a wholly new claim that HCL had been responsible in January 2020 for "a deliberately false entry" in his GP training portfolio. HCL called evidence from Ms Lubomski-Wiggan, which the claimant did not challenge, that HCL has no affiliation to GP training and had no link to West Midlands Deanery. Accordingly, she said, if anyone entered incorrect information on the claimants' e-portfolio, they could have had no connection with HCL. All the people at HCL that the claimant referred to in his statement have since left the employment of HCL. This included Jackie Knowles, a key witness. The balance of hardship was firmly in HCL's favour in relation to this amendment, which was not permitted to be made.

55. The time point : the claim against HCL also crystallised in May 2017 in connection with the aftermath of the car park incident. Like the claim

against UHB, it was substantially out of time. The reasons for the delay in lodging the claim are already set out in detail above. The cogency of the evidence that could be called by either the claimant or HCL at a hearing held some time in 2024 would be substantially affected by the passage of time. This was all the more so because of the absence of witness evidence from relevant employees of HCL who have since left.

56. In conclusion, the Tribunal did not feel able to exercise its discretion to permit the claims against HCL to proceed either and they too were struck out for want of jurisdiction.

57. In summary, the Tribunal fully understood why the claimant, representing himself as he was, focussed on the GMC hearing and then the judicial review proceedings first before approaching the Employment Tribunal for relief. The Tribunal also fully accepted the stress that the events which are the subject-matter of these claims have put the claimant under. However, the time limits for bringing discrimination claims are strict. That is to protect claimants as well as respondents from having to answer questions about complex and often quite nuanced issues that they cannot fully remember. This was not, in the Tribunal's judgment, one of the exceptional cases in which those time limits should be extended.

Employment Judge J Jones
12 June 2023