



EMPLOYMENT TRIBUNALS

Claimant: Ms Josefa Orellana

Respondent: Epsom & St.Helier University Hospitals NHS Trust

Heard at: London South Employment Tribunal, via CVP

On: 1st March 2021

Before: Employment Judge Apted

Representation

Claimant: self-represented.

Respondent: Mr S. Sudra – counsel (instructed on behalf of Capsticks LLP).

JUDGMENT

1. This case is listed today the 1st of March 2021 for a Preliminary Hearing.
2. At the outset of the hearing, I confirmed that all parties had access to the same documents. The claimant confirmed that she would be representing herself and that she was ready to proceed. The respondent was represented by Mr S. Sudra. A Spanish interpreter was provided, and I was satisfied that the claimant and interpreter understood each other. All participants attended the hearing via CVP, as did I. All parties were able to participate fully in the proceedings.
3. I heard oral evidence from Ms Maghrabi and Ms Physicos on behalf of the respondent. I also heard oral evidence from the claimant. I was also in possession of an indexed and paginated 'Preliminary Hearing Bundle' consisting of 121 pages.
4. At a case management hearing on the 28th of September 2020, Employment Judge Harrington, in addition to making a number of Case Management Orders, identified two issues to be decided today. Firstly, has the claimant's claim for unfair dismissal been brought out of time? If so, does the Tribunal extend time because it was not reasonably practicable for

the claim to have been brought in time? Secondly can the claim be amended to bring a claim for race discrimination (harassment) and failure to pay sick pay/breach of contract.

5. The relevant background is as follows. It is agreed that the claimant has been continuously employed by Epsom and St Helier University Hospitals NHS trust for a continuous period greater than two years.
6. Following a period of sickness absence, a reconvened sickness absence hearing was held on the 11th of September 2019. The claimant was present at that hearing and had with her a representative from Sutton Uplift, who was an employment advisor.
7. At the conclusion of that reconvened sickness absence hearing on the 11th of September 2019 the claimant's employment was terminated on that date on the basis of ill health capability. She was informed that she would be paid 4-week's pay in lieu of notice and that she would be paid her holiday pay.
8. In a letter and email dated the 20th of September 2019, Ms Maghrabi – who was then the General Manager – Cancer Services and Endoscopy – wrote as follows: "I am writing to confirm the outcome of the reconvened Sickness Absence Hearing, held on the 11th September 2019..." In that letter, Ms Maghrabi went on to confirm that the claimant's employment would be terminated that day (ie the 11th September 2019) on the grounds of ill health capability.
9. On the 13th of December 2019 the claimant referred her claim to ACAS for Early Conciliation. On the 13th of January of 2020 ACAS issued a certificate.
10. On the 5th of February 2020 the claimant lodged a claim form ET1 with the Tribunal.

Issues:

Has the claimants' claim for unfair dismissal being brought out of time?:

11. Under *s111(2)(a) of the Employment Rights Act 1996*, a claim for unfair dismissal must be brought within three months of the effective date of termination. The first question that I therefore have to decide in this case is what is the effective date of termination?
12. The claimant submits that the effective date of termination is the 20th September 2019, which is the date that she received the letter, dated the same date from Ms Maghrabi, in which the termination of her employment was confirmed. The respondent submits however that the effective date of termination was the 11th of September 2019 which was the date of the reconvened sickness absence hearing.
13. In my judgement the effective date of termination is the 11th of September 2019. The claimant was present at that hearing. At the conclusion of that

hearing the claimant was informed that her employment would be terminated that day. The letter dated the 20th of September 2019 in my judgment simply confirms what the claimant was told at the hearing on the 11th of September of 2019.

14. Therefore, in my judgment, under *s111(2)(a) of the Employment Rights Act 1996*, the claim for unfair dismissal must have been brought by the 10th of December 2019.
15. As I have already said the ET1 was lodged on the 5th of February 2020 which is a period of 57 days (or nearly 2 months) after the time limit expired.
16. Again, as I have already said, the claimant referred her claim for early conciliation to ACAS on the 13th of December 2019. That was three days after the time limit had expired. Accordingly, there is no period by which the time limit can be extended as a result of early conciliation.
17. In my judgement therefore the claimant's claim for unfair dismissal has been brought out of time.
18. The second question that I then have to decide is whether to extend time because it was not reasonably practicable for the claim to have been brought in time.
19. Under *s111(2)(b) Employment Rights Act 1996*, the Tribunal can extend time in a case where it was not reasonably practicable for the claim to be presented before the end of the three-month period.
20. The burden is on the claimant to show that it was not reasonably practicable to present the claim in time.
21. The claimant submits that it was not reasonably practicable because she was unwell suffering with stress, anxiety and depression. That stress, anxiety and depression was caused by members of the respondent's staff.
22. The respondent submits that there is no medical evidence which says that the claimant was unable to bring a claim in time and that she was receiving employment support from Uplift Sutton and had accessed advice from the Citizens Advice Bureau.
23. At pages 117-119 of the bundle, there are medical notes which confirm that at the relevant time, the claimant was suffering from depression and stress at work. At pages 44-46 of the bundle, there is also a letter from Dr Thomas at South West London & St. George's Mental Health Trust, dated the 10th February 2020, which diagnosed the claimant as having a moderate depressive episode. The claimant told me that the behaviour she had suffered at work had a profound effect upon her. She told me that it affected her to the point where when she was at work, she was unable to swallow food.
24. I therefore accept that at the time of her dismissal and in the months thereafter, the claimant was suffering from depression, stress and anxiety.

25. However, it is clear that the claimant was able to access assistance. When the reconvened sickness absence hearing took place on the 11th September 2019, the claimant had the benefit of a representative from Sutton Uplift. That person is described as an Employment Adviser. In a letter at page 94 of the bundle, there is a letter from Sutton Uplift. This letter confirms that the claimant had accessed a variety of their services and that between the 6th June 2019 and the 12th February 2020, the claimant had support from their Employment Team. Additionally, the claimant accepts that at that time, she had received advice from the Citizens Advice Bureau, because it was they who advised her that she refer her claim to ACAS. She accepts that she was in contact with the Citizens Advice Bureau before the 10th December 2019.
26. In my judgment therefore, it was reasonably practicable for the claimant to have brought the claim in time. I therefore refuse to extend the time limit within which the claim should have been brought.

Can the claim be amended to bring a claim for race discrimination (harassment) and failure to pay sick pay/breach of contract:

27. I turn then to the second issue of whether the claim can be amended to bring a claim for race discrimination (harassment) and failure to pay sick pay/breach of contract?
28. This is an amendment to an existing claim. I have already decided that the claim for unfair dismissal has been brought out of time and I have refused to extend the time limit. Accordingly, in my view, the Tribunal does not have any jurisdiction to hear the claim for unfair dismissal and accordingly there cannot be any application to amend that claim.
29. The claim for unfair dismissal is therefore dismissed under *section 111 Employment Rights Act 1996*, as the Tribunal has no jurisdiction to consider it. Accordingly, there is no power to amend the claim and so any application to amend, must fail.

Employment Judge **Apted**

Date: 1st March 2021

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