



EMPLOYMENT TRIBUNALS

Claimant: Miss Michelle Seale

Respondents: (1) Axis Europe Limited
(2) Mr John Hayes
(3) Ms Maria Northwood
(4) Mr Tim Hayes

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 12 January 2021

Before: Employment Judge Tobin (sitting alone)

Appearances

For the claimant: Mr K Harris (counsel)

For the respondent: Mr R Butt (counsel)

JUDGMENT FOLLOWING RECONSIDERATION HEARING

Following the Preliminary Hearing (Open) the Judgement of the Tribunal is:

1. The Judgment of the Employment Tribunal promulgated on 5 October 2019 is confirmed.
2. The claimant's claims of unfair dismissal, unlawful deduction of wages and disability discrimination are dismissed as out of time, pursuant to s111(2) Employment Rights Act 1996, s23(4) Employment Rights Act 1996 and s123 Equality Act 2010, respectively.
3. Accordingly, proceedings are dismissed.

REASONS

The hearing

This has been a remote hearing which has been consented to by the claimant and the respondent. The form of remote hearing was a video hearing through the HMCTS Cloud Video Platform and all the participants were remote (i.e. no-one was

physically at the hearing centre). A face-to-face hearing was not held because it was not practicable in the light of the coronavirus pandemic and the Government's restrictions.

1. Regional Employment Judge Taylor ordered this hearing, i.e. a Primary Hearing (Open) on 11 January 2020 before any Judge to consider: of

1. whether it is just an equitable to grant the claimant an extension of time to make an application for reconsideration, and if it is
2. to consider with the original decision to strike out her claims should be varied or revoked.

2. On 5 October 2019 Judge Taylor promulgated her Judgment following a Preliminary Hearing on 27 August 2019 in respect of the time limit points. The claimant's solicitor applied for this Judgment to be reconsidered on 18 October 2019. In her Judgment Judge Taylor stated that the claimant did not provide any medical evidence to support her claim to be disabled or that she had a disability that prevented her presenting her claim within the appropriate statutory time limits. The claimant had in fact submitted medical evidence 6 days before the hearing, by email have on 21 August 2019 at 13:27. This evidence was not considered by Judge Taylor because, it appears, the correspondence plus enclosure was not linked with the file prior to the hearing.

3. The claimant's application did not comply with rule 71 of the Employment Tribunal Rules 2013 requiring the application to be copied to all the other parties in the case. The respondents were sent a copy of the claimant's application on 14 November 2019 and the respondents complained that the application was out of time.

4. Under rule 70 a Judgment will only be reconsidered where it is "*necessary in the interests of justice to do so*". There would be a significant injustice to the claimant if her documents in support of this crucial matter was not considered fully by the Tribunal and the decision reconsidered accordingly.

5. Following preliminary discussion at the preliminary hearing, parties and me (i.e. the Judge) agreed that the hearing would proceed as a reconsideration hearing only, i.e. on issue 2.2 above. There was a substantive issue to be heard and Mr Butt confirmed, on behalf of the respondents, that the respondents would not be taking the time point in respect of the application for reconsideration. It was in the interest of justice to proceed to the substantive issue.

6. I note that I have the power to reconsider the whole of Judge Taylor's decision and not just had a part of it that prompted the application for reconsideration. I discussed this with the parties at the outset of the hearing. It was agreed that this hearing was to determine one question in respect of Judge Taylor's findings, namely would the medical evidence had made any material difference? The claimant's case was that there was a multiplicity of reasons why she did not issue proceedings within the statutory time limits and that her medical condition was a key reason. This was not fully explored at the hearing because the medical evidence the claimant had

proffered was not put before Judge Taylor. The issue for me to determine was, if Judge Taylor had considered such medical evidence, would she have come to a different conclusion. If so, then her Judgment would need to be varied or revoked.

7. I heard witness evidence from the claimant who had provided a signed statement dated 8 January 2021. The claimant confirmed her statement at the hearing and was cross examined on its contents by Mr Butt. I asked some questions for clarification and Mr Harris asked some further questions.

8. Both Mr Harris and Mr Butt had provided skeleton arguments in advance of the hearing, which were both very helpful.

The previous findings of fact

9. Regional Employment Judge Taylor made a number of findings of fact relevant to the claimant's dismissal, the alleged discrimination and the claimant's claims. These findings were not challenged by the parties. I summarised some of Judge Taylor's relevant findings of fact as follows (and I have corrected the obvious typographical errors in certain years recorded):

- i. Events began on 13 November 2018 with an investigation meeting, after which the claimant was invited to a disciplinary hearing.
- ii. Prior to the disciplinary hearing, on 20 November 2018, the claimant sought legal advice from solicitors.
- iii. A disciplinary hearing was held on 22 November 2018.
- iv. On 24 November 2018 the claimant contacted her insurers in respect of activating cover for possible legal expenses insurance.
- v. On 26 November 2018 the claimant was summarily dismissed by letter. This was her effective date of termination. Of the
- vi. On 24 February 2019 claimant was notified that she did not have legal expenses insurance for a claim in the employment tribunal. The insurer informed the claimant not to delay presenting her claim form to the employment tribunal. The claimant spoke to a friend at the citizens' advice bureau and then contacted ACAS to commence the early conciliation procedure.
- vii. On 24 March 2019 early conciliation ended and by email ACAS highlighted the need to submit an employment tribunal claim on time. The claimant knew that there was a deadline for making her claim but was not clear of the date of the deadline. Despite this she took no steps to find out the time limit for presenting her claim. The claimant did not contact the CAB or speak to the person who had helped her earlier.

- viii. On 24 April 2019 the claimant contacted the ACAS officer about whether the respondent had been in contact about a settlement offer. The ACAS officer informed the claimant that morning that her potential limitation date was here and suggested she go ahead make an application to the employment tribunal otherwise she ran the risk of being out-of-time. The claimant did not take immediate action in response to that information. She had a routine medical appointment the next day and she decided she would prepare and submit her claim to the employment tribunal the day after her medical appointment.
- ix. The claimant submitted her claim to be employment tribunal on 26 April 2019, which was 2 days outside the applicable time limits.

10. At paragraph 26 of the Judgement, Judge Taylor said that the claimant gave 3 explanations for her inaction prior to presenting her claim late:

- 1. The claimant expected to receive support from the insurance company.
- 2. The claimant expected that the respondent would respond positively to ongoing efforts to settle the case (although this was disputed by the respondents).
- 3. The final reason the claimant gave was that she had an ongoing disability.

The claimant claimed that she had chronic fatigue during this period, which had affected her ability to bring a tribunal claim. (Whether the claimant has a disability is challenged by the respondent.) *The claimant did not provide any medical evidence to the tribunal in support of her claim to be disabled, or in support of her contention that her ability to make a timely claim to the employment tribunal was impeded by her ill health or disability, or in what way [my emphasis].*

11. Regional Employment Judge Taylor noted, at paragraph 33, that:

The claimant submitted that she had a disability and her ability to function had been impaired. She did as much as she could to progress and present her claim....

The claimant's ill-health or disability

12. We are not concerned at this hearing as to where or not the claimant met the definition of a disabled person under s6 Equality Act 2010. It is the second matter that this hearing focused upon, i.e. the claimant's contention that her ability to make a timely claim to the employment tribunal was impeded by her ill-health or disability.

13. At paragraph 37 of the Judgment Regional Employment Judge Taylor concluded (wrongly):

The Tribunal has had regard to the claimant's contention that she has a disability which prevented her from presenting her claim on time. The Tribunal did not have any medical evidence before it to support the claimant's contention that she has a disability of 'chronic fatigue' or that it she had it [sic] affect her ability to present a claim on time. The Tribunal did not accept the claimant's evidence that late presentation of her claim was caused or contributed to by her ill-health or disability.

The missing documents and my additional findings of fact

14. The documents that Judge Taylor did not consider was provided in the hearing bundle at page 104 to 112. These were:

- a. a letter from Dr Dominic J Mort, Consultant Neurologist, to Dr Patrick Lal [the claimant's GP] dated 30 April 2018 [HB104-105];
- b. a letter from the claimant's GP to Mrs Bajekal, Consultant Gynaecologist, dated 18 December 2018 [HB106-109];
- c. Extract from the claimant's GP records 27 April 2018 to 23 May 2018 [HB110];
- d. a letter from Ms Pushpa Maharajan, Consultant Gynaecologist & Obstetrician, to Dr Patrick Fong [the claimant's GP] dated 16 February 2019 [HB111]; and
- e. a letter from Mr Pratik Shah, Consultant Gynaecologist & Obstetrician, to the claimant's GP, dated 17 August 2019.

15. We are particularly interested in the events from the discrimination alleged and/or the claimant's dismissal of 26 November 2018 until 5 months later when she issued proceedings on 26 April 2019.

16. In document 15(a) above, Dr Mort reported a fainting episode on 27 April 2018 (1 year before the claimant issued proceedings). Dr Mort reported that the claimant enjoyed training in netball regularly and played recently. He said the claimant had a number of times when she felt slightly lightheaded or dizzy in the preceding 6 months, although she never fainted before. He reported the claimant felt back to normal and that her neurological examination was normal.

17. The document 15(b) records a referral to the consultant gynaecologist for heavy bleeding for the last 3 months and recorded a thorough examination. The claimant contended that document 15(c) was included with document 15(b) although the version I have shows it was printed on 6 August 2019. I have reviewed this document separately and I conclude that it does not clarify the picture further to the information provided in the preceding documents.

18. Document 15(d) is the only document created during our period of particular scrutiny. This correspondence confirmed that the claimant had presented with menorrhagia (i.e. heavy periods or blood loss) for 2 years. This letter recommended a hysteroscopy as an outpatient that with an ensuing biopsy. Finally, the letter at 15(e) was written almost 4 months after the claimant issued proceedings and confirm the claimant's menorrhagia had not improved and that the consultant gynaecologist had referred her for fibroid embolization.

19. Having reviewed these documents carefully I find that the claimant had an ongoing condition of menorrhagia for 2 years prior to the events under scrutiny. That

the claimant was able to issue proceedings 2-days outside the statutory limitations for the employment tribunal claims and that there is nothing in her medical records to indicate why the claimant could not issue proceedings within time or corroborate the claimant's oral evidence as to why she could not comply with the statutory limitations.

20. I have the carefully reviewed the medical evidence provided and there is nothing to indicate that the claimant was suffering from any stress or anxiety from the end of November 2018 but until the end of April 2019.

My reconsideration of the information missing from Judge Taylor's hearing

21. In her witness statement the claimant said that she suffers from chronic fatigue and "brain fog", which I take to be a symptom of confusion and disorganisation. There is categorically nothing in the claimant's medical records from at least 5 senior medical practitioners that corroborate anything more than occasional light-headedness and headaches. If there was some more serious neurological or other relevant disorder, or even symptoms, then this would have been recorded, and it is inconceivable that this would be overlooked by a consultant neurologist, 2 GPs and 2 Consultant Gynaecologists, particularly as detailed histories were taken. I reject the claimant's evidence of ongoing seriously debilitating illness. This evidence is wholly unsubstantiated in circumstances where their ought to be corroboration. The claimant evidence in this regard is self-serving and runs contrary to her contemporaneous medical evidence and also to the explanation that the claimant gave in her claim form for her delay in issuing proceedings.

22. The claim form addressed the claimant's delay under section 15 additional information. The claimant said that:

Axis are still in discussions with the Mark Arkely and have told him that they are still considering my offer and keep promising to come back to him but we are still waiting which has caused a delay in me submitting this form as they promised to come back before the 24th April and have not yet.

However, in the preceding paragraph the claimant referred to the stress and anxiety that this had caused her. Stress and anxiety is different from menorrhagia and is also different from chronic fatigue and "brain fog" subsequently contended.

23. Accordingly, I conclude that if Judge Taylor had reviewed the documents as stated above then the outcome would not have been different. The further evidence provided did not materially support the claimant contention that she could not have issued proceedings towards the end of the limitation period, or even sooner.

My conclusion

24. So far as my consideration of the claimant's position, I have had the benefit of the claimant's witness statement (which Judge Taylor did not). I have considered (and adopted) Judge Taylor's finds of fact and made my own findings of fact about the claimant's medical evidence.

25. Having heard the claimant, her evidence was vague and lacked detail. I do not find her evidence credible. The claimant accepted that she missed her time limits because of a variety of factors: she expected support from legal expenses insurers; the claimant expected her complaint to be resolved without the need for proceedings; and the claimant's ill health. The insurance issue was clarified (and appropriate advice in respect of limitations given) 2 months before the limitations date. There was no real prospect of the respondents settling the claimant's claim, particularly after the ACAS conciliation officer issued an early conciliation certificate and ceased her involvement. I am not persuaded that the claimant was so disabled or that she could issue proceedings even towards the end of the limitation period (as extended by the early conciliation provisions). The claimant's contended debilitation for menorrhagia/ chronic fatigue and brain fog/ stress and anxiety is not consistent and lacks corroboration with the detailed medical investigations undertaken from April 2018 to August 2019.

26. For completeness, Judge Taylor's decision does not record that she considered the following authorities in respect of time limits referred to at this hearing by the claimant:

Palmer & Saunders v Southend-on-Sea BC [1984] IRLR 119 CA – which dealt with “not reasonably practical”.

Schultz v Esso Petroleum Co Limited 1999 ICR 1202 CA – which emphasised that in respect of the claimant's illness following a dismissal the test is one of practicability (what could be done) not whether it was reasonable not to do what could be done.

Ahmed v Ministry of Justice [2015] UKEAT/0390/14 – which sets out the factors that ought to be considered.

I have considered these cases and they do not alter the above determination.

27. Accordingly, all of the claimant's claims were out-of-time pursuant to s111(2) Employment Rights Act 1996, s23(4) Employment Rights Act 1996 and s123 Equality Act 2010. In respect of the claim for unfair dismissal and the unlawful deduction of wages claim, I am not satisfied that it was not reasonably practical for the complainant to present her complaints within the appropriate statutory time limits and in respect of the disability discrimination complaint then I do not extend the statutory time limit on just and equitable principles.

**Employment Judge Tobin
Date: 17 February 2021**