



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr S Onasanya

v

Luton and Dunstable NHS Foundation Trust

PRELIMINARY HEARING

Heard at: Watford

On: 6 February 2020

Before: Employment Judge Smail

Appearances:

For the Claimant: Mr G McKetty, Consultant

For the Respondents: Mr P Tominson, Counsel

PRELIMINARY HEARING JUDGMENT

1. By reason of the Claimant suffering from a severe depressive disorder, it was not reasonably practicable for the Claimant to present his claim of unfair dismissal in the primary period of limitation, and it is reasonable and just and equitable for time to be extended to 1 April 2019 to allow the claims of unfair dismissal and disability discrimination to be presented.
2. It is a condition of 1 above that the Claimant's representative, Mr McKetty, provide a witness statement, within 7 days of the promulgation of this Judgment, supported by a statement of truth confirming that he was first consulted by the Claimant in the last week of March 2019 and exhibiting the dated medical consent form obtained from the Claimant and any other documents relevant to the timing of his first instruction.
3. There will be a further Preliminary Hearing at the Watford Employment Tribunal on **24 March 2020** at 2pm for the purposes of case management and to consider any amendment application made by the Claimant.
4. The full merits hearing in this matter will take place over 3 days in Watford, **17-19 February 2021**.

REASONS

1. In this matter, the respondent, entirely reasonably, has asked for there to be a preliminary hearing to assess time because, on the face of it, these claims are presented outside the primary limitation period.
2. By section 111, subsection 2 of the Employment Rights Act 1996, an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented to the tribunal-
 - (a) before the end of the period of three months beginning with the effective date of termination, or
 - (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
3. By section 123, subsection 1 of the Equality Act 2010, a discrimination claim may not be brought after the end of-
 - (a) the period of three months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable
4. The matter has a most unfortunate background story to it. The claimant was employed by the respondent trust as a Care Assistant. His employment started on 2 November 2015. He was working full time when, on 23 March 2017, an elderly female patient, on Ward 17 at Luton and Dunstable University Hospital, made a series of a very serious allegations of sexual harassment. The claimant was suspended for an extended period of time until, ultimately, first, the police dropped their criminal investigation and, secondly, the hospital cleared the claimant of any wrongdoing.
5. The fact of the allegations though caused significant problems for the claimant. On the strength of them it seems, his wife left him and took their children with her leaving him to share a flat with a friend, having been repossessed out of the former family accommodation. The claimant suffered a severe depressive disorder and still requires medication to deal with it. He was dismissed on 3 October 2018. The ACAS conciliation certificate was sought on 31 January 2019 and obtained that day. At that point it was 3 months and 29 days after the dismissal. The claim was eventually presented on 1 April 2019 which was 2 months and 1 day after the ACAS certificate. Therefore, the claim has been presented considerably outside the primary period of limitation.
6. The claim has two aspects to it. First of all, an unfair dismissal claim; secondly, an Equality Act claim which may presently be understood as a reasonable adjustments claim. The reasonable adjustment seeming most probable as pleaded at the moment is failure to give the claimant further time to consider employment options at the Trust. It has been mooted in argument that probably the more sensible Equality Act claim, reflecting what the claimant actually wants to argue is under s.15. There would have to be, in due course, an application to

amend. The unfair dismissal claim, though, is plainly based upon the same position: failing to give the claimant sufficient time to recover to be able to resume in a role at the respondent hospital.

7. The argument is not without difficulty because there is a documented internal sickness absence procedure whereby adjustments are offered, for example, working on different Wards or in the Outpatient Department, but at the time of each such offer, the claimant was still signed off with his severe depressive disorder and, on the face of the documentation, the claimant appears to have agreed, possibly even to have suggested, that the best course would be for him to be dismissed on the basis of incapacity by reason of his ill-health condition. At the ultimate time of this position, October 2018, he had long exhausted the contractual sick pay entitlement and by leaving when he did, that did at least attract a payment of notice and accrued holiday pay and, possibly, some outstanding pay, equivalent to four and a half months pay, around apparently, £3,000 net.
8. That said, throughout this period the claimant appears to have been suffering from a severe depressive disorder. He was to be treated, and had been treated, with therapy and the case he wishes to argue is that insufficient time was given to him to recover from the consequences of these very serious, false it seems, allegations. So, it is not difficult to see what the claimant would like to argue and the issue for the tribunal, if we were to have a hearing, is going to be the extent to which the respondent can justify terminating the contract when it did in the context of the claimant's sickness absence, which is very likely to amount to a disability in the circumstances.
9. So, as I say, it is not difficult to see what the case is going to be about and the claimant will have to deal with the fact that, on the face of the documentation, he appears to have agreed with the course of conduct. That said, I do not regard his position as being unarguable. There is an arguable unfair dismissal case. I am not saying it is going to win but I understand the argument and there would be an arguable disability discrimination case, once properly put. So, I do not approach this case as being doomed to fail in the first place.
10. There are of course separate tests for extending time for unfair dismissal and for disability discrimination. I have a medical report, dated 6 December 2018, from Dr A Tarl, a Consultant Psychiatrist. It is not a report for the Tribunal's purposes, it is a letter sent to the claimant's GP and the diagnosis is severe depressive disorder without psychotic symptoms. There is a prescription for Quetiapine; he also takes Mirtazapine at night. The dose of Quetiapine was to be increased following the consultation November 2018. It was said that sometimes the claimant thought of ending his life as he sees people going to work and he is not able to, but he has no current plans. He was with CRHT, which I assume is a mental health service, a few months ago due to suicidal thoughts. So, that would have been about August or September 2018. He denies hearing voices, his mental state examinations are recorded as him being a middle aged, African origin gentleman, who is appropriately dressed and clean; he was avoiding eye contact and during the whole interview he looked at the floor or closed his eyes. It was difficult to establish rapport and he was always going around and round the same thing which was he cannot face his colleagues and people and he does

not have the confidence to go to work. Pausing there, that theme was very much mentioned by the claimant today in evidence to the Tribunal. The report goes on: There was no psychomotor agitation or restlessness, his speech was articulated and coherent, his mood, he said, was low and objectively low. His effect was flat but there was no evidence of paranoia or persecutory delusions. He denied hearing voices and was not distracted or disturbed by any external stimulate. He had a good insight in to his condition and has capacity to make decisions about the management plan for his treatment.

11. The Claimant explains the presentation of the ACAS certificate as being down to a friend of his with whom he was sharing a flat. He sat next to his friend, his friend rang ACAS and ACAS then emailed the certificate to the claimant's email address. He understood that he had three months to bring a claim from the ACAS certificate. That, of course, is incorrect. However, he certainly did not understand that he needed to bring a claim immediately because he did not bring a claim immediately.
12. He raised the matter with Mr McKetty, who is a lawyer, and who is a chairman of a Community Centre. He raised it with Mr McKetty, I am told, in the last week of March 2019. Mr McKetty then took the matter up at his firm and the ET1 was presented on 1 April 2019. There has been a slight deficit of disclosure in this case but Mr McKetty is prepared to sign a witness statement with a statement of truth to that effect and exhibiting the first document he will have obtained which was a medical consent release form. I am happy to approach the matter on that basis.
13. The claimant tells me that throughout this period he was extremely depressed about his personal and family situation that he was unable to deal competently with other people because of a complete loss of self-confidence given what had happened to him. He did not understand his employment rights until, ultimately, consulting Mr McKetty. It was his friend who had arranged the ACAS certificate, not him.
14. On the balance of probability, I accept the claimant's account. We have medical evidence that he was suffering from a severe depressive disorder. When giving evidence before the tribunal today one could tell that he is not entirely well and he was speaking and giving evidence consistently with the medical report that I have read. That the claimant was suffering from a severe depressive disorder, for which he has to take medication, is a highly relevant factor in the test I have to apply.
15. In terms of his unfair dismissal claim, the question is: was it reasonably practicable - and a common translation of that otherwise not entirely clear term is - was it reasonably feasible for the claimant to present a claim in time? Well, I conclude that for this claimant, suffering as he was from a severe depressive disorder, it was not reasonably feasible that he could present his claim within time. The fact that his friend got an ACAS certificate for him does not alter that fact. I am confident that it was not until he met Mr McKetty that it was feasible for him to put in a claim. I do not underestimate the enormity of the experience the claimant had by being falsely accused of very serious allegations of sexual

harassment and losing his wife and kids as a result. I am not surprised that this led to severe depressive disorder as corroborated by the consultant psychiatrist.

16. Similarly, I regard it as just and equitable for time to be extended to present an Equality Act claim even as presently pleaded. The Equality Act claim is not readily clear - it is more as presently pleaded an unfair dismissal claim - but disability discrimination has been ticked and it is not difficult to see how a disability discrimination claim can be argued. Again, I am not saying it is going to win. Maybe the respondent can justify the position with the apparent agreement with the claimant, but that was an apparent agreement with someone suffering from a severe depressive disorder and very likely disabled. So, there is something to look at. There is no question of any evidential prejudice on the part of the respondent. Their position is plainly documented. The reasonableness of their position will be ascertainable by evidence and submission. There is no difficulty in there being a fair trial.
17. So, in short, because the claimant is suffering from severe depressive disorder, this is one of the unusual cases where it is appropriate to extend time for unfair dismissal and also for disability discrimination and time will be extended to the date of presentation. It will be in the order that Mr McKetty provides the witness statement with a statement of truth exhibiting such documentation that he has in his possession confirming the time of his first instruction.

Employment Judge Smail

Date: 5 March 20

Sent to the parties on:

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For the Tribunal:

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