



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss K Phillips

**Respondent:** Orchid Orthopedics Solutions Sheffield Ltd

**Heard at:** Leeds (by CVP)

**On:** 30 April 2024

**Before:** Employment Judge Bright

## Representation

Claimant: In person

Respondent: Mr Sandeman (solicitor)

**JUDGMENT** having been sent to the parties on 3 May 2024 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:

# REASONS

## Introduction

1. The claimant was employed by the respondent, a company that manufactures medical parts, as a Cast Finish Operative. She was subject to a performance improvement plan (PIP) and her employment was terminated by the respondent on 27 March 2023. The respondent said the reason for dismissal was poor performance. The claimant presented complaints of unfair dismissal and disability discrimination. The respondent accepted that the claimant was disabled by her mental impairment of anxiety and depression, but not by her hand pain.
2. The claimant's claim of unfair dismissal was struck out on 15 April 2024 because it was presented out of time and it was found to have been reasonably practicable for it to have been presented in time. The claimant's complaint of disability discrimination relating to her hand pain was struck out at the same time because the claimant was found not to have been disabled by reason of that impairment at the relevant time. Reasons for those judgments were delivered orally at the preliminary hearing and written reasons for those judgments have not been requested.
3. By a judgment sent to the parties on 3 May 2024 the claimant's complaint of disability discrimination (section 15 Equality Act 2010) relating to her

mental health impairment was struck out on grounds that it was presented out of time and it was found not to be just and equitable to extend time in the circumstances. Her application to amend her claim was also refused. It is that judgment which is the subject of the claimant's request for written reasons dated 15 May 2024. The Tribunal apologises for the delay in provision of the written reasons, which was due to the judge's sickness.

## **Issues**

4. The issues to be decided were:
  - a. Whether the claim was presented within the applicable time limit?
  - b. Whether the claim was brought within "such other period as the employment tribunal thinks just and equitable" (paragraph 123 (1)(b) Equality Act 2010)?

## **The Facts**

5. The claimant's employment with the respondent terminated on 27 March 2023. Her complaint was one of discrimination arising from disability (section 15 EQA), in which the act of unfavourable treatment pleaded was the dismissal. The claimant's Early Conciliation Certificate showed that she contacted ACAS for early conciliation on 27 June 2023 and was issued with her early conciliation certificate on 18 July 2023. She also presented her claim on 18 July 2023.
6. The following findings of fact were made on the evidence relating to the claimant's understanding of the law and Employment Tribunal procedure. The claimant gave evidence to the Tribunal at the preliminary hearing that she had spoken to ACAS and a solicitor about making a claim against the respondent on 7 February 2023, albeit that it related to a different complaint. She gave evidence that she spoke to ACAS on 7 March 2023 about the respondent's failure to make reasonable adjustments and a document at page 95 of the file of documents prepared by the parties for the preliminary hearing (the "file") made reference to her speaking to ACAS and her solicitor on 7 March 2023. A document on page 96 of the file referred to her intending to start early conciliation and speaking to ACAS on 9 March 2023.
7. Following her dismissal the claimant appealed and set out details of the alleged discrimination (page 107 of the file), the final paragraph of which referred to registering her claim for early conciliation with ACAS. Page 110 of the file again mentioned registering for early conciliation with ACAS. On 14 April 2023 the claimant wrote an email informing the respondent that she had commenced early conciliation (page 112).
8. The claimant gave oral evidence and made submissions that her mental ill health prevented her being able to enter into early conciliation in time, but she did not identify specifically how her illness caused her to miss the deadline, nor produce any documentary or medical evidence to support that assertion. On the contrary, I found from the documentary evidence before me, that she was able to write a number of letters, over the course of the months leading up to her claim, threatening legal action against the company, informing them that she would present a claim and telling them she had spoken to ACAS and solicitors. The documentary evidence

appeared to contradict her own account. At the preliminary hearing the claimant blamed ACAS for delaying issuing the early conciliation certificate, but it was clear to me from the claimant's own evidence that she had been in discussion with ACAS for some months about her relations with her employer, had been threatening her employer with early conciliation and an employment tribunal claim for some time and evidently knew about the time limitation period and the requirement to approach ACAS for early conciliation well before the date of her dismissal.

## **The Law**

9. Any complaint to the Employment Tribunal may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable (section 123(1) Equality Act 2010). Section 18A of the Employment Tribunals Act 1996 requires a claimant to contact ACAS before instituting proceedings and, provided the claimant does so before expiry of the time limit, that time limit can be extended by early conciliation.

## **Determination**

10. Based on the effective date of termination of 27 March 2023, the primary limitation date for the claimant's claim was 26 June 2023 (applying section 123 of the Equality Act 2010). The time limit can be extended where a claimant complies with subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) before the expiry of the limitation period. However, according to the Early Conciliation Certificate, the claimant approached ACAS for early conciliation on 27 June 2023, one day after the expiry of the limitation period. She was issued with an Early Conciliation Certificate on 18 July 2023 and presented her claim on 18 July 2023. In failing to comply with subsection (1) of section 18A of the Employment Tribunals Act 1996 before the expiry of the limitation period she therefore did not benefit from the extension of time and her claim was presented 22 days out of time.
11. The question is therefore whether, for the purposes of section 123 of the Equality Act 2010, I consider it just and equitable in the circumstances to extend time?
12. I acknowledge that it may appear harsh to find that it is not just and equitable to extend time in a discrimination case where an employee approaches ACAS one day late, but I consider that the circumstances of this case are such that it is not just and equitable to extend time. The caselaw is clear that time limits are there for a reason and extensions of time are intended to be exceptions, not the rule. I have made clear findings of fact that the claimant had full knowledge of the limitation date and the requirement to approach ACAS before that date. The test is not that of reasonable practicality, but I consider it relevant that the claimant was in a position to act and had, in fact, repeatedly threatened her employer with ACAS conciliation and an Employment Tribunal claim on a number of occasions in writing during the previous weeks.

13. I have considered the relative prejudice to the parties resulting from extending time or striking out the claim. Clearly there would be some prejudice to the claimant by her complaint of disability discrimination being struck out. However, her original pleadings predominantly focused on discrimination arising from, or because of, her hand pain. Any mention of her mental health was peripheral and vague. Even at the preliminary hearing on 30 April 2024 she initially stated that her mental health had not affected her performance, before changing her position to assert that her mental health had had an impact on her performance. The respondent submitted, and I agreed, that the complaint relating to her mental health had the ring of an afterthought. Given that the primary focus of her disability discrimination complaint had been on the performance-related dismissal arising from her hand pain, and that complaint had already been struck out because she was found not to be disabled by her hand pain, I considered that the prejudice of being unable to pursue her mental health claim was lesser. Further and separately, the bulk of the evidence and the claimant's pleadings appeared to relate to her previous position that her performance was affected by her hand pain. I therefore judged that her complaint that poor performance arising from mental health was the cause of her dismissal was likely to have little reasonable prospect of success.
14. The respondent submitted, and I accepted, that it would be severely prejudiced by the claim proceeding, because the managers involved in the performance process (Mr Laycock and Mr Mead) had left the business and were no longer available to give evidence. Moreover, the discussion with the claimant throughout the performance process and occupational health process, including her own input regarding her productivity and requests for adjustments, focused almost entirely on her hand pain, rather than mental health issues (pages 55, 59, 67, 69). The documentary evidence would not therefore be of any assistance to the Tribunal in respect of the claimant's present complaint and the respondent would have nothing with which to defend the complaint. I agreed with the respondent's representative that, in these rather unusual circumstances, the prejudice to the respondent outweighed that to the claimant.
15. On balance, weighing the evidence and my findings and conclusions set out above, I considered that it was not just and equitable in the circumstances, to extend time. The claim is therefore struck out.

### **Application to amend claim**

16. The claimant had previously made an application to amend her claim to include a complaint of direct discrimination under section 13 EQA. That amendment application was put off until today. She alleged that, because of her anxiety and depression, Mr Mead:
- a. Failed to record in writing what was expected of her output in terms of pieces per hour or per day for the purposes of her performance improvement plan (PIP) on or around 1 July 2022; and/or
  - b. Required her to do extra non-bookable jobs but did not adjust her target to take account of non-bookable work.
17. In deciding whether to allow the amendment, I considered the following factors.

18. The nature of the amendment. This was not merely a relabelling of existing facts or an existing complaint. These were new allegations and new claims, not otherwise apparent in the claim form, requiring different evidence from the other allegations.
19. The timing and manner of the application. The application to add a direct discrimination complaint was first made at the preliminary hearing on 24 January 2024, over 6 months after the claim was presented and after the date when Mr Mead, the manager alleged to have done the acts of discrimination had left the respondent's business. The complaint was presented out of time and I would not find that it was just and equitable to extend time for the same reasons set out above in the discrimination arising from disability complaint.
20. Balance of hardship/prejudice. I considered that the prejudice against the respondent would be significant because Mr Mead had left the business and was no longer available to give evidence or assist the respondent in responding to the allegations. The documentary evidence relates almost entirely to the claimant's hand pain and therefore the respondent is not in a position to be able to respond to the claim.
21. I therefore determined that it was not in the interests of justice to grant leave to amend the claim.

*Employment Judge Bright  
23 September 2024*