EMPLOYMENT TRIBUNALS

Claimant: **Mr C Aston**

Respondent: **Jim Walker and Company Ltd t/a I-Ride**

Heard at: **London South** **On: 11 August 2017**

Before: **Employment Judge Martin**

Representation
Claimant: **Mr Roberts - Counsel**
Respondent: **Mr Burgess - Solicitor**

RESERVED JUDGMENT AT PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The Claimant's employment terminated on 17 May 2016 and his claims are therefore out of time.

2. The Tribunal does not have jurisdiction to hear the Claimant's claim of unfair dismissal as it was reasonably practicable to have presented it in time. This claim is dismissed.

3. It is just and equitable to extend time for presentation of the Claimant's claim for disability discrimination and this claim will be heard on 6 and 7 March 2018.

RESERVED REASONS

1. By a claim form presented to the Tribunal on 20 March 2013 the Claimant made claims of unfair dismissal and disability discrimination. The Respondent defended the claims in its response dated 13 April 2017 on the basis that the Claimant's claims were out of time, the dismissal was fair and that the Respondent did not discriminate on the grounds of the Claimant's disability.

The issues

2. This hearing was listed to consider when the Claimant's contract of employment terminated and whether the Claimant's claims were presented to the Tribunal in time and if not whether the Tribunal should extend time on the basis that it was not reasonably practicable to present the claim in time (unfair dismissal) or that is it is just and equitable to extend time (disability discrimination).

3. The Claimant's case is that the effective date of terminate (EDT) was 4 January 2017 in which case the claims would be in time. The Respondent's case is that the EDT was 17 May 2016 in which case the claims would be out of time.

4. I heard evidence from the Claimant and for the Respondent from Mr Ian Wilson and Mr Paul Butler. I had before me the Claimant's chronology and a bundle of documents numbered to 147.

5. The facts were largely undisputed. The Claimant commenced employment with the Respondent on 5 January, 2005. The Claimant went on sick leave from 8 June, 2015, from which he did not return to work. It is not necessary for the purpose of this judgement to go into great detail. The key points relevant to my decision are that the Claimant was absent from work from 8 June, 2015 and that he did not return to work. During his absence from work, the Respondent made a home visit on 18 September, 2015, had a meeting with the Claimant on 5 February, 2016, a second meeting on 14 April, 2016, and then communication by email up to 5 June, 2016.

6. It was common ground that from February 2017 the Claimant and Respondent were in discussion about a possible return to work. The Claimant did not want to return to the same role he was undertaking previously because of his disability. The Respondent is a small organisation and there were limited options available to them in terms of alternative work for the Claimant. The initial suggestion they made was refused by the Claimant and after the meeting on 14 April 2016, the Respondent tried to find another alternative but were unable to. There were then several email communications.

7. The first relevant email is dated 6 May 2016.

"Dear Chris

Following out recent discussions and meetings related to your application for a different role here at I-ride to the original Operations Manager role, it is with regret that I am afraid to say that we will be unable to offer you a different role to the one I outlined in my previous job specification to you. As you know last summer before your period of absence, you told us that you did not want a managerial role and those responsibilities and that you wished to resign. Subsequently, earlier this year you asked us to consider a reduced role for you. Consequently, we met with you and then prepared the role set out in my last job specification to you.

However, in our last meeting you said that you were not happy about doing some of the things mentioned there, like monitoring the Wiggle website etc and helping with the preparation of CPO spreadsheets, sales offers etc.

Therefore, unfortunately, after much consideration, I am afraid we are not able to see a way to offer you a role working with us.

Chris, this decision has been reached after much thought and with much regret on our part as we value you as a friend and wish you and your family all the best for the future we would like to offer you an amount of £4,000 as a gesture of goodwill on our part for your future".

8. The Claimant responded on 10 May 2017:

> *"Hi Paul I am obviously very disappointed to hear this. Having worked for the company for over a decade, it's going to take a bit of time to fully process. I'm unclear on exactly what you are saying though. When we had our meeting a few weeks ago, I thought that everything seemed to have been discussed and we had a plan going forwards. The last thing I mentioned to you was getting a new bike sorted and now I don't know whether you're firing me, or am I redundant or what? Regards Chris".*

9. On 16 May 2016 Mr Butler replied:

> *"Dear Chris*
>
> *Thank you for your message*
>
> *What has been clear to myself and Ian is that firstly, you did not want your original role with us…..*
>
> *Therefore, you asked us to consider finding a less responsible role for yourself within the company. So secondly, this we did: however, in your message to me and at our subsequent meeting with Ian and myself you made it quite clear to us that you did not want this role…..*
>
> *So following our last meeting, and at your request, we have considered very carefully whether there is a third option of scope to offer you another role within the company doing exclusively purchasing and along the lines we discussed with you: and unfortunately, I am afraid to say that we are unable to come up with another option for you.*
>
> *Accordingly, we are of the view ….. that you have left us.*
>
> *However, Chris you should appreciate that we have come to this point only after much consideration and a great deal of thought to see if we can make a suitable role here for you within the company which will be acceptable to you: and unfortunately, try as we might, we are just unable to do so. Therefore it is with much regret that it seems that our working relationship with you has come to an end: but we do value your contribution over the years and as a friend, which is why we were prepared to give you some money out of our own good will to help you with your new family."*

10. On 17 May 2016 the Claimant sent this email:

> *"Dear Paul*
>
> *Thank you for your email.*
>
> *Thank you, too for your gesture of goodwill of a £4,000 payment which I am happy to accept. I will require a P45 in order to pursue work in the future and would be grateful if this could be sent.*
>
> *Regards Chris."*

11. Following this were a series of emails regarding the £4,000 payment and how it should be categorised to minimise any tax payable; without prejudice commutations between solicitors and one payslip sent to the Claimant (for a nil amount) which the Respondent said was sent in error. On 6 December 2016, the Claimant sent via his solicitor a grievance. The Respondent replied saying that as the Claimant was not an employee as his contract of employment had ended in May 2016 it would not respond to the grievance.

12. The Claimant then sent a letter to the Respondent on 7 January 2017:

> *"My solicitors, Lawson Lewis Blakers, have informed me you have refused to deal with my grievance because you claim I have left. Obviously this is not the case, hence the ongoing communications.*
>
> *However due to your refusal to deal with my grievance you have left me with no alternative than to resign my employment. Because of the way you treated me, I do not consider I am obliged to give you any notice and accordingly will you accept this letter a notification of termination of my employment as from the date of this letter".*

13. The Claimant's P45 was not sent to him until January 2017 and at the date of the hearing the £4,000 had not been paid.

14. The Claimant had waived privilege in relation to advice given to him by the solicitors acting for him in 2016. However, whilst some documents were disclosed it was clear that not all documents had been and it was therefore not clear exactly what advice the Claimant had been given or what the basis for that advice was.

When was the effective date of termination of employment?

15. Both parties gave submissions which were carefully considered. I first considered when the EDT was.

16. The Claimant's case is that there was no mutual agreement to terminate the contract and that the language used by the Respondent was insufficient to communicate an unequivocal intention to terminate the contract (Sandle v Adecco UK Limited [2006] 0028/16]. The Claimant submitted that the context made dismissal unlikely and the emails of 6 and 16 May were completely ambiguous and any ambiguity should be construed against the Respondent.

17. The Claimant submitted that the contract of employment subsisted after May 2016 and that it was terminated by resignation on 4 January 2017.

18. The Respondent's position is there was a dismissal on 16 May 2016 and the words used were clear and would be interpreted by reasonable person to construe that the employment had come to an end.

19. The Respondent relies on Gale v Gilbert in that the consideration is not about what Mr Butler intended or how Mr Aston received the words. The question is objectively what would a reasonable person have taken from the exchange of emails. The Respondent submitted that it was telling that the Claimant asked for his P45 the next day. The Claimant's email of 10 May expressed disappointment and clarification was asked for. These are words suggesting that the employment came to an end,

20. The Respondent distinguished this case from the Sandle case where there was no communication at all, in this case there was clear communication.

21. The P45 not relevant to issues of dismissal or EDT. The Respondent referred to 97(1)b of the Employment Rights Act 1996 and submitted the EDT was 16 May 2016 and not notice was given.

22. I find that the EDT was on 17 May 2016. I find that looking at the emails objectively a reasonable person would conclude that the Claimant's employment had terminated. I find that the Respondent terminated the Claimant's employment and that this was understood by the Claimant as he asked for his P45 thereby clearly demonstrating his understanding. The fact that the P45 was not sent until January 2017 and that one payslip was sent is not determinative. Although I accept that the wording of the email of 16 May 2017 could have been better written, I find the wording of sufficiently clear that objectively it should be understood that the Claimant's employment had ended.

Should the Tribunal exercise its discretion to extend time?

23. Having come to this conclusion the Claimant's claims are out of time. I then considered whether to extend time on the basis it was reasonably practicable for the Claimant to have brought his claim in time for the claim of unfair dismissal or whether it is just and equitable to extend time for the disability discrimination claim. The submissions on this are summarised as follows:

24. The Claimant submitted that his belief that the employment was continuing meant it was not reasonably practicable to bring the claim in time. The Claimant relies on Ebay (UK) Ltd v Miss T Buzzeo [2013] UKEAT/1059/13/MC EAT. The Claimant referred to advice he was given namely that his employment was continuing and he should make a grievance. The Claimant also referred to his disability and how it affected him at the relevant time.

25. In relation to the disability discrimination claim, the submission by the Claimant was that the refusal to have the Claimant back in an appropriate role was part of continuing conduct that ended when the Respondent dismissed the Claimant's grievance.

26. The Claimant referred to s33 Limitation Act 1980 and submitted that he relied on legal advice, believed his employment was continuing, that there would be no effect on the evidence, and that the Respondent's conduct after the cause of action arose was vague. That as a disabled person he placed greater reliance on the legal advice given and that he acted properly and swiftly in taking legal advice.

27. The Claimant submitted his claim was very strong even on the Respondent's version of events relying on procedural failings, the medical evidence that the Claimant would return to his original role, that it was disproportionate to dismiss the Claimant in the context of this matter and that the Claimant only had three formal meetings in a year and waited weeks for responses to emails in 2016.

28. The Respondent submitted that in relation to reasonable practicability the Tribunal must look at all the factors and at what the main cause was of not issuing in time. The factors relied on are that in January 2016 the Claimant was feeling well enough to return to work even though still on medication; he was well enough to attend meetings; was able to read and understand emails; was in no less worse position in May 2016 and looking forward to returning to work and was able to make rational decisions.

29. It was submitted that the primary reason that the claim was not in time, was the advice from his solicitors which started on 21 June 2016. The Respondent relied on Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379 which makes it clear that the fact of a solicitor being negligent in their advice does not preclude C from pursuing UDL. The Respondent submitted that the solicitor was clearly negligent in not identifying that there may be issues about the May emails as to whether there was a dismissal and not presenting the claim in time.

30. In relation to the discrimination claim and whether it was just and equitable to extend time the starting position is that time should only be extended in exceptional circumstances and these are not exceptional circumstances in that by May 2016 the Claimant was better and had the support of family and what should have been support from solicitor in June 2016. He knew his employment ended and just wanted the £4,000. He gave his solicitor all the papers and there are some seen attendance notes in bundle. However it is clear that there are a lot of missing notes, emails and records of conversation. This is not an exceptional circumstance as the Claimant had regular contact with the solicitor.

31. The Respondent submitted that negligent advice should not allow a claim to be presented out of time.

32. I find that it was reasonably practicable for the Claimant to have brought his claim of unfair dismissal in time. The Claimant sought legal advice in good time, and as I have found, the emails in May 2016 are sufficiently clear to terminate the Claimant's employment. This should have been apparent to the Claimant and his solicitor.

33. The test in relation to the discrimination claim is whether it is just and equitable to extend time for presentation of the claim. This is a much broader test than reasonable practicability. I considered the submissions made by both parties and the test set out in Robertson v Bexley Community Centre t/a Leisure Link 2003 [IRLR] 434 CA, where it was noted that, while Tribunals have a wide discretion to extend time in discrimination cases, it should only be exercised in exceptional circumstances. '*time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion*.'

34. I find that it is just and equitable to extend time for presentation of the Claimant's claim of disability discrimination. In coming to this conclusion, I have taken into account the length of the delay and any effect on the

evidence. I find that although the delay about six months, that this will not affect the cogency of the Respondent's evidence. I have considered that the Claimant took legal advice promptly and also the nature of his disability and the effect this would have on him. It was reasonable for him to rely on professional advice. I have considered the nature of the advice given on the limited papers before me. It is difficult to know exactly what advice the Claimant was given, however what is clear is that the solicitor did not sufficiently consider the email chain that terminated the Claimant's employment and therefore did not appreciate the significance of them. As I have set out above the emails whilst they could have been better worded are sufficiently clear to terminate the Claimant's employment. This on its own may not have persuaded me, however this taken together with the other factors mentioned has persuaded me that it would be just and equitable to extend time.

35. The Claimant's claim of unfair dismissal is therefore dismissed and the Claimant's claim of disability discrimination will be heard on 6 March 2018 as agreed at the hearing.

Employment Judge Martin

Date: 05 September 2017