

Neutral Citation Number: [2023] EAT 20

Case No: EA-2020-000799-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 December 2022

Before :

HIS HONOUR JUDGE MURRAY SHANKS

Between :

MISS R THORPE
- and -
SAINSBURY'S SUPERMARKET LIMITED

Appellant

Respondent

Ruth Thorpe the Appellant in person
Max Gordon (instructed by TLT LLP) for the Respondent

Hearing date: 6 December 2022

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant/appellant made claims of unfair dismissal and discrimination arising out of her dismissal on 7/6/19 by an ET1 form presented on 20/8/19 but the ET1 did not include an ACAS certificate number and that omission was not remedied until 11/11/19. She applied for extensions of time to bring the claims.

Taking account of her written and oral evidence, medical reports and the fact that she had been able to engage with her employers and put in the ET1 in the period after June 2019 the EJ decided that no extension of time should be granted in respect of either type of claim.

The EAT dismissed her appeal against that decision as there was no basis for saying that it was perverse. A factual error in the judgment as to the dates of a hospitalisation was immaterial to the decision and did not make it perverse.

HIS HONOUR JUDGE MURRAY SHANKS:

Introduction

1. This is an appeal against a judgment of Employment Judge TR Smith sitting in the Croydon Employment Tribunal, which was sent out on 26 September 2020, whereby he found that the claimant's claims against her former employer, Sainsbury's, were out of time and refused to extend that time.

2. That decision followed a hearing which took place on 23 September 2020 at which the claimant, Ms Thorpe, was present and gave evidence and at which the judge had a bundle of documents running to 125 pages.

3. The appeal against his decision was allowed to proceed with some hesitation by Judge Auerbach in the Employment Appeal Tribunal after a rule 3(10) hearing on 26 January 2022. In accordance with the normal practice, only Ms Thorpe attended that hearing. She was represented by an ELAAS representative called James Stewart, who placed an amended ground of appeal before Judge Auerbach, which was the sole ground on which the appeal was allowed to proceed. In short, it is said that the Employment Judge's decisions were perverse.

4. The appellant, Ms Thorpe, has represented herself today, ably; Mr Gordon of counsel has represented Sainsbury's.

The Facts

5. The claimant was employed by Sainsbury's in Croydon from 10 October 2016. Unfortunately, she suffered domestic abuse from her partner. In January 2019 she was able to obtain alternative accommodation in [redacted], but she could not move for a period and she stayed

with her parents in Croydon. However, she was not able to work during this period: she was suffering mental health issues and she had three children to look after. On 7 June 2019, Sainsbury's notified her that she had been dismissed. That date was the "effective date of termination".

6. Ms Thorpe, perhaps with justification, regarded her treatment by Sainsbury's as unfair and she presented a claim to the employment tribunal by filling in a standard ET1 claim form on 20 August 2019. She alleged in that claim that she had been unfairly dismissed; that she had not been paid holiday pay and that she had been subject to various forms of discrimination, including age, race, disability, pregnancy or maternity, sex and religion.

7. The form that was sent in is at pages 26 onwards in my bundle today. On page 2 of the form (page 27 of my bundle) there is a question relating to ACAS. First of all, it says, "*Do you have an ACAS early conciliation certificate number?*" to which Ms Thorpe rightly answered "No." There is then a question, "*If no, why don't you have this number?*", and she ticked a box that I am afraid was not right, which says, "*My claim consists only of a complaint of unfair dismissal which contains an application for interim relief.*" Then there is a bracketed section which says, "*See guidance*". In fact, of course, her claim consisted of much more than claims for unfair dismissal and her unfair dismissal did not contain an application for interim relief.

8. Before the employment judge, Ms Thorpe contended that she read the relevant guidance on the Government website but had not understood the guidance about the need for an ACAS certificate.

9. Given that the EDT was 7 June 2019, time for bringing a claim expired on 6 September 2019. On 19 September 2019 the employment tribunal wrote to Ms Thorpe an email which is at page 80 in my bundle which said:

“Good afternoon, Miss Thorpe,

We are in the process of vetting your ET1 claim form. You have not attached your ACAS certificate or advised us of its unique number or given a reason why you are exempt from providing this. Please can you provide this information as soon as possible so that we may continue processing your claim. Please reply by 30th September.”

10. Ms Thorpe responded to that by sending the employment tribunal a completely irrelevant number that related to her application to be relieved of the requirement to pay fees. In fact, that response document I do not think was before the employment judge, but it is in a supplementary bundle that she has put before the EAT. But in any event, it is clear that she did not respond with an ACAS certificate or explain why she was exempt from providing an ACAS certificate.

11. She then received shortly after 28 October 2019, a standard form letter from the employment tribunal which told her (page 82 in my bundle) that the claim had been referred to an employment judge and rejected and that the reason it had been rejected was because she had not been through the early conciliation procedure with ACAS and there was therefore no relevant number on the ET1 form.

12. She acted quickly in response to that document, notified ACAS of the dispute and a certificate was issued and provided to the employment tribunal on 11 November 2019. So only at that stage was her claim properly made. I am not entirely clear whether there was a new claim form, or it was simply accepted as an amendment, but it does not matter: it is only at that stage that the claim was properly made and it was two months out of time and an extension was therefore required.

13. In relation to the unfair dismissal and the wages claims, the employment judge had to decide whether it was reasonably practicable to have presented the claim in time and whether it was

presented a reasonable time thereafter. In relation to the discrimination claims, the issue was slightly different. It was whether it was just and equitable to extend time to 11 November 2019, the onus being on Ms Thorpe to show that it was just and equitable.

14. The case essentially turned on whether Ms Thorpe's state of mental health was such that she could or could not have been expected to understand that she needed to obtain an ACAS number before presenting the ET1. The employment judge had before him in considering that issue evidence from the claimant herself in the form of an email, which is at pages 70 through to 77 of my bundle, and he also had oral evidence from her. In the statement, she said that she had been told about her dismissal by email on 7 June 2019 and then she said:

“This news came at a time when I was just getting used to taking my new medication for my acute adjustment disorder and acute and transient psychotic disorder. It was a big blow to my mental health. I felt weak, confused and agitated and my confidence was just knocked back. It was only 4 days into my new medication and I was not given no chance for it to start working with this shocking news of dismissal.”

Then she said a bit later on:

“I had no other recourse after months of agonising communication with Sainsbury's I had no other option but to apply to the Tribunal for redress with the help of the family I managed to get the paperwork together despite the way I was feeling, I had to push on through my anxiety from preparing the Tribunal paperwork. It was draining on my mental health, but I knew I had to press on for the sake of myself and my 3 children.”

At page 72, dealing more specifically with the effect of her mental health issues, she said:

“I then had to work within a timeframe to try and appeal my dismissal and pay with HR suffering from anxiety, stress, depression, acute and transient psychotic disorder and other mental health conditions.”

Then she made a point at the bottom of page 72:

“My claim was not rejected because of my unfair dismal [she says] (...) claim

or being out of time, it was rejected because I needed an ACAS certificate.”

15. At page 74 she says that she did not know the type of mental health she was suffering until she was assessed by the Maudsley on 3 June 2019 as suffering from acute and transient psychotic disorder. She said that in December 2018 she had a disability due to domestic violence, PTSD, stress, depression, insomnia, anxiety and other health conditions. So, she had put her position before the judge.

16. The judge also had before him a medical report, which we have established was in fact dated 14 August 2019, which was prepared by the doctors in London for the transfer to [redacted] . At page 123 in my bundle, it said this:

“In summary, Ms Thorpe was found by the consultant psychiatrist on 03.06.19, to have adjustment disorder (...) To date, Ms Thorpe has undergone very high levels of social stressors, following domestic violence for which she has now been moved to [redacted] (...) This stress appears to have a negative impact on her mental wellbeing, in particular in terms of symptoms of anxiety and latterly psychotic symptoms. Risk to self and others appear low. However, on-going child safeguarding is concerns - children remain under child protection.”

This is the important bit:

“Whilst she has been under the care of assessment and Liaison Service, there appears to have been significant improvements in Ms Thorpe’s mental state, both objectively and subjectively, and she feels that the olanzapine has been much benefit to her. However, it is still early days in this regard and she will require a period of monitoring and on-going stabilisation.”

It is fair to say the judge did not refer specifically to that passage. There was, however, another report prepared in November 2019 which said this:

“In June 2019 she had a telephone consultation with a psychiatrist from the Maudsley Hospital and was prescribed olanzapine 2.5 mg daily which was further increased to 5 mg daily. She also relocated to [redacted]. Since then, her sleep improved, appetite improved, anxiety decreased, and she is managing well with her day-to-day activities. She is planning to work in the

future and is optimistic.”

Then it says a bit further down:

“There is no evidence of any abnormal thought processes or abnormality of perception. She is insightful.”

Then at the bottom of page 103:

“Ruth possibly experienced an acute psychotic episode triggered by a stressful life circumstances (...) She has improved and is currently stable in her mental state.”

17. There was also, very unusually, before the employment judge a document that Ms Thorpe herself had prepared for her doctor in June 2020, so a year later than the relevant events, which is at page 117, and she said this:

“3rd June 2019 I was reassessed by mental hospital because I had unknown relapse in my mental health which brought on acute and transient psychotic disorder. (...) I was placed on Olanzapine low dose 5mg for 6 months. This helped my mental health which I have been suffering from since May 2017 to present. It helped me to focus and bring an Employment Tribunal case against Sainsbury's for wrongful and unfair dismissal and discrimination. Even though I suffer from mental health, I felt the need to push on for justice, for wrongful and unfair dismissal with the help of family.”

18. The judge also took account of the fact that between June 2019 and August 2019, Ms Thorpe engaged with her employer about her dismissal and wages and that she was able to present the ET1 form, albeit without the necessary ACAS number and certificate. He also mentioned that she had assistance from her family.

19. On that basis he decided that she had not discharged the burden of showing that it was not reasonably practicable for her to bring her claim in time. He also decided that the further delay between 19 September 2019 when she was told about the lack of an ACAS number up to the date that she obtained an ACAS certificate, was not reasonable and so he would not have extended time in any event for the unfair dismissal and wages claims. He also decided it was not just and equitable to extend time for the discrimination claims and that was fundamentally for the same reason expressed at paragraph 66 where he said this:

“The Claimant contended it was her mental health that inhibited her obtaining an ACAS early conciliation certificate. However, the medical evidence does not support that conclusion. Whilst the Claimant was in a particularly difficult position up until June 2019, thereafter there was considerable improvement. She started to function well. She engaged with the Respondents as to her dispute. She was able to fill in a Tribunal claim. The Tribunal has looked at the Claimant’s medical condition and other challenges in the round and had regard to the fact that whilst those conditions may not have been a total impediment, were they such that they still impeded the Claimant correctly completing a claim form? On the basis of the evidence before it the Tribunal found that was not the case here.”

The appeal

20. The appellant says on this appeal that those decisions were perverse because the judge had not taken proper account of evidence, including the medical evidence. On the face of it, given the evidence he did have, which I have outlined, I would consider that that was really a hopeless submission. To show that a decision is perverse is very difficult and there was clearly evidence that the judge could rely on in support of the decision he made.

21. But today the appellant has pointed out, correctly, that there is an error in the judgment which she says is of significance. At paragraph 33 the judge said this:

“In April 2019 her health was such that she required the intervention of mental health services and was hospitalised between the 14 to the 17 of April 2019.

34. She was prescribed new medication on 21 May 2019 and adjusted in June which the Tribunal found, and the Claimant accepted, led to a marked improvement in her condition (...).”

Then the judge refers to the handwritten document that she prepared which I have already mentioned.

22. In fact, it is clear from the documents and should have been clear to the judge, that the hospitalisation referred to in paragraph 33 did not take place until April 2020, not 2019. Nor was she prescribed new medication on 21 May 2019. What in fact happened was that on 3 June 2019 she was prescribed 2.5 mg of Olanzapine which was increased to 5 mg within two weeks. She had not been hospitalised before that. It was only after the medication was removed in January 2020 that she ended up in hospital and subsequently with a higher dose.

23. The claimant says that this was important because the employment judge did not have a proper picture of the progress of her mental health difficulties and, in particular, of the need for stabilisation. I accept that there was an error, and it was an unfortunate error, made by the employment judge, but I do not consider that it was of any materiality to his decision. The crucial period that he was concerned with was June 2019 to November 2019, the period when the claimant was under an obligation to put in her Tribunal claim because the date of dismissal was 7 June 2019.

24. The employment judge had reports and he had the claimant's own record as to her state during that period. He was able to take account of all the material, including things that the claimant was definitely capable of, like filling in the ET1, when he reached his view. As Mr Gordon pointed out, his misapprehension on the point about her being in hospital before June 2019, may actually have favoured her in a sense, because it would have indicated that things were more serious in June 2019 than perhaps, they were.

Disposal

25. In any event, that does not matter. I am clear that this error does not mean that the judge's decisions were perverse. I understand how difficult and exasperating the whole process is, particularly for litigants in person, and how unfair it can seem at times. But I am afraid the rule about the ACAS conciliation and the rule about time limits for bringing claims are very strictly enforced and that Ms Thorpe has indeed fallen foul of them.

26. I know it has also taken an inordinate amount of time to get this far for her to have a hearing with me of the appeal, but I am afraid I must apply the law, however sympathetic I feel towards her. So the appeal is accordingly dismissed.