



EMPLOYMENT TRIBUNALS

Claimant: Miss PE Hyde

Respondent: Pennine Acute Hospitals NHS Trust

Heard at: Manchester On: Thursday, June 10 2021
Employment Tribunal
(Via CVP)

Before: Employment Judge Mr. M. Salter

Representation:

Claimant: In person, supported by her mother.

Respondent: Mr. J. Upton, solicitor.

JUDGMENT

It is the judgment of the tribunal that the Claimant's claims of:

- (a) unfair dismissal, unlawful deduction from wages, and breach of contract were not presented within the relevant time limits, in circumstances where it was reasonably practicable for them to have been. The tribunal, therefore, has no jurisdiction to hear these claims;
- (b) disability discrimination were not presented with the relevant time period permitted by s123 of the Equality Act 2010, however it is just and equitable in the circumstances of this case to extend time.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are my reasons for the decision above.

2. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

BACKGROUND

The Claimant's case as formulated in her ET1

3. The Claimant's complaint, as formulated in her Form ET1, presented to the tribunal on 11th May 2020, is in short, she was unfairly dismissed and that she was subject to acts of disability discrimination. She was also, she claims, not paid for overtime she had taken and was not paid appropriately for her notice period.

The Respondent's Response

4. In its Form ET3, received by the tribunal 12th June 2020, the Respondent accepted the Claimant was an employee and that she was dismissed, but denied that that dismissal was unfair or that the Claimant had sufficient continuity of employment to present a claim of unfair dismissal. It also raised a potential jurisdictional bar to the claims: that the Claimant had presented her claims out of time.

Relevant Procedural History

5. The matter came before E.J Whittaker on 25th November 2020 for a Preliminary Hearing for case management, and then before Employment Judge Benson on 8th March 2021 for a second case management hearing, when today's hearing was listed; a final hearing was also listed.
6. As a result of those Preliminary Hearings an agreed list of issues was produced where the Claimant's claims are identified as:

- (a) Wages/Holiday: and concern the failure to pay the claimant for 28 hours overtime and for underpaying the Claimant's salary during her notice period [105 §7];
- (b) a failure to make reasonable adjustments [105 8(a)] in not providing the Claimant adequate support in her role;
- (c) discrimination arising from disability [105 §8(b)] where the Respondent encouraged the employee whose maternity leave the Claimant was covering to return to work early; and
- (d) unfair dismissal [106].

THE PRELIMINARY HEARING

General

7. The matter came before me and had a one-day time estimate. It was listed to consider the matters identified by Employment Judge Benson [94 §15(i) and (ii)] namely whether the Claimant's claim had been presented in time and whether the Claimant had the necessary continuity of service to be able to present a claim of unfair dismissal.
8. The Claimant represented herself, and the Respondent was represented by Mr. Upton.
9. This was a remote hearing which was not objected to by the parties, being conducted entirely by Cloud Video Platform ("CVP"). A face-to-face hearing was not held because it was not practicable, and no-one requested the same it was conducted using CVP under rule 46. The parties agreed to the hearing being conducted in this way. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no significant difficulties.
10. The participants were told that it was an offence to record the proceedings.
11. Evidence was heard from the witnesses via video link. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

Points that were Discussed

Adjustments

12. The Claimant confirmed she did not require any other specific adjustments to be made in view of her disability; but it was agreed that should any other matter of concern arise as the hearing went along, she should raise this, and appropriate ad hoc adjustments could be made. I explained it was my practice

with video hearings to break every hour. At a point during the hearing the claimant was visibly upset and distressed, she did not wish to have a break, and so we continued for a short while longer until it was time for a scheduled break.

Litigant in person

13. As the Claimant was representing herself, I took time to explain to her:

- (a) the purpose and approach to cross examination;
- (b) that whilst I would do my best to ensure she was on an equal footing with the Respondent who was represented, and whilst I am able to ask questions of the witnesses in the case, I am not able to conduct cross examination of those witnesses on behalf of her; I also explained that part of cross examination was to “put the case” to the witness, and what this entailed.
- (c) the requirement to put her case to every witness, or I will consider she accepts the point left unchallenged;
- (d) that she would get an opportunity at the end of the hearing to make submissions, if she wanted to, to tell me why she should win her claim;

DOCUMENTS, EVIDENCE AND SUBMISSIONS

Witness Evidence

14. I heard evidence from the Claimant and from Mr. Jon Dobson, the Respondent’s Associate Director of Workforce. Both witnesses gave evidence by way of written witness statements that were read by the me in advance of them giving oral evidence. Both witnesses were cross-examined

Bundle

15. To assist me in determining the matter I have before me today an agreed bundle consisting of some [292] pages prepared by the Respondent, although other documents were appended to the Claimant’s witness statement. My attention was taken to a number of these documents as part of me hearing submissions and, as discussed with the parties at the outset of the hearing and before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

Submissions

16. I heard helpful submissions from both parties.

17. Mr Upton made closing submissions from 1231 until 1250 and helpfully adopted a structure that made his submissions logical to follow. For each discretion he asked me to focus on the chronology of events and reminded

me of the higher hurdle for unfair dismissal/breach of contract/wages act claims than under the Equality Act 2010. Candidly, he accepted that the effect of delay on the evidence will be that there is some loss of recollection, but he could not say that would be significant, or a witness had left the employ of the Respondent.

18. The Claimant, in her submissions, explained what she described as her "spiral into ill health" after she was dismissed, and that she ended up chasing the Respondent for answers. When she addressed the issue of continuity, she highlighted that to her [117] provides continuity of employment. When addressing the issue of time limits the Claimant asked why would she file a claim before she actually did when the situation was not clear to her; and that she cannot see any difference for time limits for the Respondent being delayed in its compliance with internal steps owing to COVID, and her being delayed in commencing her tribunal litigation because of her ill-health.

MATERIAL FACTS

General Points

19. From the evidence and submissions, I made the following findings of fact. I make my findings after considering all the evidence before me, taking into account relevant documents where they exist, the accounts given by the Claimant and Mr Dobson in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all the evidence, even where it is disputed.
20. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principal findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

21. The Respondent is an NHS Trust. It works closely with Salford Royal NHS Foundation Trust (“Salford Royal”). They work together under the banner of the “Northern Care Alliance NHS Group” (“Northern Care Alliance”). This is effectively a trading name for the two organisations which, I find, are separate NHS Trusts. The proximity of these two trusts’ working relationship is shown as, for instance, Mr Dobson himself is employed by Salford Royal, but will provide HR services to the Respondent and the Northern Care Alliance.
22. The Claimant moved from Salford Royal to the Respondent in February 2019. It is an agreed fact that the Claimant was employed by the Respondent on a fixed-term contract covering maternity leave from 25th February 2019 [Dobson WS§4]. The Claimant’s contract of employment states her continuity of employment commenced on 25th February 2019 [107]. The letter comes from the Northern Care Alliance but identifies that the Claimant was appointed by the Respondent.
23. As part of her move to the Respondent the Claimant’s employment data was transferred from Salford Royal [117]. This records that the Claimant’s “Date of Entry to NHS” was 5th September 2016.
24. The Claimant was employed as a Cancer Support Manager and remained in this role until she commenced a period of sick leave in July 2019. She was not to return.
25. On 18th July 2019, the person for whom the Claimant was covering indicated that she wished to return early from her maternity leave [119]. Although this email looks like the employee is wishing to return the Claimant believes that this is part of a cover up and that the employee was being encouraged to return to work early.
26. On the 1st September 2019 the Claimant queried outstanding payments and outstanding annual leave [126 refers].
27. On the 27th September 2019 the Claimant’s contract was terminated [121].
28. On the 11th October 2019 the Claimant received a response to her query about outstanding holiday and additional hours [126] this letter informs the

claimant that the payment for the outstanding hours will not be paid as the hours were not authorised.

29. On the 23rd October 2019 the Claimant presented a grievance [131]. Part of the grievance process was that the Claimant attended a meeting on 21st November 2019 accompanied by her mother's best friend. After this meeting the Claimant produced amendments to the minutes provided by the Respondent.
30. The Claimant did not receive an outcome until 31st January 2020.
31. It is an agreed fact that the Claimant's employment ended on 21st November 2019 [14 §5.1, 94 §9].
32. Towards the end of 2019, the claimant suffered bouts of serious ill health, which I will not set out in this judgment as it will be a public document, but it is accepted that these involved her receiving treatment and assessments.
33. Throughout the period after her employment ended there was an amount of contact between the Claimant and Respondent via email and I was taken to various parts of this, and it was not disputed there was contact between the parties throughout the period October 2019 to the presentation of the Claimant's claim
34. The Claimant explained to me that she received assistance and guidance during this period from a family friend who is in HR.
35. As stated above the Claimant received her grievance outcome on 31st January 2020 [173]. The Claimant appealed her grievance outcome [177], and on 4th March 2020 notes she had lost faith in the Respondent's ability to comply with the grievance policy and "therefore I will not have to consider alternative options in the absence of a response" [182-183].
36. I was taken to various notes in the evidence that showed the Claimant the Claimant's state of health had improved in February 2020 [265-266]
37. On 18th March 2020 the Claimant emailed the Respondent [187] seeking financial compensation and stating that her "next port of call is going to be

ACAS and or Solicitor...” The Claimant told me her mother helped her with this email and that it was probably around this time that she was aware she could present a claim to an employment tribunal.

38. On 16th April 2020 the Claimant sought advice from ACAS [89 refers]. At the time the claimant’s mother was emigrating and the Claimant was assisting her with that and, to quote the Claimant, the “claim was not in the forefront of [her] mind. [she] understands [she] should have done something sooner but she did not.”
39. The Claimant attempted to present a claim to the tribunal on 22nd April 2020 but this was rejected. The claimant tried again to present her claim but again it was rejected on 6th May 2020 [89].
40. The Claimant made her application for ACAS Conciliation on 7th May 2020 [29, 41]. This ended on 11th May 2020 and she received her certificate by email. She presented her claim on the same date [11].

THE LAW

Statute

41. There are two different discretions available to me. The first is under the Employment Rights Act 1996, sections 23(2) and (4) and 111, and the Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, where I can extend time if I am satisfied that it was not reasonably practicable to have brought the claim within time and, where it has been brought within a reasonable time thereafter. This is a question of fact to be determined in a two-stage process. Ill health may prevent an employee from presenting a claim in time. The burden is on the Claimant to produce evidence in support of such a contention. The test is not one of absolute incapability but of practicability, namely what could be done given the Claimant’s health in the relevant period. In considering whether the claim was brought within a reasonable period thereafter, the Tribunal is entitled to have regard to the public interest in claims being brought promptly and the prejudice caused in allowing the claim to proceed out of time.
42. As for the discrimination claim, section 123 of the Equality Act 2010 provides that no complaint may be brought after the end of the period of three months

starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable.

43. If the claim is presented outside the primary limitation period, the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:

- (a) Time limits in employment cases should be observed strictly and an extension is the exception not the rule, see Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576.
- (b) The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended;
- (c) The tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim;
- (d) This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues;
- (e) There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, British Coal Corporation v Keeble [1977] IRLR 336.

44. no matter which discretion I am considering, the time limits should be observed strictly and the burden of proving what I should exercise the discretion rests on the Claimant.

CONCLUSIONS ON THE ISSUES

General

45. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

46. It appears appropriate for me to determine whether the Tribunal has jurisdiction to hear the claims first and then to decide if the Claimant has continuous employment to present a claim.

Findings on the Issues

Issue 1: were the claims presented in time:

47. This requires an adjudication as to when the claims arise.
48. Each of the claims presented by the Claimant have limitation periods of three months less one day of the claim arising.
49. I make the following findings as to the Claimant's claims:
- (a) Unpaid wages: the Claimant was aware the Respondent would not be paid for the accrued overtime on 11th October 2019 [126], limitation is therefore the 10th January 2021;
 - (b) Notice pay: this will arise on the effective date of termination of the Claimant's employment, so the 21st November 2019. Limitation would be the 20th February 2020;
 - (c) Unfair dismissal: again, this will arise on the 21st November 2019, again then limitation is the 20th February 2020;
 - (d) Discrimination, the exact date depends on the claim:
 - (i) Discrimination arising from disability: this is the encouragement of the early return of the employee whose maternity leave the Claimant was covering. This appears to have arisen on 18th July 2019;
 - (ii) For the claim of a failure to make reasonable adjustments the adjustments are identified [105 §8(a)] as those set out in the Claimant's document: "Claimants Response to Respondents Grounds of Resistance List of Issues" [59 §18] these all concern the manner in which the Claimant undertook her role and aspects of the job itself. The Claimant was not at work from mid-June 2019. Limitation would appear to run then from, at the latest, June 2019 when the Claimant went off work
50. The Claimant did not commence ACAS conciliation until 7th May 2020 and did not present her ET1 until 11th May 2020. All the claims have, therefore been presented out of time.

Issue 2: Unfair dismissal/Breach of Contract/wages act: reasonable practicability

51. I have decided that it was reasonably practicable for the Claimant to have presented her claim within the relevant time limit for these claims. My reasons are as follows:
- (a) Whilst there is undoubtedly serious medical situation and I have considered the impact on the claimant of her disability; I have seen

extensive and detailed contact between the Claimant and the Respondent;

- (b) The claimant was receiving assistance from HR family friend;
- (c) From the date of her dismissal the Claimant was aware of the facts underlying the claims for pay and arising from her dismissal.
- (d) I consider that it would not be reasonable for the claimant to have been ignorant of her rights during this period, and it follows that I would not consider it reasonable for the claimant to have been ignorant of the relevant time limit to pursue those rights

52. Considering all these factors I find that it was reasonably feasible for the Claimant to have presented a claim within the relevant time period.

Issue 3: unfair dismissal/Breach of contract/wages act: within a reasonable time thereafter

53. If I am wrong on this then I would have determined that the Claimant was not presented within a reasonable time thereafter. The Claimant refers to contacting ACAS and a solicitor in March 2020, so she was aware of the existence of these sources, but it is not until April that this is in fact done, and not until May that ACAS conciliation is commenced and her claim presented.

54. This two-month period is not, in my conclusion, a reasonable period in the circumstances of this case.

Issue 4: Discrimination: Just and equitable to extend time.

55. The Employment Tribunal is afforded a wide discretion in deciding whether, in all the circumstances of the case, it considers that it is just and equitable to extend time.

56. The exercise of discretion is essentially weighing the balance of prejudice to the claimant if the extension of time is denied against that to the respondent if the extension is granted.

57. Mr. Upton candidly stated that there was no specific prejudice he could point to which his clients would suffer in this matter beyond the natural degradation of memory, there had been, for instance, no loss of paperwork and all witnesses were available to the respondent.

58. In the exercise of discretion as to whether to consider a claim out of time on just and equitable grounds, a useful, but not mandatory, exercise are the factors contained within s33 Limitation Act 1980 referred to in British Coal

Corporation v Keeble & Ors IRLR 336 which include the following factors, that I was addressed on and which appear to me to be relevant:

- (a) Length of and reasons for delay: these are considerable delays from June 2019 until May 2020, almost 9 months out of time;
- (b) The promptness with which C acted once he knew of the facts giving rise to the cause of action: here the Claimant was aware of many of the facts underlying her claim from June 2019;
- (c) The steps taken by C to obtain appropriate professional advice once he knew of the possibility of taking action: the Claimant had access to HR advice and was aware of ACAS and solicitors

59. Not every element in s33 is relevant and it is not a tick box exercise. I:

- (a) have also considered the impact of the Claimant's disability itself on her complying with time limits
- (b) was not addressed on the merits of the claims.

60. Weighing these factors up against each other and considering the lack of prejudice caused to the Respondent I consider that it is just and equitable for the tribunal to exercise this discretion and extend the time limit for the presentation of the claimant's discrimination claims so they can proceed to Final Hearing.

Issue 5: Continuity of Service

61. Although not necessary for me to determine considering my findings above, if required to decide on this matter I would have determined that the claimant did not have continuity of service to present a claim of unfair dismissal. Her argument that

- (a) she was an "NHS employee" and so had continuous service from her entry into employment by a Trust is misconceived. She was employed by Salford Royal and then moved to another employing organisation, the Respondent, which is legally a wholly separate employer in February 2019, her continuity of employment starts on that date with the Respondent;
- (b) that the Collective agreement does not say that she did not have continuity of employment and therefore she does have continuity also fails. Continuity of employment is a legal concept; it is not open to parties to a contract of employment to say whether it does or does not exist in any given case. The collective agreement means that other benefits that the employer can adjust are done so to reflect lengthy

service within NHS Organisations. These rights can be set by contracting parties. Continuity of employment cannot be;

CONCLUSION

62. Therefore, I determine the tribunal does not have jurisdiction to hear the Claimant's claims of unfair dismissal, breach of contract and for unlawful deduction from wages. However, the discrimination claims can proceed. I have given case management orders for the progression of that matter to the previously listed Final Hearing.

Employment Judge Salter

Monday, 21st June 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

24 June 2021

FOR THE TRIBUNAL OFFICE

Notes

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.