



EMPLOYMENT TRIBUNALS

Claimant: Mrs H Sandwell

Respondent: Department for Work and Pensions

Heard at: Manchester (remotely, by CVP)

On: 5 November 2021
8 November 2021
(In chambers)

Before: Employment Judge Ross

REPRESENTATION:

Claimant: Mr Johnson of Counsel

Respondent: Mr Webster of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unfair dismissal pursuant to section 95 and section 98 Employment Rights Act 1996 was presented out of time and it was reasonably practicable for the claim to be presented within time within the meaning of section 111(2)(b), and accordingly the Tribunal does not have jurisdiction to hear that claim.
2. The claimant's claims for disability discrimination which culminated in a claim that the claimant was unfavourably treated because of something arising in consequence of disability when she was dismissed by the respondent was presented out of time. However, it is just and equitable to extend the time limit pursuant to section 123 Equality Act 2010 and accordingly the Tribunal has jurisdiction to hear the claimant's claims of disability discrimination.
3. The claimant was a disabled person within the meaning of section 6 Equality Act 2010 by reason of the mental impairment of anxiety and depression. The claimant was also a disabled person within the meaning of section 6 Equality Act 2010 by reason of the condition of psoriatic arthritis.
4. The claimant was not a disabled person within the meaning of section 6 Equality Act 2010 by reason of the condition of asthma alone but when considered in conjunction with the conditions of anxiety, depression and psoriatic arthritis, the claimant was a disabled person by reason of that condition.

5. The case will be listed for a case management hearing to identify the issues and claims in the disability discrimination case and to list the case for hearing.

REASONS

Introduction

1. The claimant was employed by the respondent from April 2000 until she was dismissed with effect from 8 April 2019 on the grounds of unsatisfactory attendance.

2. The claimant suffers from many health conditions which include asthma, psoriatic arthritis and mental health conditions of anxiety and depression.

3. There is no dispute that the claimant's claims were presented out of time. The claimant brings claims for "ordinary" unfair dismissal pursuant to sections 95 and 98 Employment Rights Act 1996 and claims for disability discrimination. The claims of disability discrimination have not been completely clarified but the claimant wishes to bring a claim that her dismissal was unfavourable treatment because of something arising in consequence of disability pursuant to section 15 Equality Act 2010. She also wishes to bring a claim that the respondent failed to make reasonable adjustments in the way it applied its attendance management policy to the claimant. It is unclear whether she wishes to bring a disability discrimination claim in relation to the appeal against dismissal.

4. I heard from the claimant and from her union representative (now retired) Mr Bramhill. I also heard from her line manager at the time, Mrs Molyneux.

Facts

5. I find the following facts.

6. The claimant's husband had been diagnosed with cancer in 2014. He had treatment at that time which was successful.

7. He was diagnosed with cancer again in July 2018 and became very unwell immediately following an operation to treat his condition. When he came home from hospital the claimant initially booked annual leave to look after him as he was unable to do anything for himself.

8. However, caring for her husband seriously aggravated the claimant's underlying health conditions of psoriatic arthritis and asthma. I rely on the evidence supplied by her GP in a letter dated 13 November 2020 for these proceedings and the fit note dated 25 October 2018 which states:

"Asthma and psoriatic arthritis major exacerbation caused by being main carer for husband who has undergone major surgery and is in recovery period."

9. An Occupational Health referral on 17 January 2019 noted that the claimant had chronic health conditions i.e. psoriatic arthritis and asthma. The referral also mentioned anxiety and depression and said that the claimant was vulnerable to flare-ups.

10. On 23 January 2019 the claimant's husband took his own life. The claimant became further distressed and unwell. In her own words she "spiralled into a depression". On 31 January 2019 her notes indicated that she was suffering from severe low mood/depression which remained an entry on the fit note until her employment was terminated.

11. Her husband's funeral took place in March.

12. She was called to a meeting under the respondent's attendance management procedure on 5 April 2019, which resulted in her dismissal with effect from 8 April. She appealed against her dismissal and the appeal was heard on 11 June 2019 but she was unsuccessful. She received notification of the failure of her appeal on 4 July 2019 (see disability impact statement).

13. She contacted her union representative Mr Bramhill and later Ms Grant. Ms Grant contacted ACAS on 18 July and a certificate was issued on 12 August 2019. The claim was presented on 13 August 2019.

Considering whether to exercise discretion to extend the time limit under section 111(2)(b) Employment Rights Act 1996

14. Time limits in the Employment Tribunal are strictly applied. Both the claimant and her representative said that they knew that the time limit for bringing a claim to the Employment Tribunal was three months less one day from the date of dismissal. The date of termination of employment accordingly to the letter sent to the claimant dated 5 April 2019 was 8 April 2019 (see page 372). The time limit therefore expired on 7 July 2019.

15. ACAS was contacted on 18 July 2019 and a certificate was issued on 12 August 2019. The claim form was presented on 13 August 2019.

16. There is no dispute that if a party contacts ACAS after the expiry of the primary limitation period there can be no extension of time under the early conciliation provisions. It appears the claimant misunderstood the ACAS requirements prior to starting proceedings.

17. Given that the claim was presented out of time, which is agreed by both parties, I must turn to consider whether it was reasonably practicable for the claim to be presented within time.

18. I find that the claimant was seriously unwell at the time the proceedings were presented. It was not the claimant herself but her trade union Branch Secretary who submitted the claim form on her behalf and who also contacted ACAS.

19. I find that the claimant, who had been a suicide risk prior to her husband taking his own life (p351) continued to suffer from anxiety with depression. Her GP noted she remained concerned about the claimant's mental health risk (12 July).

20. Although the claimant was very unwell during this period, and prior to it, she was noted on 2 July as "clearly struggling as before but managing", and in June was low and tearful although not actively suicidal.

21. The claimant herself said that she had spoken to her trade union representative after she received her dismissal letter. She could not recall the date. Mr Bramhill represented her at her appeal in June. Although she said she had made rough notes of her conversations with him on scraps of paper, unfortunately these had not been produced to the Tribunal and neither had the text messages which she had sent Mr Bramhill.

22. Mr Bramhill has now retired and did not have any paperwork or other evidence of telephone conversations he agreed he had with the claimant.

23. The claimant said she had three conversations with Mr Bramhill: one after she received her dismissal letter in April, then another one and then a final one on 8 July. She said she knew the date of 8 July because it was in her call history log of telephone calls on her mobile phone. On 10 July the claimant contacted ACAS and they sent her a link about how to submit early conciliation. The claimant says she forwarded this to Angela Grant, her Branch Secretary, who contacted ACAS on her behalf and submitted the claim form later. The claimant said she had good days and bad days and was trying to find a “new normal” between July/August.

24. Mr Bramhill, the claimant's PCS representative, had represented her at her dismissal hearing and the appeal hearing which took place on 11 June 2019 but which was unsuccessful. The outcome was communicated on 4 July 2019.

25. Mr Bramhill's recollection is different to the claimant's recollection. He said he did mention taking the case further and contacting ACAS but the claimant was too tearful to take in all that was said. He did not think she would cope well with the stress of an Employment Tribunal and did not think she was well enough to give him instructions. Mr Bramhill's evidence was that by the time the claimant said she wanted to go to the Employment Tribunal the deadline had already passed. He explained the usual procedure was that the union would contact its solicitors who would assess the merits of the case before advising whether or not they would become involved.

26. Mr Bramhill had no further involvement in the matter and did not contact ACAS or present the claim form – that was done by the Branch Secretary, Ms Grant. I did not hear from her.

27. I find that during the period after the termination of her employment and prior to the presentation of her claim the claimant was mentally unwell, suffering from anxiety and depression. Her GP was worried about her suicide risk. However, I am satisfied that she was aware of the time limit of bringing a claim to an Employment Tribunal and I am satisfied that she was well enough to attend her appeal hearing during this period and also to contact Mr Bramhill on two occasions prior to the termination of her employment.

28. The appeal outcome was sent to the claimant very close to the primary Tribunal limitation but the claimant accepts she was aware that the time limit ran from the date of dismissal. I am therefore satisfied that despite her mental ill health it was reasonably practicable for her to inform Mr Bramhill that she wished to bring a claim in the Employment Tribunal. I find in these circumstances he would have presented a claim on her behalf, if she had asked him to do so.

29. I therefore find it was reasonably practicable for the claim to be presented within time.

Considering the time limit under section 123 Equality Act 2010

30. Although there was a suggestion at the previous case management hearing that the last act may relate to the appeal hearing in June 2019, for the purposes of this hearing it was not disputed that the last act complained of by the claimant in her disability discrimination claim was the termination of her employment which, according to the letter of dismissal dated 5 April 2019 to the claimant from Christine Smith (Decision Manager) was 8 April 2019.

31. I reminded myself of the well-known cases of **British Coal Corporation v Keeble & Others [1997] IRLR 336 EAT** and **Southwark London Borough Council v Afolabi [2003] ICR 800**, which remind me that although I should have regard to section 33(3) Limitation Act 1980, which includes a list of factors to consider when exercising discretion when a case is presented out of time, it is not a checklist to be adhered to slavishly. I also reminded myself of the cases **Department of Constitutional Affairs v Jones [2008] IRLR 128** and **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194**.

32. I turn first of all to consider the reason for the delay in the claimant's claim being presented in the Employment Tribunal.

33. I am satisfied that the reason for the delay was the claimant's continuing poor mental health in the time period following her dismissal. Her mental health had already deteriorated during her husband's ill health and the claimant caring for him and deteriorated further following the sad situation of her husband's death.

34. The serious nature of the claimant's illness is set out in a note on page 357C which Mrs Molyneux confirmed in cross examination as to the action that she felt she had to take in terms of involving the police in a welfare check due to their concerns about the claimant's wellbeing. The entries in her GP notes make it clear that the claimant was struggling seriously with her mental health during this period. I accept her evidence that her mental state was very fragile, that there were days when she had forgotten to take her medication, and that she had a note pinned to the fridge to remind her. I rely on the evidence of Mr Bramhill that throughout the period of time he was assisting the claimant, between November 2018 and July 2019, the claimant became very emotional and often burst into tears. He described her as being in "a constant state of distress" (paragraph 9 of his statement).

35. The GP throughout the period was concerned about the claimant's mental health. In February she is noted to be upset and tearful. In March she is diagnosed with severe low mood (page 463). In April the diagnosis is of severe depression secondary to recent trauma. In April she is noted as being "v flat and not engaging". She remained low and tearful and states "there is nothing positive in her life." There is a "long and difficult" consultation with the claimant on 12 July where the claimant expressed suicidal thoughts.

36. I turn to consider the length of the delay. It is a relatively modest period of time. The claimant should have presented her claim to the Employment Tribunal on 7 July. In fact she presented her claim on 13 August. The delay is therefore a

period of seven weeks. I find that the claimant's mental state made it difficult for her to reach decisions and her poor mental health paralysed her. She explained how difficult she found some days, even getting out of bed was hard and she was, forgetting her medication and to eat. I entirely accept her evidence that she simply did not have the mental energy to phone other solicitors to seek advice as her union representative had suggested. When she was able to contact Angela Grant, the Branch Secretary, a claim was lodged on her behalf. I find it is significant that Ms Grant contacted ACAS and completed the Tribunal form on behalf of the claimant, despite it being written in the first person. I find that is suggestive of the fact the claimant was not well enough to do that herself. She said she spoke to Ms Grant to give her the information.

37. I turn to consider the extent to which the cogency of the evidence is likely to be affected by the delay. As Mr Webster for the respondent fairly conceded, the delay is likely to have no real effect on the cogency of the evidence. This is a case which is very well documented. A delay of a few weeks in presenting the claim is not going to make a difference to the recollection of the dismissing officer and the appeal officer, who are likely to be the key witnesses in a case which is likely to relate primarily to the claimant's dismissal, although there may also be a reasonable adjustments claim in relation to the process.

38. Given the nature of the claimant's mental health impairment and the enormously stressful events that she had suffered – her own poor health, caring for her husband, the death of her husband, the loss of her job – although the claimant did not present her claim in time she did take steps to consult her union representative. She consulted Ms Grant and the claim was lodged reasonably promptly thereafter.

39. The claimant had the benefit of trade union representation: Mr Bramhill had represented her at her dismissal hearing and at her appeal hearing and also at a grievance hearing. She sought to consult him and his colleague reasonably promptly, particularly after she was informed on 4 July that her appeal against dismissal had failed.

40. I have had regard to the prejudice of each party. If the extension is not allowed there is great prejudice to the claimant because her claim can not be heard. By contrast, the prejudice is much less significant to the respondent- they will have to deal with a claim which is clearly well documented.

41. I step back to consider whether it is just and equitable to extend time in the particular circumstances of this case. The claimant had suffered a series of extremely distressing circumstances. Her mental health had deteriorated so much that during the time period following her dismissal she was considered to be at risk of suicide by the health professionals treating her following the death of her husband and her manager had asked for a police welfare check. Taking everything into account these circumstances I am satisfied it is just and just in all the circumstances of this case to extend the time limit.

Disability Issue

42. Is the claimant a disabled person within the meaning of section 6(1) Equality Act 2010? I reminded myself of the guidance on matters to be taken into account in determining questions related to the definition of disability (2011).

43. I reminded myself that I must be aware of the material time for establishing disability. In this case the material time was 2018 and up to the claimant's dismissal in April 2019.

44. I turn first of all to the claimant's physical impairments of psoriatic arthritis. The claimant was diagnosed with psoriatic arthritis in around March 2017. The claimant explained how she and her husband initially paid privately to be referred to Dr George at Wirral University Teaching Hospital and she was later transferred back into the NHS system. The claimant explained that her psoriasis had increased at that time, and her head was covered in it as well as her arms and legs. However, the real issue was severe stiffness in her joints. It was taking her 1½ hours to shower and dress. She also noticed her fingers were like fat sausages and recalled Dr George saying to her that is exactly how psoriatic arthritis is described. She was unable to grip and bend her fingers.

45. The diagnosis of inflammatory arthritis is confirmed in a letter from the Rheumatology Clinic led by Dr George at Arrow Park Hospital (part of the Wirral University Teaching Trust) relating to a consultation on 27 March 2018 where it was noted that the claimant "has a diagnosis of psoriatic arthritis which has deteriorated over the last 12 months and she is requiring increased medication. She is currently on an injection form of methotrexate that was only started on 12 March 2018 and can take 4-6 weeks before starts taking effect". The letter goes on to state, "Inflammatory arthritis can be very unpredictable and until the disease is well controlled the patient can suffer from increased stiffness and joint pain on a day-to-day basis, some days worse than others".

46. An entry in the Occupational Health records of 19 April 2017 confirms that psoriatic arthritis had been diagnosed "four weeks ago" (page 519). Another entry states the claimant had paid for physio because of her psoriatic arthritis privately (28 November 2017 – page 286). During the period 22 November 2017 to 13 March 2018 the claimant was absent from work with psoriatic arthritis and work-related stress (pages 265-266). The Occupational Health report on 13 March 2018 confirms that, "current symptoms include pain, swelling and stiffness in all of her affected sites. Additionally her fine motor skills are affected in terms of her finger function and her mobility is affected due to her current symptoms". The report notes time will be required for the injections to take effect. The entries in her GP records (page 474) indicate that the claimant was signed off.

47. The claimant was further absent from 3 April 2018 to 26 April 2018 with psoriatic arthritis only (page 472).

48. The claimant was also diagnosed with an aggravation of her psoriatic arthritis in the period when she was absent from work from 25 October 2018 until the fit note for this period of absence which led up until the termination of her employment changed to mental health issues.

49. I turn to consider whether the impairment had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities.

50. I am satisfied that this condition forced the claimant to be absent from work on a number of occasions. That is a serious effect on her normal day-to-day activities. I further accept the claimant's evidence that her fingers were swollen by reason of the condition and her joints were very painful, which made it difficult for her to carry out day-to-day tasks including washing and dressing. I accept the claimant's evidence that she required regular injections for this condition.

51. Mr Webster raised the point that the claimant had other conditions that might have affected her similarly, namely fibromyalgia and chronic pain syndrome.

52. I am satisfied from the claimant's description of the problems with her fingers and joints and from the description of inflammatory arthritis contained in the letter from the hospital, that the claimant's inability to attend work and was as a result of this condition. That is what the entry in the medical records state. I further rely on the claimant's letter from her GP referring to the claimant suffering from this condition.

53. I find that the condition is long-term in the sense that it is likely to last for the rest of the claimant's life and has lasted since 2017. I find that the nature of the condition is that the claimant suffers from it on a permanent basis but there are flare-ups when the condition is worse.

54. I turn to the claimant's mental health conditions of anxiety and depression which I have considered together. I accept the evidence of the claimant's GP in the letter provided for this hearing that the claimant has a longstanding mental health condition dating back many years. I accept the claimant's evidence that she was mentally unwell when caring for her husband in the autumn of 2018 but her depression and anxiety following the death of her husband in January 2018 became very bad. I accept her evidence that there were many days when she struggled just to get through the day. I accept her evidence that she did not feel safe and had many dark thoughts about wanting to be with her husband. I accept the evidence in paragraph 19 of her statement completely, about how it affects her everyday life.

55. I rely on the evidence given by Mrs Molyneux of the need for a police welfare call given the claimant's very poor mental health in April 2019. I refer to the many entries in the claimant's GP records during this period, where the GP identifies concerns about the claimant's mental health and assesses her risk of suicide.

56. I accept the evidence of the GP that anxiety and depression is a long-term condition. It is a condition which flares up as the claimant states.

57. I find that although the claimant does not have medication specifically prescribed for her anxiety and depression, she is prescribed amitriptyline which, as the claimant said, is sometimes prescribed as an antidepressant.

58. I am satisfied that the claimant had, as set out by her GP, suffered from depression and anxiety in the past. The Occupational Health referral on 17 January 2019 referred to the claimant's "chronic health conditions", which included psoriatic arthritis, asthma, anxiety and depression and indicated the claimant was vulnerable to flare-ups. I was therefore satisfied that anxiety and depression were a long-term health condition from which the claimant had suffered for many years with flare-ups

and which had a substantial adverse effect on her life at certain times causing her to be absent from work. In particular she suffered a very serious episode which started while she was caring for her husband in autumn 2018. (See GP entry which stated on 11 December 2018 that the claimant had not been out of the house and identified her as a suicide risk on 2 January 2019 and referred to the risk of a spontaneous act on 24 January 2019).

59. I am therefore satisfied by reasons of anxiety and depression that the claimant was a disabled person within the meaning of section 6 Equality Act 2010.

60. I turn to asthma. I find that the condition, which was diagnosed many years ago, caused the claimant to be a disabled person when considered in conjunction with her other conditions. The entry in the GP notes for 11 November 2008 says the claimant has mild asthma. The claimant explained that she needs to carry an inhaler everywhere she goes, including around the home, and has a cough.

61. However, I heard no detailed evidence as to how this affects the claimant's day-to-day living and I did not hear any detailed evidence about how often the claimant had an asthma attack. When questioned by the respondent's counsel the claimant was unable to give a clear explanation.

62. However, I am satisfied that the claimant has suffered from this condition for many years. Requiring an inhaler means that the condition is significant long term condition which does have an adverse effect on the claimant's day to day life in the need to keep an inhaler with her at all times and therefore when considered cumulatively with the conditions of psoriatic arthritis and anxiety and depression, the claimant was a disabled person by reason of this condition.

Employment Judge Ross
Date: 9 November 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
15 November 2021

FOR THE TRIBUNAL OFFICE

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