



EMPLOYMENT TRIBUNALS

Claimant: Ms Suraiya Begum

Respondent: Surgi-Call Locums Limited

RECORD of a PRELIMINARY HEARING

Heard at: Bury St Edmunds (by telephone) **On:** 13 November 2020

Before: Employment Judge K J Palmer (sitting alone)

Appearances

For the Claimant: Mr Allan Roberts, Counsel

For the Respondent: Ms Catherine Meenan, Counsel

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing on the papers which had not been objected to by the parties. The form of remote hearing was by telephone (A). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

RESERVED JUDGMENT

Pursuant to a Preliminary Hearing conducted by Telephone

Background and Discussion

- (1) This matter came before me today as a two hour telephone Preliminary Hearing. I was informed by the Administration that this was going to be a Case Management Discussion. After dialling in the parties who were originally communicated to me by the Administration as being Allan Roberts of Counsel, on behalf of the Claimant and Maria Gallucci, a Solicitor, on behalf of the Respondent. Ms Gallucci proved to be impossible to dial in. I was then informed that, in fact, the Respondents were due to be represented by Counsel Ms Catherine Meenan. After some machinations I was able to find out the details for Ms Meenan from Mr Roberts and dial her in to the Hearing.

- (2) It then became very clear, that the purpose of the Hearing was not that which I had originally been informed, but that there was a specific issue which was due to be before me in respect of this matter and in respect of which, Ms Meenan had submitted written submissions which were also not before me. Fortunately, she was able to email those to me on my Judicial email account and accordingly, they were then before me.
- (3) It is clear, however, that the purpose of today's short Hearing had morphed into something rather more complex than had originally been indicated to me. I was therefore at something of a disadvantage.
- (4) I had received a Bundle of papers sent electronically in preparation for what I thought was a Case Management Hearing and I was able to access that Bundle. However, it became clear during the course of the Hearing that I did not have all of the documents in the Bundle in front of me. I was missing some documents.
- (5) I resolved to proceed to hear the various issues and the submissions of both Counsel and then had no alternative but to adjourn and reserve my Judgment on the issue that was before me. I specifically asked Mr Roberts to cause the missing documents to be forwarded to the Tribunal and I asked the Administration then to forward those on to me.
- (6) For whatever reason, and that reason is not clear to me, and despite my chasing on numerous occasions those documents were not sent to me until 18 December 2020 and I therefore did not have the full Bundle in front of me and was not able to consider the issue before me pursuant to the submissions I heard until after I received them.

The Issues

Brief History of these proceedings

- (7) The Claimant who was employed by the Respondent as a Team Leader, from 9 July 2009, presented a claim to this Tribunal on 31 July 2019. At that time the Claimant was still employed by the Respondent. In that claim, which was home made, she ticked the boxes for discrimination on the grounds of pregnancy or maternity and indicated that she was owed other payments. The claim was home made and not particularised. The claim mentioned, in a short narrative, claims for pay disparity / equal pay – gender discrimination, and discrimination because of pregnancy or maternity.
- (8) The Respondents filed a fulsome ET3 acknowledging that they understood the Claimant's claims to be sex discrimination, discrimination on the grounds of pregnancy and maternity leave, equal pay, unlawful deduction of wages and a failure to grant a request for flexible working. However, they sought further and better particulars of these claims which, at that time, were wholly unparticularised. The ET3 was filed on 30 September 2019.

- (9) The Claimant provided home made further and better particulars of her claim, under Case Number: 3321056/2019 on 31 January 2020.
- (10) However, pursuant to a letter of resignation dated 19 August 2019, the Claimant had resigned. In that letter, the Claimant alleged constructive dismissal.
- (11) Her effective date of termination was therefore 19 August 2019, some 19 days after presentation of the Claimant's claim under Case Number: 3321056/2019 ("the First Claim").
- (12) The further and better particulars supplied on 31 January 2020 set out in a little more detail the Claimant's claims as being sex discrimination, pregnancy and maternity discrimination, equal pay, unlawful deduction of wages and a failure to grant flexible working requests.
- (13) The Claimant had commenced an Early Conciliation process with Acas in respect of her constructive dismissal claim pursuant to her resignation on 19 August 2019, on 22 August 2019. In fact, Acas issued an Early Conciliation Certificate on 30 August 2019 in that respect.
- (14) The Claimant then commenced new employment on 14 October 2019.
- (15) It is clear that by 11 December 2019, the Claimant had sought and was in receipt of legal advice. She confirmed this in a letter by email addressed to Employment Judge Tynan dated 11 December 2019 (this was one of the documents that I did not have before me at the Hearing and was only supplied to me on 18 December 2020).
- (16) The Claimant also wrote to the Tribunal on 31 January 2020 seeking to amend the First Claim to include a claim for constructive dismissal. She received a response from the Tribunal indicating that such an Application could only be entertained if the Application was accompanied by a draft of the proposed amendments and was copied to the Respondent.
- (17) There was a Preliminary Hearing on 23 April 2020, before Employment Judge Spencer (sitting alone) and the issue of the Claimant's amendments was discussed. By that time no formal Application had been advanced. At that Hearing, the Respondents were represented by Ms Meenan who was before me today (after some communication difficulties) and Ms Meenan made it clear that any such Application would be resisted and pointed out that in the Respondent's view, Section 18A of the Employment Tribunals Act 1996, debarred the Claimant from amending the First Claim to add this new complaint.
- (18) That appeared to prompt a discussion as to whether the Claimant should therefore pursue a constructive dismissal claim by presenting a second claim to this Tribunal and Ms Meenan made it very plain in that if that was to happen, then the Respondents would argue that such a claim could not proceed as the tribunal had no jurisdiction to hear it as it would be manifestly out of time.

- (19) The Claimant then did present a Second Claim to this Tribunal on 14 May 2020, almost nine months after her resignation. That claim added a 'tick' at paragraph 8 to the unfair dismissal box and simply said,

"R563015/19/48 – maternity and pregnancy discrimination and equal pay claim to have this constructive unfair dismissal claim added to".

- (20) There then appears to have been some considerable correspondence between the parties and the Tribunal, not all of which I am party to, but it was made clear in a letter dated 25 October 2020 caused to be written by Employment Judge Ord, that any and all Applications would be considered at this Preliminary Hearing.

The Issues Before Me Today

The First Claim

- (21) I have no formal Application to Amend the First Claim to include the Claimant's claim for constructive unfair dismissal. I cannot deal with that today as there is insufficient time and I have had no submissions from either party in this respect. The only issue before me today is whether the claims advanced in the Second Claim can proceed.
- (22) It is the Respondent's case that the Tribunal has no jurisdiction to hear them because they are so manifestly out of time.
- (23) Ms Meenan's submissions are entirely on the basis that the only claim in the Second Claim is a claim for constructive unfair dismissal.
- (24) Whilst it is not clear what aspect of the Second Claim includes claims in discrimination, as before me there is the barest details of the claim in the Second Claim, Mr Roberts argues that the Second Claim does include aspects of discrimination.
- (25) To be clear, the claims in the First Claim are articulated in the Case Management Summary of 23 April 2020. This appears at paragraph 15.

The Second Claim and the claim for constructive dismissal

- (26) The Second Claim was presented some 9 months after the Claimant's letter of resignation in which she alleged constructive dismissal.
- (27) Section 111(2) of the Employment Rights Act 1996 ("ERA"), makes it clear that an Employment Tribunal shall not consider a complaint for unfair dismissal unless it is presented:

“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.”
- (28) These time limits are marginally extended in light of the Early Conciliation procedure. In this case, the Early Conciliation Certificate was produced on 30 August 2019. On any analysis, however, the Claimant’s claim was presented some six months out of time.
- (29) I have heard submissions by both Counsel on the issue of whether I should exercise my discretion and extend time under Section 111(2)(b) of the ERA. The test I have to apply in respect of an unfair dismissal claim, is the “*not reasonably practicable*” test.
- (30) The Law is relatively is relatively well settled.
- (31) I do not propose to repeat that in detail, save to say I am grateful to Ms Meenan for her written submissions which adequately set out the Law. I have duly considered the cases she has referred me to and also to which Mr Roberts has referred. I have considered the cases of:
- Palmer and Saunders v Southend-on-Sea [1984] ICR372;
 - Marley (UK) Limited v Anderson [1996] IRLR163;
 - Zyntek v Wickman Machine Tool Manufacturing Company Limited EAT340/79;
 - Chouafi v London United Busways Limited [2006] EWCA Civ 689; and
 - Norbert Dentressangle Logistics Limited v Hutton EAT0011/13.
- (32) I have also considered Dedman v British Building and Engineering Appliances Limited [1973] IRLR379, which is pertinent on the issue of the Tribunal taking into account whether or not the Claimant had access to legal advice at the material time.
- (33) The Claimant’s arguments, through Mr Roberts, are essentially based upon her ill health. The ill health in question is anxiety and depression. I had before me medical evidence advanced by the Claimant in the form of a Doctor’s report from Dr Rachel Spendlove from the Harvey Group Practice, from Jacqueline Cotton from the Hertfordshire Public Health Nursing Service, GP records for the period of 12 April 2019 through to June 2020.
- (34) The Respondents do not deny that the Claimant suffered from ill health. However, they point out that despite this, the Respondent was able to accomplish a number of feats including:
- 34.1 writing a detailed letter of resignation on the basis of constructive dismissal on 19 August 2019, despite suffering from anxiety and depression at the time;
- 34.2 contacting Acas on 22 August 2019, initiating Early Conciliation;

- 34.3 engaging in the process of applying for jobs and obtaining one and starting new work on 14 October 2019; and
- 34.4 working in that role from October 2019 until April 2020.
- (35) I also point out that at the time the Claimant went off sick, it was shortly thereafter that she presented the Second Claim.
- (36) She was also able to engage with the Tribunal throughout the timeline. Ms Meenan referred me to that part of the Bundle which I did not have before me, but which was sent to me on 18 December 2020, which illustrates that on 11 December 2019 the Claimant was able to email the Tribunal requesting a time extension for her discrimination claims. In that letter she said she was still receiving legal support; indicating that she was in receipt of some kind of legal assistance and had been for some time.
- (37) In that letter she said that her new job role reduced how much time she had to regularly liaise with her legal representatives and that therefore she clearly had been in regular contact with them prior to that. She does not, in that letter, indicate that her new job role had increased her anxieties such that she could not communicate with her Solicitors. Instead, she cites constraints of time.
- (38) On 31 January 2020, the Claimant contacted the Tribunal twice. First by email at 1348 hours and provided a coherent set of home made Further and Better Particulars in compliance with the Tribunal's Order of 17 November 2019. She also emailed the Tribunal at 1403 hours and confirmed she had been advised by her Solicitor in relation to her constructive dismissal claim. She points out in that letter that she was aware that she needed to lodge a separate Application for constructive unfair dismissal. The letter is coherent and clear.
- (39) Yet, by the Preliminary Hearing on 23 April 2020, she still had not done so. She took a full part in attending the Hearing on 23 April 2020, but had by that time still not presented her Second Claim. She did not do so until 14 May 2020 where she added the constructive dismissal claim by ticking the unfair dismissal box at Section 8.1 of the form and adding the words I have set out above.
- (40) Miss Meenan directs me to the fact that between 3 September 2019 and 25 February 2020, the Claimant did not contact her GP about her anxiety. When she did contact her GP on 25 February 2020, she was no longer taking medication. She was issued with a fit note on 22 April 2020 to 24 May 2020. Her symptoms were worsening at that time.
- (41) None of the medical evidence proves that it was not reasonably practicable for the Claimant to present her claims in time.
- (42) Mr Roberts, on behalf of the Claimant, seeks to pour scorn on the submissions of Ms Meenan. He says the submissions are scatter gun and he says the submissions demonstrate a total misunderstanding of mental health impairment. He argues that the Claimant's actions were wholly in line with someone suffering from such an impairment. He suggests that Ms Meenan's attempts to show that the medical evidence does not support the argument that

it was not reasonably practicable to issue, once again demonstrates a misunderstanding of mental health impairment.

- (43) I am not impressed by Mr Roberts' submissions.
- (44) For all the reasons that Ms Meenan has outlined, and which I have set out above, it is clear that it was reasonably practicable for the Claimant to issue her claim in time and her illness did not preclude her from doing so. I take into account the fact that she clearly had some legal advice, was coherently dealing with the First Claim and had innumerable correspondence with the Tribunal in that respect. She understood the nature of her constructive dismissal claim, yet did not present a claim until some 9 months after the termination of her employment. That claim is manifestly out of time and the Tribunal has no jurisdiction to consider it under Section 111 of the ERA. For the reasons set out, I do not exercise my discretion to extend time to validate it. That claim is therefore struck out.

Discrimination Claims

- (45) It is not clear to me from the pleading before me constituting the Second Claim, that within the Second Claim there is contained claims in discrimination. However, if and in so far as the Second Claim does advance additional claims in discrimination over and above those in the First Claim, then they are also manifestly out of time. The test for exercising discretion to validate any such claims in the Second Claim is of course a different one and is the just and equitable test set out in the Equality Act 2010 at Section 123(1)(b). The test here is a lower hurdle for a Claimant to clear and both Counsel referred me to the relevant Authorities. In that respect I have considered the test set out in **British Land v Keeble [1977] UK EAT 496**. I have also considered the very recent case of **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 23**.
- (46) In respect of this authorities I have considered all the factual issues I have considered above and also, as indeed I have above, considered the level of prejudice to both parties. I agree with Ms Meenan that looking at the history of this case, in so far as I am able to as a result of the documents in front of me, it has been a slow moving car crash. It seems to me, prejudice will be caused to the Respondents if the Second Claim, in any form, whether it be in respect of any claims in discrimination or in respect of the constructive dismissal claim, would manifestly prejudice the Respondents. The claim has been running since July 2019 and is not much advanced by the end of 2020. To allow a claim presented on 14 May 2020 to continue would unnecessarily prejudice the Respondents.
- (47) Taking into account all the facts I have set out above, and in so far as the Second Claim includes claims in discrimination, they are manifestly out of time and I conclude it is not appropriate for me to exercise my discretion on the just and equitable principal and extend time to validate them. They are therefore out of time and are struck out.

- (48) For the avoidance of doubt, therefore, all claims in the Second Claim are struck out and cannot proceed as the Tribunal has no jurisdiction to hear them.

Further Preliminary Hearing

- (49) As I have mentioned above, no claims were before me to amend the First Claim to include any claims ventured in the Second Claim. It may be that the Claimant wishes to venture such an Application as has previously been indicated. However, such an Application may not succeed for the reasons the Respondents indicated in their arguments before Employment Judge Spencer on 23 April 2020. I propose to set this matter down for a further Telephone Preliminary Hearing to discuss any remaining Case Management issues, including any Applications to amend the First Claim and, to make such appropriate directions as are necessary for the further conduct of this matter and to list the matter for a Full Merits Hearing.
- (50) The matter will be listed for a 2 hour Preliminary Hearing Case Management discussion by telephone on the earliest available date.

Other Matters

- (51) The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at:
www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/
- (52) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
- (53) **Public access to employment Tribunal decisions**
All 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.

Employment Judge K J Palmer

Date: 28 January 2021

Sent to the parties on:

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For the Tribunal:

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