



## EMPLOYMENT TRIBUNALS

### Claimant

Mrs A Juke

v

### Respondent

Quality Care Management Limited

## RESERVED JUDGMENT AT PRELIMINARY HEARING

Heard at: Southampton

On: 16/5/2019

Before: Employment Judge Wright

### Appearances

**For the Claimant:** Mrs D Strange - Social Worker

**For the Respondent:** Mrs T Kanjanda - Manager

## JUDGMENT

It is the Judgment of the Tribunal that the claimant's application for a reconsideration of the Strike Out Judgment of the 26/11/2018 fails. The Strike Out therefore stands. In the alternative, the claim was presented outside of the applicable time limit and it was not presented within such further period as the Tribunal considers to be reasonable.

## REASONS

1. This case was listed on 16/1/2019 for a public preliminary hearing to address the following matters:
  - a Clarification of issues
  - b Compliance with Tribunal orders
  - c Any applications to strike out
  - d Any further case management orders
  - e Any applications for time preparation or costs orders
2. By notification of 29/1/2019 the parties were also informed, that following REJ Pirani's Judgment that the claim be struck out (as it had not been actively pursued)

on 26/11/2019, that the claimant's letter dated 18/12/2018 received on 20/12/2018 had been treated as an application for reconsideration. That application was also to be considered at this preliminary hearing.

3. The background to this matter is the claimant's employment commenced on 3/10/2004. She presented a claim to the Tribunal on 4/1/2018 stating her rights had been breached under s. 47C Employment Rights Act 1996 (ERA) - leave for family and domestic reasons.
4. A telephone case management preliminary hearing was held on 8/3/2018. EJ O'Rourke's case management summary records the claims as:

*'4. Section 47C(1) ERA/Reg 19 MPL Regs - Detriment*

*4.1 Did the respondent submit the claimant to the following detriments:*

*4.1.1 Following her return from AML on 5/9/2016, reduce her hours of work;*

*4.1.2 At the same time, require her to work day shifts, when her previous shift pattern had been nights, which she preferred, for childcare reasons;*

*4.1.3 In or around November 2016, frustrate or fail to co-operate with the claimant's attempts to gain a literacy qualification necessary for her work;*

*4.1.4 Prevent her, for no valid reason, from 20/2/2017, from attending work?*

*5 Reg 18(2) MPL Regs*

*5.1. Following the claimant's return from AML on 5/9/2016, did she either:*

*5.1.1. Return to the job in which she was employed before her absence; or*

*5.1.2 If it was not reasonably practicable for the respondent to permit her to return to that job, to another job which was both suitable for her and appropriate for her to do in the circumstances?'*

5. It was also noted that the respondent took issue with the limitation period and accordingly, at that hearing the case was listed for a preliminary hearing on 18/5/2018 to determine whether or not the claims were in time and if not, whether the Tribunal should exercise its discretion to extend time, on the basis that it was not reasonably practicable to present the claims within time, that they had been presented within such further time as the Tribunal considers reasonable.

6. It is now necessary to explore the chronology of this claim and how it came to be that it was struck out on 26/11/2108 as it had not been actively pursued.
7. At the Preliminary Hearing the Tribunal did not have the benefit of sight of the paper Tribunal file. Limited document were available by means of an e-file, which comprises of various documents and orders of which scanned copies are made available. Not all of the relevant documents were therefore in front of the Tribunal. The claimant did not have any paperwork with her. The respondent had its 'file' and the parties agreed to the Tribunal reviewing the respondent's file, so as to complete the gaps in the correspondence. This was considered to be an appropriate method of conducting this matter in accordance with the overriding objective and was done by agreement.
8. It cannot be disputed by the parties that the relevant facts are as follows. The dates were agreed at the Preliminary Hearing.
9. The claimant's first period of maternity leave with the respondent commenced on 1/9/2015.
10. The claimant returned to work on 5/9/2016.
11. The claimant was absent due to ill health in October 2016. An issue was raised by the CQC on 11/11/2016 and the claimant as then absent for an extended period from 23/11/2016 until 11/1/2017. Following that absence, the claimant was deemed unfit for work due to Hyperemesis Gravidarum (HG/severe morning sickness) until 6/2/2017. The respondent says that was the first notification it had had of the claimant's pregnancy on this occasion.
12. The respondent says, the claimant returned to work for a training session on 7/2/2017 and worked on 8/2/2017 and 9/2/2017. It is unclear, but it seems at the Preliminary Hearing on 8/3/2018, that it was accepted the claimant was then absent from 20/2/2017 and that it the date which the claimant relies upon.
13. The claimant's solicitors (Archbold Solicitors) wrote to the respondent in respect of the claimant reporting for duty on 5/4/2017 on 3/4/2017. The claimant having been deemed unfit for work from 25/3/2017 to 22/4/2017 due to 'stress at work, pregnant and exhausted and depression'; according to her MED3.
14. The claimant was then certified as unfit for work from 22/4/2017 to 20/5/2017 due to 'stress at work, exhaustion and depression'.
15. The respondent then discovered the claimant had given birth on 18/7/2017 (the day maternity leave commenced) on 30/7/2017.
16. The claimant's claim was presented on 4/1/2018 by her solicitors and it was served upon the respondent on 10/1/2018. The respondent was advised the ET3 was required by 7/2/2018.
17. On 8/3/2018 a telephone case management preliminary hearing took place. The claimant was represented by her solicitor. An in-person preliminary hearing was listed for 18/5/2018 and directions were issued.

18. The respondent sent its bundle to the claimant on 22/3/2018 and put the ET on notice that it had not received the claimant's bundle or witness statement (in accordance with the agreed directions) on 25/4/2018. The respondent chased this up on 10/5/2018 and in response, the claimant's solicitor said her GP had not been able to provide the information requested and said that it intended to ask the ET to vacate the hearing on 18/5/2018.
19. On the 6/6/2018 the ET relisted the preliminary hearing for the 12/10/2018. From 17/7/2018 to 6/9/2018 the claimant was certified as unfit for work due to anxiety and stress.
20. By letter dated 10/7/2017 (although the year must be incorrect and the correct date must be 2018, not 2017) the claimant's solicitors wrote to the ET. The letter is confusing as it refers to the preliminary hearing listed for 18/5/2018. The letter states:

'Regrettable [sic], we have recently been informed by our clients [sic] GP that they have not been able to process our client's request for their medical records to be disclosed. The reasons for this delay have not been articulated to us. We had anticipated that we would be in receipt of these documents by today upon which we would not have to make this application.

We seek to bring to the Courts [sic] attention that the outstanding medical records are paramount to our clients [sic] claim. It is our client's claim that she was unable to bring the claim as she was severely unwell. In the absence of this evidence, our client would not be able to succeed in justifying why it was not reasonably practical to present her claim within the prescribed 3 months.

We wish to confirm that this application would not prejudice the Respondent. We therefore ask that the court vacate the next hearing date for a later date. We anticipate that we would be in receipt of the evidence...'

21. Whether or not that application related to the hearing listed for 18/5/2018, in any event, that hearing was postponed and relisted for 12/10/2018. If the claimant's solicitor had already requested her medical records, which were deemed to be 'paramount', that still afforded the claimant/her representatives a further five months to obtain the records, in readiness for the hearing on 12/10/2018.
22. On 10/8/2018 the claimant's solicitor wrote to the respondent to inform them of a change in the fee earner acting for the claimant. On 21/8/2018 the respondent wrote to the claimant's solicitor stating that it was still waiting for the bundle and witness statements.
23. On 28/8/2018 the claimant's solicitors wrote to the respondent in respect of the end of her fit note. It was stated that the claimant's representative had left the firm, however, it was attempting to progress her claim. Thereafter on 28/9/2018 (two weeks before the preliminary hearing) the claimant's solicitors wrote to the respondent and said that the firm was no longer representing the claimant and she had been advised to seek assistance from the CAB.
24. At that point in time when the claimant's solicitors ceased to act, the firm had been representing the claimant since at least 3/4/2017. Furthermore, a preliminary hearing had been listed for 18/5/2018 and it was postponed until 12/10/2018. The

claimant's solicitors had themselves said her medical records were 'paramount' to her establishing her claim.

25. From the 1/10/2018 to 6/12/2018 the claimant was certified as unfit for work due to anxiety and stress. Irrespective of that, the claimant's medical records should have been obtained and witness statements should have been prepared in readiness for the hearing on 12/10/2018. If the directions were varied in respect of the preliminary hearing on 12/10/2018 (the Tribunal has not had sight of them), they should have been complied with, particularly in view of the failure to comply with them for the May preliminary hearing. If no directions were issued or they were not varied, then as the claimant was legally represented until 28/9/2018, her representatives would have been expected to have progressed the case in accordance with the overriding objective. The matter to be determined at the preliminary hearing was whether or not the claim had been presented out of time and did the ET have jurisdiction to hear the claim? The burden therefore fell to the claimant to establish that either her claim had been presented in time, or to persuade the ET in the alternative that it had been presented within such further time as the ET considered reasonable.
26. On the 4/10/2018 the respondent wrote to the ET to say that further to its letters of the 28/3/2018 and 12/4/2018, it still had not received the bundle and witness statements. On the same date, the ET wrote to the respondent and claimant's solicitor, to say that it may have to postpone the hearing listed for 12/10/2018 due to lack of judicial resources. The claimant's former solicitor wrote to the ET, copying in the claimant and respondent, saying it was no longer action for the claimant.
27. Despite the fact the claimant's solicitors had said they were no longer acting, they wrote to the respondent on 21/10/2018 in respect of her fit notes for October and November 2018. The claimant was certified as unfit for work from 1/11/2018 to 6/12/2018 due to anxiety and stress. On 13/11/2018 the respondent wrote to the claimant in respect of their outstanding letter of 4/10/2018.
28. On 15/11/2018 the ET wrote to the claimant to say that unless it heard from the claimant by 22/11/2018, her claim was at risk of being struck out. On the 26/11/2018 the claim was struck out by the Regional Employment Judge as it had not been actively pursued. The Judgment records it was sent to the parties on 28/11/2018.
29. The claimant send a letter dated 18/12/2018 to the ET, which was received on 20/12/2018 setting out her position. By letter dated 29/1/2019 the parties were informed the claimant's letter had been treated as an application for a reconsideration of the strike out.
30. Between 29/11/2018 and 31/1/2019 the claimant was certified as unfit for work due to anxiety and stress.
31. On 16/1/2019 the case was relisted for a preliminary hearing on 16/5/2019.
32. The respondent complained in writing to the ET that the claimant had still not complied with the directions and on 1/4/2019 the ET wrote to the parties saying there was no need for the claimant to comply, because, as things then stood, the claim had been struck out on 26/11/2018.

33. At the hearing on 16/5/2019 the claimant was represented by her social worker Mrs Strange. Mrs Strange said she had only become involved in the preceding two weeks and she was confident that she could produce the claimant's medical records within seven days.
34. Notwithstanding the ET's letter of 1/4/2019, it was clear that as far back as the preliminary hearing on 8/3/2018, the claimant's medical records were relevant to the issue of whether or not the claim had been presented in time and if not, in seeking to persuade the ET to exercise its discretion that it was presented within such further period as was reasonably practicable.
35. Even accepting at face value the claimant's medical issues (although there was no evidence of them other than the Fit Notes she had sent to the respondent), there is no satisfactory explanation as to why her solicitors failed to pursue her case from the first preliminary hearing on 8/3/2018 to when they ceased to act on 28/9/2018 (noting that they did in fact continue to act for her after that date); when a second preliminary hearing was imminently due to take place on 12/10/2018. If there had been any issue with obtaining medical evidence, the claimant's solicitors did not set out what it was. There was also no explanation for the failure to provide a witness statement (subject to the medical evidence) or for failure to provide other documents in accordance with the ET's order.
36. It was not made clear to the parties (in particular to the claimant) until the ET's letter of 1/4/2019 that as the claims had been struck out, there was no requirement for the claimant to comply with the ET's previous order. Prior to that however, the claimant was seeking to ask the ET to reconsider the decision taken to strike out her claim and as such, if she wished to rely upon her health issues, she was aware of the need to produce the evidence available to support her contention that her health had had a major impact upon her ability to do so.
37. The claimant's letter dated 18/12/2018 was accepted as an application for reconsideration, yet that application was made late. Even allowing that no issue has been taken with the late application (it should have been made within 14 days in accordance with Rule 71 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013), the claimant must have been aware since she first made her claim on 4/1/2018 of the importance and existence of time limits and it was certainly expressly set out that there was an issue with the time limit in respect of whether or not her claim was out of time. She was also on notice of the need to provide her medical evidence.
38. The Tribunal has to consider that the claimant was given notice of the ET's intention to strike out her claim, in the event that she did not make representations by 22/11/2018. In her reconsideration application to the ET, the claimant complains that the ET wrote directly to her and not to her solicitor. As far as the ET was concerned (although not the respondent as the respondent had received correspondence from the claimant's solicitors dated 21/10/2018) her solicitors came off the record on 28/9/2018. The ET was correct to contact the claimant directly and to use the contact details it had for her. Furthermore, the claimant was given seven days to respond. This was against a background of previous failings to comply with the ET's orders, a result of which meant the hearing listed for 18/5/2018 was postponed.

39. The events the claimant complains of took place between her first period of maternity leave with the respondent ending on 30/5/2016 and her being absent due to ill health on 20/2/2017. It is now May 2019. It is appropriate to consider the prejudice to the respondent and whether a fair trial is now possible. The claimant's complaints as set out in the case management order of 8/3/2018 refer to decision taken upon her return to work in September 2016, an incident which occurred in respect of the claimant's literacy in November 2016 and in February 2017. The respondent who has self-represented throughout has complied with the ET's orders and sought to progress the claim. One reason for the short time-limits in the ET is due to the fact witness' memories fade and that certainly applies here and will cause prejudice to the respondent. The reason why the Rules provide that a claim or response may be struck out if it has not been actively pursued is because of the prejudice to the other party if it is not.
40. Multi-day final hearings are being listed on odd dates in late 2019 and blocks of dates are available in January 2020 and from March 2020 onwards. Even if this case was listed for a two-day hearing (allowing for the fact of the claimant's health and her not having legal representation), that would mean considering events which are by then 3¾ years' old.
41. As at the date of the hearing, the claim has been no more progressed by the claimant than was the position at the first preliminary hearing on 8/3/2018. Up until 28/9/2018, the claimant was represented by solicitors. For those reasons, the claimant's reconsideration application fails.
42. In the alternative, if the Tribunal is wrong on the issue of dismissing the claimant's application to reconsider the decision to strike out the claim, it has also considered whether, if the claim was not brought within the primary time limit, that it was not reasonably practical to present the claims within time and if so, was it presented within such further time as the Tribunal considers reasonable.
43. The most recent event the claimant complains of took place on 20/3/2017. The primary time limit therefore ended on 19/5/2017. Acas Early Conciliation took place between 3/11/2017 and 20/11/2017 and the claim form was presented on 4/1/2018.
44. Considering whether it was reasonably practical to present the claim in time; it was. The claimant has been represented by solicitors since 3/4/2017 when they wrote on her behalf to the respondent. She was also represented at the time her claim form was presented on 4/1/2018.
45. Notwithstanding that, was the claim form presented within such further time as is considered reasonable? Noting again that although the claimant was certified as unfit for work between 25/3/2018 and 22/4/2018; she was clearly capable at that time of instructing her solicitors to engage with the respondent on her behalf. Her solicitors were taking issue with the duties which the respondent had allocated to the claimant upon her return to work and therefore the claimant must have been able to give instructions at that time, notwithstanding any health issues. The claim was not therefore presented within such further period of time as is considered reasonable.

46. For those reasons, the claimant's application that the strike out decision is reconsidered fails; and the claim remains struck out as per REJ Pirani's Judgment of 26/11/2018. In the alternative, the claim was presented out of time, it was reasonably practicable for it to have been presented in time and the Tribunal is not persuaded to exercise its discretion under s. 48 (3)(b) Employment Rights Act 1996.

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Employment Judge Wright

Date: 22<sup>nd</sup> May 2019