



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Owen

Respondent: The Huntercombe Group Limited

Reconsidered on the papers on: 28 September 2021

Before: Employment Judge Sage

Representation

Both parties provided written submissions which were read and taken into account but will not be replicated in this decision.

RECONSIDERED JUDGMENT

The judgment is confirmed.

RECONSIDERED REASONS

1. This reconsideration has been listed at the request of the Claimant on the grounds set out below. It was confirmed that the parties were content for this matter to be dealt with on the papers. The application for reconsideration was limited to the findings of fact and decision in relation to whether the complaint of unfair dismissal should be allowed to proceed out of time. The facts and decision in relation to the extension of time for the claim of discrimination are not challenged therefore the case continued to be listed for a hearing on the merits, it being decided that it was just and equitable to extend time to allow the claim for discrimination to proceed.
2. In outline the reconsideration was requested on the following grounds:
 - a. That the judgment on the issue of whether the claim for unfair dismissal was presented out of time should be reconsidered on the basis that the Tribunal misread the date of the statement provided by Ms Teoc as April 2020 whereas it was dated April 2021. Therefore, the conclusion reached by the Tribunal that the Claimant had requisite knowledge “on the 11 December (2019) or if not then sometime up to April 2020” could not stand as it was based on incorrect facts.

- b. The Claimant stated that the facts were clear and supported their contention that she became aware of the facts that caused her to become aware for the first time that her role had not been made redundant on the 4 July 2020.
 - c. That the date of departure of Ms Teoc from the business in December 2019 was irrelevant, that the relevant date for this witness was that Ms Teoc informed the Claimant of the fact that her role was not redundant in April 2021. Paragraph 9 of the reasons records a mistake where the date of the 11 December 2019 is again referred to as the date on which Ms Teoc 'had a conversation' but this was incorrect as the date of the conversation was in April 2021
 - d. That the CVP was slow, the quality was poor and kept freezing.
 - e. That the Claimant stated that the evidence at paragraph 9 of the written reasons was incorrect when it found that Ms Teoc "confirmed to me on the 1 July 2020 I found that my role had been made redundant" and "(Michaela became aware of an advert placed in LinkedIn in September 2019 ...on 9 April 2020". The Claimant stated that this was not said and she only became aware of the job advert when it was sent to her on the 30 September 2020 by the Respondent, it was stated that this had not been seen by the Claimant at the time they contacted ACAS on the 8 July 2020.
 - f. There was an error in paragraph 25 where the date of 2021 was wrongly referred to as the date of presentation of the claim, which was the 8 July 2020 (not 2021).
 - g. The Claimant stated that in the light of the errors and the poor quality of the CVP the decision in relation to whether the claim for unfair dismissal should be reconsidered.
3. It was concluded that the decision should be reconsidered as it was accepted that the date of the statement was misread therefore the finding of fact made as a result of this error as referred to above at paragraph (a) could not stand. The typographical error at paragraph 25 will also be corrected. Also, in the light of the grounds for the reconsideration set out above at paragraph (c) (d) and (e) it was concluded that the evidence provided by the Claimant in cross examination should also be reconsidered.

Confirmation of the documents before the Tribunal

4. The Tribunal had before it a bundle of documents, including directions for this hearing at pages 30-31 which included a direction for the Claimant to produce a statement setting out when she learned of the circumstances giving rise to the claim in as much detail as possible. The Claimant produced a witness statement that was headed 'Witness statement – Timeline of events' which was in the form of an excel spreadsheet. There was also a second document headed 'Witness statement – When and how I learned of the circumstances giving rise to the claim: summary'. This document was part statement and part submission made by the Claimant's representative as it was confirmed that pages 3 – 10 had been written by him and not the Claimant. The Tribunal also had before it the requests for reconsideration dated the 22 June and 30 June and the email communication dated the 4 August 2021.

The Issues

5. The issues for this hearing were as follows:
 - a. When was the Claimant aware of the circumstances that led her to conclude that she had a claim of unfair dismissal against the Respondent;
 - b. Was it reasonably practicable to present her claim within the statutory period of three months, if not
 - c. Was it presented within such further period as was reasonable.

Findings of Fact

6. The Claimant's evidence in chief in her timeline of events showed that at the time she was made redundant, she was not aware that her position would continue. She had been told by Dr Barlow that her role would cease on the appointment of a Band 5 physiotherapist. The Band 5 was due to start on the 28 June 2019 which was also the effective date of termination (pages 32-33 of the bundle). At the date of termination, the Claimant had no cause to believe that her role was not redundant and she was prepared to accept on the facts known to her at the time that her role was redundant and her dismissal was therefore fair. The Claimant therefore accepted her redundancy payment and did not challenge the fairness of the dismissal.
7. In cross examination the Claimant confirmed that she felt (although could not be sure) that she was not offered the role of Band 5 physiotherapist because she was pregnant. The Claimant confirmed that she applied for the Band 5 role in January 2019 and was interviewed on the 14 February 2019 but was not successful. She confirmed that she told Dr Bristow (her supervisor) on the 18 February 2019 of her pregnancy, however the timeline showed that Dr Barlow had been aware of the Claimant's desire to start a family at the earlier date of the 24 August 2018. The Claimant confirmed that prior to her going on maternity leave she was aware that Ms Bristow emailed the staff asking for those interested in taking over the Claimant's role after she commenced maternity leave. She confirmed that this email was sent twice to colleagues and that those who expressed an interest had to attend an interview. She confirmed that she was aware of this before the 30 May 2019.
8. The Claimant's evidence as to when she became aware of the facts that caused her to believe that her role was not redundant and therefore her dismissal potentially unfair was unclear. In her timeline of events she referred to the date of the 11 December when "*Witness Andrea Teoc (rehab assistant) leaves Huntercombe, Hothfield. She later confirms that the post of Physiotherapy Assistant was still active when she left and was being performed by Bethany Hatcher*". There was no reference in the timeline to when Ms Teoc later informed the Claimant of this, despite the timeline being prepared according to the case management directions referred to above. It was stated in the reconsideration application that the statement dated the 22 April 2021 from Ms Teoc was the date that she informed the Claimant that someone was still doing her job. Although that has been stated in the application, the statement made no reference to any such conversation with

the Claimant and the Claimant also made no reference in either of her statements to discussing this with Ms. Teoc on the 22 April 2021.

9. The timeline of events then went on to state that the Claimant '*became aware*' that her job was '*still live*' on the 4 July 2020 and she contacted ACAS on the 8 July 2020 and presented her claim the next day the 9 July 2020. The Claimant's document headed 'Witness statement' only referred to the date of the 4 July 2020 which is when she stated that she was '*made aware*' that her role was still active after receiving a notification on LinkedIn, which stated "*Georgina MacKinnon worked at the Huntercombe Group - Hothfield after you started*" and her evidence in cross examination confirmed this point and the Tribunal saw this document at page 38 of the bundle. The statement also referred to the date of the 6 July 2020 which was when she was "*sent a photograph of the physiotherapy team poster*". There was no indication of who sent the Claimant this and no indication of whether this was sent following a request made by the Claimant or if the receipt of the photograph was unsolicited. The statement also confirmed that she had heard "*from a different source that my job had in reality never gone away...*". There was no detail of when the Claimant '*heard*' this, who told her and how the conversation arose. The Claimant failed to provide any names of those who she was in contact with, or dates of emails, texts or WhatsApp messages or conversations.

10. The Claimant was asked in cross examination about page 3 of her statement which the Tribunal noted was not written by the Claimant but by her husband and representative in these proceedings. The Claimant was taken to the reference in this document where it was stated that it was "*widely known that a Rehabilitation Assistant, Bethany Hatcher, was given the role of Physiotherapy Assistant on a temporary basis and was still active in it until at least December 2019*". She was asked for more details of what this meant and she replied that "*colleagues of mine told me that after I had left on maternity leave that Bethany Hatcher started working on the physiotherapy team*". The Claimant again provided no details of who told her this and when.

11. The Claimant was then asked in cross examination whether she was aware that her role continued to be performed after her employment ended and she stated she was not aware. The Claimant was then asked about the reference in the detailed account provided by her husband where he stated that "*we have a witness statement from an ex-employee that confirms this*" [that Ms Hatcher was given the role of Physiotherapy Assistant after the Claimant left and was still in the role in December 2019]; and she replied that "*my colleagues, who have left, they said after I left Bethany started working alongside physio and wore physiotherapy uniforms, physio wore lilac, with regard to the witness I can't give any names*". The Claimant was pressed on this and she was asked who told her and when and she was asked specifically about Ms Teoc; she replied that she only "*recently*" spoke to her and also "*recently another colleague Adrianna confirmed to me as well as Ms Teoc that she was working alongside the physiotherapy team*". No details were provided by the Claimant of when she spoke to Adrianna and what was said.

12. After the Claimant failed to provide clarification of who informed her that her role continued to be carried out by someone else and when these conversations took place she was pressed further on this point and she replied that she had "*recently been told by Ms Teoc*" and recently meant that she was told this in April 2021, for the first time. If that was the case it was difficult to understand the relevance of this evidence to the issue of when she became aware of the circumstances that led her to conclude that she had a claim of unfair dismissal against the Respondent.
13. The Claimant was then asked in cross examination twice of the date that she found out that her role was continuing on a permanent basis and she replied "*11 December Andrea confirmed to me and on the 1 July 2020 I found that my role had not been made redundant*" (*it is accepted that the statement referred to the date of the 4 July 2020*). This was then followed up by a second question asking her to clarify whether she was saying that that on the 11 December 2019 she found out that her Band 3 role was continuing permanently from Ms Teoc and the Claimant replied "yes". The Tribunal find as a fact that this answer appeared to be consistent with what she had written in her timeline, that Ms Teoc told her this close to the 11 December and the reference to her later confirming this, showed that the conversation took place around this date. The Tribunal considered whether the reference in the statement could refer to the much later date of April 2021 and it was concluded that it could not for a number of reasons. Firstly, this date was not mentioned in the timeline by the Claimant despite the statement being produced in preparation for the hearing. Secondly, Ms Teoc made no reference in her statement to speaking to the Claimant on the day it was written and lastly this date appeared to be irrelevant to the issues in the case; the Tribunal could not understand why it was relevant that Ms Teoc had informed the Claimant of a fact that she had established for herself nine months earlier (on the 4 July 2020).
14. The Tribunal looked carefully at the notes of the hearing to ensure that the above exchanges given in cross examination were accurately recorded and from the notes it was concluded that they were. This exchange occurred after the hearing had moved from CVP where the quality of the connection was poor, to the telephone where the quality of the call was good.
15. In re-examination the Claimant said that she became aware that the position was still 'open' on the 4 July 2020, but the date of the 11 December was when Ms Teoc left the Respondent. Ms Teoc 'later confirmed' to her that the post of physiotherapist was still ongoing. She also confirmed that she did not mean to answer in the affirmative to the question above at paragraph 13 where she was asked if she was aware on the 11 December that her role was continuing permanently.
16. The Claimant's evidence as to when she found out that her role was continuing was less than clear. There was reference to a number of conversations with people she had worked with at the Respondent, but the Claimant was unable to provide any details of when they occurred and what was said. The Claimant was evasive in her answers to these questions. The Claimant's evidence in chief only made reference to the date of the 11 December and having a later conversation. The Claimant's answers given

in cross examination were clear that she learned that her role was continuing on the 11 December and she replied in the affirmative to this question twice. She then retracted this in re-examination. The Tribunal has to make a finding of fact of when the Claimant became aware of the facts that she now wishes to rely on to pursue her claim. The Tribunal discounted all references to any incidents that occurred after the presentation of the ET1 because anything that post-dated this was irrelevant to the issues in the case. In the light of the Claimant's inconsistent evidence as to when she spoke to Ms Teoc, her failure to provide any clear evidence as to when she spoke to any of her ex-colleagues it is concluded that she became aware of the fact that her role was continuing on a permanent basis on or around the 11 December 2019.

17. The Claimant confirmed that she had access to the internet at all times but told the Tribunal that she was not looking at LinkedIn during her maternity leave (which she spent in Romania). The Claimant said that it did not cross her mind to check her LinkedIn profile during this time however there was no evidence to suggest that she was unable to do so. She confirmed that nothing physically prevented her from presenting her claim.

The Law

Employment Rights Act 1996 section 111

Complaints to employment tribunal

- (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
- (2) Subject to the following provisions of this section], an employment tribunal shall not consider a complaint under this section 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.

Reconsidered Decision.

18. When pursuing a claim for unfair dismissal, the test for whether a claim has been presented in time is whether it has been presented within 3 months of the effective date of termination (28 June 2019). It is not in dispute that this claim is out of time. The test requires me to consider whether it was reasonably practicable for the Claimant to present the claim within three months and I conclude that it was not. The Claimant's evidence and closing submissions were clear that had her role been redundant, she was happy to accept that decision and walk away. At the effective date of termination, she accepted that her role would terminate on the appointment of a band 5 physiotherapist and the termination of her contract would coincide with the

Band 5 role commencing. She also accepted that at the time, her role was redundant.

19. The evidence was consistent that the Claimant was unaware that at the date of termination the person appointed on a temporary basis to cover her role would continue in post permanently. The evidence that corroborated that the role had not ceased or diminished but was in fact continuing on a permanent basis was material to the Claimant changing her mind and concluding that her dismissal may be unfair. As these facts had not been known to the Claimant at the time of her dismissal and there was no way in which she could have been aware of them during the primary time period, I conclude that it was not reasonably practicable for her to present her claim within three months of the effective date of termination that is by the 27 September 2019.
20. The second part of the test in respect of her unfair dismissal claim is whether the Claimant presented her claim within such further period as was reasonable.
21. The timeline and statements before the Tribunal only referred to the date of the 4 July 2020 as being the date when the Claimant 'became aware' of the facts relating to the continuation of her role. 'Made aware' was a passive term indicating that prior to seeing this post, she had not looked at the LinkedIn site nor had she conducted any enquiries of her own.
22. The burden of proof is on the Claimant to show when she became aware of the facts that she now wishes to rely on to show that she presented her claim within such further period as was reasonable. She was ordered to produce a statement "setting out when and how she learned of the circumstances giving rise to the claim in as much detail as possible". The timeline provided by the Claimant was brief and gave no indication of any steps taken by her from the date of dismissal until the 4 July 2020 to establish the facts that she now seeks to rely on.
23. It was only after the 4 July 2020 that the Claimant admitted that contact was made by someone (on the 6 July) but again there was no clear evidence as to who initiated the contact and the name and details of the person who provided the photograph. Similarly, the statement provided by the Claimant gave no details of who she spoke to and when and what was discussed. It has been found as a fact that she referred to contacting two people (the person who sent her a photograph and someone she referred to as a 'different source') but again did not identify them or disclose the communication that took place. When the Claimant was asked who she spoke to she said she could not give any names or details of any discussions.
24. It has been found as a fact that the Claimant became aware on or around 11 December 2019 that her role was continuing. In arriving at this conclusion account was taken of the Claimant's evasive answers given in cross examination as referred to above. There were a number of references to contact with those colleagues, but the Claimant was unable to recall details of who she spoke to and when. It was concluded on the balance of

probabilities and after considering all the facts, that she became aware on or around the 11 December 2019 that her role was continuing.

25. It was important to establish when and how the Claimant became aware of the facts she now relies upon in pursuit of her application. The question for the Tribunal is whether the Claimant presented her claim within such further period as is reasonable and a reasonable time limit ultimately depends on all the circumstances of the case, including what the Claimant did, what she knew or ought to have known about the time limits and how the further delay occurred. A Tribunal must also consider the primary time limit and the strong public interest consideration that all claims should be pursued promptly. Litigation should be pursued efficiently and without delay. When considering time limits the Tribunal must consider not just the difficulties that the Claimant experienced but also the difficulties experienced by the Respondent.
26. The clear evidence before the Tribunal was that the Claimant was still in contact with four people who she had worked with at the Respondent company, or at least was able to contact them. There was no evidence to suggest that the Claimant took steps after the primary time limit had expired to establish what had happened to her role after being made redundant. There was no evidence that the Claimant pursued her enquiries expeditiously. It was noted that the only consistent evidence the Claimant relied upon in this case was the notification she received from LinkedIn. She confirmed that she was able to access her LinkedIn profile but did not do so when she was on maternity leave. The Claimant did not explain why she chose not to do so.
27. The evidence that confirmed that the Claimant's role was ongoing and permanent was available on a public site which the Claimant could have accessed at any time. It was also concluded that the Claimant had knowledge on or around the 11 December 2019 for the reasons stated above. The Claimant has not explained the reason why she failed to undertake any searches or why she failed to make any enquiries until the 4 July 2020. There was nothing that prevented her from doing so earlier and she confirmed that at all times she had access to the internet. This was not a case where the information was hidden or could not reasonably be discovered if reasonable enquiries were undertaken expeditiously. The Claimant made the choice not to conduct those enquiries sooner.
28. In the absence of any impediment that prevented the Claimant from making these enquiries earlier it is concluded that she failed to act promptly to pursue her claim for unfair dismissal.
29. The time limit for unfair dismissal is more stringent than that for discrimination for public policy reasons. The Claimant has not explained the reason for the significant delay in pursuing this matter. There has not been an explanation for the delay from the 27 September 2019 to the 4 July 2020. It is concluded that the reason for the delay is simply down to the fact that the Claimant failed to make any enquiries sooner and no explanation as to why this was. The Claimant has failed to show that she had pursued her claim within such further period as was reasonable after the expiry of the primary time limit.

30. The claim for unfair dismissal is out of time and is therefore dismissed.

Employment Judge Sage

Dated: 11 October 2021