EMPLOYMENT TRIBUNALS

Claimant: Mr Pawel Artur Klicner

Respondent: (1) G4S Secure Solutions UK Ltd
(2) G4S plc

Heard at: London South (Croydon) **On: 20 November 2017**

Before: Employment Judge John Crosfill

Representation
Claimant: In person
Respondent: Mr Nick Sheppard, a Solicitor

JUDGMENT

1. The Claimant's claim that he was subjected to a detriment for making a protected disclosure contrary to Section 47B and 48 of the Employment Rights Act 1996 is struck out as:

   1.1. the ET1 was presented to the Employment Tribunal outside the time limit provided by Section 48 of the Employment Rights Act 1996; and

   1.2. in any event the claim ought to be struck out as an abuse of process; and

   1.3. the Second Respondent was not the Claimant's employer and no other proper basis has been identified for that company being liable for this claim accordingly that claim has no reasonable prospect of success.

REASONS

1. This claim had been listed for an open preliminary hearing to determine whether or not the Tribunal had jurisdiction to entertain the claim(s) and/or whether or not the claims should be struck out as an abuse of process.

2. By an earlier ET1 presented on 1 March 2017 the Claimant had brought claims of unfair dismissal and for holiday pay he said was due and owing to him. The matter was heard by Employment Judge Sage on 21 June 2017. She dismissed

the Claimant's claims. On 6 September 2017 the full written reasons for those decisions were sent to the parties. EJ Sage found:

2.1. That the First Respondent was the only proper respondent to the claims [para 12]

2.2. That the Claimant had insufficient service to maintain a claim for unfair dismissal [para 34]; and

2.3. That in any event there had been no resignation by the Claimant and that he had simply not taken up any work [para 35 and generally]; and

2.4. That there was no breach of contract by the Respondent [para 36/37]; and

2.5. That the Claimant had been paid everything he was lawfully due by way of holiday pay [para 40]; and

2.6. The Claimant was ordered to pay a contribution to the Respondent's costs in the sum of £100.

3. The present claim was presented by the Claimant on 20 July 2017. It was apparent from the claim form read as a whole that the Claimant was seeking to present a claim based on having made protected disclosures. He had made various references to the Fraud Act 2006 but he said he understood that the issue of whether there had been any crime committed under that act was a matter for the police and not a matter that the Tribunal could adjudicate upon. As the claim form was unclear, I was reluctant to engage in a consideration of whether the claims were presented in time or were, as suggested by the Respondent, an abuse of process without fully appreciating what claims the Claimant intended to present. I therefore took time to ask the Claimant how he put his case.

4. The Claimant appreciated that he would have to establish that he had made protected disclosures. When asked to identify these he stated that in February 2015 and again in February 2017 he challenged his line manager about what he believed was a failure to make proper payment of holiday pay. Whilst such an assertion may, or may not, suffice to pass the "public interest" requirement as understood in ***Chesterton Global Limited & Anor v Nurmohamed*** **[2017] EWCA Civ 979**. For the purpose of this hearing I have assumed that it would.

5. I then asked the Claimant to identify the detriment that he relied upon. He told me, more than once, that the detriment he complained of was not being paid the holiday pay that he was due. That was consistent with the agenda that he had prepared in advance of the hearing. Clearly there might be difficulties with whether it was possible for the protected disclosure to be the cause of the failure to make payment but, depending on which failure was referred to it was possible that a claim could be formulated in this way.

6. I then focussed upon the date of any alleged failure or detriment. The Claimant had last worked for the Respondent on 5 November 2016. The scheme operated by the Respondent provided that in order to be owed holiday pay the Claimant needed to have informed the Respondent that he wanted to take leave (the scheme is described in the judgment of EJ Sage). In the earlier claim the Claimant had maintained that he had done so and said that was the basis of his complaints in January 2017. The only other event that would trigger an

obligation to pay holiday pay, as a matter of law, was the termination of the relationship. When the Claimant brought his first claim (alleging that the relationship had ended) the Respondent made payment of the holiday pay that it said was due. It is unclear from the papers I have seen what the basis of that payment was. It seems to me that the holiday pay must have fallen due at the latest when the relationship had terminated. That termination need not amount to a dismissal (and employment Judge Sage found that there was no dismissal). In the earlier proceedings, the Claimant had maintained that the holiday pay was due and owing at the outset of the proceedings. It is not his case that the pay fell due any later and as such the latest he says it fell due was the date he brought his claim. Accordingly, his position has been that the detriment was suffered before 1 March 2017. If there was an ongoing failure or detriment then the effect of Sub-Section 48(4) is that the detriment crystalised when the Respondent decided to pay the holiday pay that it did. Thereafter the detriment cannot be considered to be a continuing act.

7. In order to present a claim within the primary time limit imposed by Section 48 of the Employment Rights Act 1996 the Claimant would have needed to bring his claim, or where appropriate contact ACAS, within 3 months of the date of the act complained of. The Claimant contacted ACAS in respect of the present claim on 12 July 2017 and an Early Conciliation Certificate was issued on 19 July 2017. It follows from that that the earliest date that could have been "within 3 months" (of the first contact with ACAS) was 13 April 2017. In fact, the Claimant had already contacted ACAS in respect of his first claim and it is debatable whether he is entitled to any extension of time by reason of the second certificate. I shall assume that he is for the purposes of this hearing. Accordingly, I therefore conclude that the claim would be in time only if it alleged a detriment that took place on or after 13 April 2017 unless the Claimant could say that it was not reasonably practicable to present the claim any earlier and can show that it was presented within a reasonable time thereafter (See Section 48(3) of the Employment Rights Act 1996).

8. The Respondents argument, submitted in correspondence and before me, was that it was not open to the Claimant to bring a further claim against them as there was no good reason why the present claims could not have been brought as part of the original claim. When it became clear that the Claimant was unfamiliar with the legal principles behind that argument I asked my clerk to provide extracts from the IDS Handbook on Practice and Procedure and I explained the basic principles to the Claimant.

9. In ***Henderson v Henderson*** **(1843) 3 Hare 100**, Sir James Wigram V-C stated:

   "… where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward the whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. A plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

10. It will generally be an abuse of process for a party to use successive proceedings to make a collateral attack on an earlier judgment of a competent court and tribunal. Where a party is dissatisfied with a judgment the proper route is to seek a reconsideration or to appeal.

11. I note that in his agenda amongst the remedies the Claimant seeks is the payment of holiday pay that he alleges is due to him. As set out above the detriment he says that he has suffered is not being paid what he is due. It seems to me that that was exactly the issue that was before Employment Judge Sage when she was asked to determine whether the Claimant was entitled to any holiday pay. She found that he was not.

12. The Claimant had produced a schedule which he said showed that there were still sums due to him. That schedule included travel allowances as being pay. I do not need to determine whether that is right or wrong but it is clear from her judgment that was exactly the point that Employment Judge Sage had been asked to decide. She commented expressly on the failure of the Claimant to substantiate that part of his claim.

Discussion and conclusions

13. I consider that I should strike out the Claimant's claim if I conclude that either the claim was not presented within the statutory time limit or that to permit the claim to proceed would be an abuse of process. I bear in mind that I am deciding this matter without hearing any evidence. I should therefore only strike out any part of the claim where, taking the Claimant's case at its highest, I am able to say that it has no reasonable prospects of success. I consider that the same approach should be taken to whether or not the claim is in time. I should take the Claimant's case on the most favourable basis and then turn to whether it has been presented within the relevant time limit.

14. It seems to me that the claim is clearly out of time. The Claimant was maintaining in January that he had not been paid the holiday pay that he was entitled to. The final payment of holiday pay the Claimant received from the Respondent was 15 March 2017. If there was any shortfall, it was plainly due on that date. Insofar as there was any detriment (whether or not on the grounds of any protected disclosure) it was on a date no later than 15 March 2017 when the Respondent paid what it said was due in holiday pay. As the claim was not presented until 20 July 2017 it was not presented in time. There was no suggestion from the Claimant that it was not reasonably practicable to present the claim in time. Indeed, he was plainly able to litigate his first case during that period and any such argument would have been doomed to failure. Accordingly, I conclude that the Tribunal has no jurisdiction to entertain the present claim because it was presented after the time limit imposed by Section 48 of the Employment Rights Act 1996.

15. If I am wrong about that then it seems to me that the claim falls foul of the rule in ***Henderson v Henderson*** set out above. Any cause of action which relies as a detriment upon the non-payment of holiday pay must, on the Claimant's case, have predated the first claim which made the same complaint. The Claimant essentially seeks the same remedy but pursuant to a different cause of action. That cause of action was complete, and he had all of the relevant knowledge, before he brought his first claim. This claim is a collateral attack on the judgment of Employment Judge Sage. The Claimant before me accepted

that he had brought this claim because he was unhappy with the outcome of the earlier proceedings but did not wish to appeal or seek a reconsideration as he thought it pointless. If he had wanted to allege that the failure to make payment to him was because of disclosures in February 2015 and February 2017 he could, and should, have included that matter in his original claim or applied to amend that claim before the proceedings concluded.

16. The Claimant has identified no special reason why he should be permitted what is in my view a second bite of the cherry. As such I am satisfied that this claim is an abuse of process and that it should be struck out.

17. If I am wrong about that I consider that the following matters are subject to "issue estoppel". In other words, the factual matters have already been decided in a claim between the same parties in a competent court.

    17.1. There is a clear finding in the judgment of EJ Sage that the second Respondent was not the Claimant's employer and therefore cannot have been the proper party for any claim for holiday pay; and

    17.2. That no holiday pay was due to the Claimant.

18. The first of those findings is binding upon me, and, in any event, is plainly correct. I therefore strike out the claims against the Second Respondent for these reasons in addition to the other reasons set out above.

19. The second finding is also binding. I accept that it is limited to a finding that the payments made in March 2017 extinguished any further liability for holiday pay.

20. In the circumstances and for the reasons given I strike out the Claimant's claims.

Employment Judge John Crosfill

Date: 23 November 2017