



EMPLOYMENT TRIBUNALS

Claimant: Mrs Zaneta Siwak
Respondent: Nottingham University Hospitals NHS Trust
On: 17 September 2021
Before: Employment Judge Ahmed (sitting alone)
At: Leicester (via CVP)

Representation

Claimant: In person
Respondent: Mr Patrick Keith of Counsel

JUDGMENT ON AN APPLICATION FOR A RECONSIDERATION

The Claimant's application for a reconsideration dated 30 June 2021 is refused.

REASONS

1. This was a hearing on an application for a reconsideration of the decision made at a Preliminary Hearing on 20 May 2021 (the "original decision") at which the claimant's complaint of unfair dismissal was struck out as having been presented out of time and an application to amend the claim was refused.
2. The basis of the application for a reconsideration is that the claimant has new evidence which she did not or could not present at the time of the original decision. The new evidence relates to the claimant's mental and physical health and in particular that at the time she was suffering from depression and episodes of migraine which impeded her ability to present the claim in time. In support of that the claimant has produced her GP records from 1 October to 2 December 2019.
3. The migraine is said to be 'migraine with aura and hemiplegia'. The claimant says that this is a neurological condition which causes a degree of weakness and lack of control on one side of the body. It is said to be a rare disorder in which

affected individuals experience a migraine headache with weakness on one side of the body.

4. The Claimant also went to hospital on 25 November 2019 when she was apparently discharged on the same day. The Claimant says she continued to suffer from the symptoms of depression and migraine and for this reason it was not practicable to present her claim in time. The effective date of termination was 5 July 2019 and so the primary time limit expired on 4 October 2019. The Claimant began ACAS early conciliation on 11 October 2019 (Day A). The early conciliation ended on 25 November 2019 (Day B). The Claim was presented to the Tribunal on 27 December 2019.

THE LAW

5. The relevant rules as to reconsideration are set out at Rules 70 - 73 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as amended (hereinafter the "Employment Tribunal Rules"). The material parts of those rules are as follows:-

Rule 70

A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Rule 72

(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

6. The Claimant's application passed the preliminary consideration hurdle set out at in Rule 72(1) and the case was therefore listed for a reconsideration hearing under Rule 72(2). The reason for that hurdle was because she indicated that she had fresh evidence.

7. The test as to whether the original decision should be confirmed, varied or revoked is whether "it is in the interests of justice to do so" - see Rule 70.

CONCLUSIONS

8. The medical records show that the claimant was seen by her GP on 2nd October 2019 because the Claimant was feeling "anxious and paranoid". This

followed an incident where her boyfriend was physically attacked. The Claimant was diagnosed as suffering from anxiety disorder and post-traumatic stress disorder. She was prescribed anti-depressant medication but there was no discussion about migraines. The migraine medication (Sumatriptan) was prescribed, seemingly for the first time, after a GP visit on 10 December 2019.

9. Pausing there, in terms of time limits, the Claimant had to begin proceedings by 4 October 2019. In reality that meant ACAS early conciliation had to begin by 4 October as the Claimant would not get past the 'gateway' to have her claim accepted without having undergone early conciliation first. Starting early conciliation is very simple. It does not require filling in a form or anything particularly complicated. A telephone call will suffice. It does not even need a call from the Claimant herself. As mentioned above the Claimant did not begin early conciliation until 11 October 2019.

10. The relevant legal principles relating to applications for reconsideration on the basis of fresh evidence was set out in **Ladd v Marshall** [1954] 3 All ER 745 (CA). In that case Lord Justice Denning MR said:

"The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled:- First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: Thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

11. In **Outsight VB Limited v Brown** (UKEAT/0253/14) the Employment Appeal Tribunal (per Her Honour Judge Eady, as she then was) said this about the principles in **Ladd**:

"... The interests of justice might on occasion permit evidence to be adduced where the requirements of *Ladd v Marshall* are not strictly met, but it was ever thus... As to what circumstances might lead an ET to allow an application to admit fresh evidence, that will inevitably be case specific... It might be in the interests of justice to allow fresh evidence to be adduced where there is some additional factor or mitigating circumstance which meant that the evidence in question could not be obtained within reasonable diligence at an earlier stage."

12. The medical evidence now supplied shows that Claimant did not see her GP about migraine until 21 November which is long after the time limit had passed. The effects of the migraine are therefore irrelevant because the Claimant, having failed to start early conciliation in time, was unable to obtain the benefit of the extension of time that early conciliation brings. There is no medical evidence that the effect of the Citalopram medication would have been such that the Claimant was prevented from starting early conciliation by 4 October. All it needed was a telephone call from the Claimant or someone else on her behalf to get it started. The Claimant was clearly able to do that on 11 October when she was still suffering from PTSD and anxiety disorder. It was a simple but significant failing not to do so a week or so earlier.

13. I am not satisfied that the medical evidence fulfils the **Ladd v Marshall** test. The medical evidence could clearly have been obtained for the earlier Preliminary Hearing with reasonable diligence. The admission of such evidence may fall under the principles set out in **Brown** (in that in the interests of justice to permit them to be relied on) but at the end of the day the GP medical records do not assist the

Claimant's case. If anything, they reinforce the fact that migraine was not a factor until after it was too late.

15. For the reasons given the application for a reconsideration is refused and the original decision is confirmed.

Employment Judge Ahmed

Date: 26 October 2021

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