EMPLOYMENT TRIBUNALS

Claimant: **Mrs Annette Lindley**

Respondent: **Capita Business Services Limited**

HELD at Leeds **ON: 11 March 2022**

BEFORE: Employment Judge Lancaster

REPRESENTATION:

Claimant: **In person**
Respondent: **Mrs S Ellison, Legal Executive**

JUDGMENT having been sent to the parties on 11 March 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, from the oral judgement given at the time:

REASONS

1. I am dealing with a claim that was issued on 3 April 2021 against the claimant's former employer Capita, but her employment ended on 11 September 2011 when she was made redundant. The purpose of this preliminary hearing is primarily therefore to determine whether or not there is any reasonable prospect of the claimant establishing that the claim which is so much out of time should be allowed to continue. The parties agree that they both understood the notice of hearing to provide that the claim might be struck out under rule 37 (1) (a) of the Employment Tribunals Rules of Procedure 2013. I have decided there is no reasonable prospect of her establishing that the claim should be permitted to go ahead,

2. I have been able to identify that following her redundancy the claimant brought a claim in the Tribunal, but she withdrew that in writing on 5 March 2012. I of course do not have all the details of that claim, the Tribunal does not keep its documents for so long and the claimant although she has a large volume of papers does not have them in an organised state.

3. I have, however, also been able to establish that the earlier case had been stayed on 8th December 20111 to allow the claimant "breathing space" so that she might recuperate and concentrate on finding a solicitor. It was, though, listed for a preliminary hearing in April 2012, on the respondent's application that it had no reasonable prospect of success, supplemented by a further application that it be struck out because of the offensive conduct of proceedings by the claimant. If there was a costs warning letter, I have not seen it. There was however a telephone conversation between the claimant and the respondent' solicitor, which is recorded in an email from Irwin Mitchell dated 28th February 2012. That email is wholly unobjectionable. It states that if the claimant were to withdraw, which she said she was looking to do on medical advice and which was emphasised by the writer to be entirely her decision without any pressure being intended to be put on her to do so, no application for costs would be made. It also confirms that if she were to decide to proceed the application to strike out at the forthcoming preliminary hearing would still be pursued.

4. Having withdrawn that claim, applying the rules that were then in force the respondent would have had to apply specifically to have the claim dismissed. I do not know that it did that, so I assume that it did not. Nonetheless on the relevant authorities, principally the case of *Khan v Heywood and Middleton Primary Health Care Trust* UKEAT/0581/05, I still cannot simply set aside that earlier withdrawal. What it does mean, however, is that the claimant would not be absolutely prohibited from seeking to bring a new claim on the same facts ,and that of course is what she has now done.

5. I still have to look therefore at that new claim as to whether there is jurisdiction to hear it. At the heart of the complaint is a claim that, although wholly unfit to work at that time, she should not have been made redundant. In particular she says it was unfair not to have delayed that process in order to allow her to pursue the possibility of a PHI (permanent health insurance) claim. I note, by way of background information, that in the period when the tribunal proceedings were put on stay, on or about 16th January 2012, the claimant was notified through the respondent's solicitor that the application to the insurers for review of the decision to reject a claim for PHI had been refused. Subsequently however it appears that she was able to obtain legal redress through an approach to the ombudsman and was awarded some £50,000.

6. A claim for unfair dismissal must be brought within three months and it is only if it was not reasonably practicable to do it in time (so that would have taken us to December 2011) that I have to look at whether it has been brought within a further reasonable time. And of course we are dealing with a claim now nearly 10 years later on.

7. The fact that the claimant was able to bring her initial claim of unfair dismissal is the clearest evidence that it would have been reasonably practicable to bring this complaint in time. Having brought that claim and then withdrawn it in the face of a defence that it had no reasonable prospect of success in any event, it would also in my view be an abuse of the process to allow that matter to be re-litigated

now. Even if it was not reasonably practicable to present the claim in time and there were legitimate ground to reopen the litigation It would certainly not appear to have been re-presented within a reasonable time

8. The other complaints are of discrimination. The claimant has ticked some boxes by mistake. She does say that at the time of the redundancy she was pregnant, undergoing IVF treatment, but there is still no indication of any proper basis for saying that she was treated unfavourably in the course of the redundancy because she was pregnant. It is apparent that the claimant is certainly disabled, and in actual fact because of various mental and physical health issues she has not been in work since October 2003 when she worked for Liberata prior to the TUPE transfer from Liberata to Capita in 2009.
9. The heart of her complaint, similar to a claim for unfair dismissal on the grounds of redundancy, is the argument that some adjustments should have been made to allow her to remain nominally in employment pending determination of the PHI issue.
10. On the discrimination complaint the claimant has more leeway because I could allow the claim to continue if I thought it just and equitable to do so. But having heard all the matters in this case this morning and heard everything the claimant has to tell me about the nature of the complaints, and given the substantial delay I do conclude that there will be no reasonable prospect whatsoever of her persuading a Tribunal -notwithstanding her serious mental ill health in intervening years - that this claim should be allowed to proceed. I accept that if it ever came to be argued the respondent would have an undefeatable argument that the balance of prejudice would weigh against them having to try to deal with matters from so long ago, and particularly where the claimant has already had the opportunity to bring those complaints and has withdrawn them.
11. Dealing with this application, as I have said there is no reasonable prospect of the claimant being able to persuade a judge that it would be just and equitable to allow any of the complaints to proceed.
12. So for those reasons this claim is struck out at this stage.

Employment Judge Lancaster

Date 18th March 2022