EMPLOYMENT TRIBUNALS

Claimant: Mr S Sweetinburgh

Respondent: Secretary of State for Business, Energy and Industrial Strategy

Heard at: **Plymouth** **On: 4 June 2018**

Before: **Employment Judge Fowell**

Representation:

Claimant: Unrepresented

Respondent: Mr P Soni, of the Respondent

JUDGMENT

The claims under Part XII of the Employment Rights Act 1996 arising on the insolvency of the claimant's employer are dismissed.

REASONS

Background

1. By a claim form dated 26 November 2017 Mr Sweetinburgh brought against a number of complaints arising out of his employment with The Accident Group Ltd, which went into administration in 2003. Regional Employment Judge Parkin decided that the only complaints which could be accepted were those under Part XII of the Employment Rights Act 1996, i.e. those made against the Secretary of State on the insolvency of an employer. All references below are to this Act.

2. These issues were then clarified at a preliminary hearing on 19 March 2018. The payments sought were in respect of:

    a. A redundancy payment;

    b. Holiday pay; and

    c. Notice pay.

3. Mr Sweetinburgh was not in fact made redundant, so the first claim in fact related to a claim for a basic award, but as the formula for calculating the two is the same in all material respects nothing turns on the description.

4. Time limits were also identified as an issue, given the age of the claims.

5. Finally, in the claim form Mr Sweetinburgh referred to a COT3 agreement he entered in 2003 with his employers and their liquidators and asked for a declaration that the effective date of termination was in fact the date on which the company went into liquidation. This was discussed at the outset of this hearing. The Secretary of State was not a party to that contract and so Mr Sweetinburgh is not bringing a claim of breach of contract against him. In stating that he wanted such a declaration, Mr Sweetinburgh was merely asserting that the effective date of termination was later than stated, regardless of the date recorded, and so he should have achieved two years' service, thereby entitling him to a larger basic award and notice payment.

6. The claim for extra holiday pay arose out of the principle established in *Lock v British Gas Trading Ltd [2016] IRLR 946*, that holiday pay should include commission payments normally earned. His pay was partly in the form of a basic salary of £14,000 and partly commission.

7. These claims gave rise to a number of preliminary issues which were dealt with one at a time by submisions. I had a witness statement from Mr Sweetinburgh setting out his arguments and background facts, but no real factual dispute arose over this and so there was no need for cross-examination. Both parties/representatives conducted the hearing with courtesy and in a helpful and professional manner, for which I record my thanks.

Part XII Employment Rights Act 1996

8. Section 182 starts with the words, "If, on an application made to him in writing by an employee…" then sets out the conditions and continues with "the Secretary of State shall, subject to section 186, pay the employee out of the National Insurance Fund…"

9. What is required then is an application and a decision by the Secretary of State. This is also reflected in section 188 which deals with complaints to an Employment Tribunal and time limits. This too requires an application and a decision by the Secretary of State, following which the normal three-month time limit begins to run.

10. The respondent denies that any application was ever made for holiday pay. This is the first factual issue to be determined.

11. The original document no longer exists. There is however a printout from 2006 of the respondent's computer records, which shows that the form was sent out (presumably to employees or other creditors) on 22 July 2003, and that Mr Sweetinburgh sent it back to them on 10 July 2006, nearly three years later. Their records also show that a payment was made to him on 30 August 2006, which must therefore have been at or shortly after the decision was made on his application.

12. That view is supported by an email from a Ms Bird at the respondent on 23 August 2006. On reviewing this email, it appears to be the decision in question, since it confirms that a review had been carried out, that their initial view had been revised and that a payment would be made to him. This was for a basic award and notice payment (one week) calculated on the basis of a years' service. There is no mention of any claim for outstanding holiday pay.

13. That is supported by the printout referred to above, and an email from the respondent's Mr Jason Hunter dated 6 November 2017, at page 119 of the respondent's bundle, which set out the information held by the Secretary of State, and which prompted the claim. This too made no mention of holiday pay.

14. It is for the claimant to prove his claim on the balance of probability. Although the original application is missing the remaining records all suggest that no claim for holiday pay was made and so there has been no decision on that claim by the Secretary of State. It follows that I have no jurisdiction to deal with it. It is not necessary therefore to deal further with arguments based on *Lock v British Gas Trading Ltd*, since this only relates to holiday pay.

Length of Service

15. The remaining claims for notice pay and basic award depend on length of service. Here again, there is a good deal of documentary evidence, even if the records between Mr Sweetinburgh and his employer at the time, bringing his employment to an end are missing.

16. Firstly, the COT3 in question gives his employment as ending on 5 September 2002. There is a further form at page 203 of the respondent's bundle, which is a follow up or additional form requesting details of a claim for notice pay. Mr Sweetinburgh says this was self-populated, although it is handwritten. This states that it ended on 3 September 2002. Most conclusively however, Mr Sweetinburgh brought a Employment Tribunal claim against his employers on 25 September 2002 claiming unfair dismissal, arrears of wages and breach of contract, in which he claimed that his employment ended on 5 September 2002. (This is the claim which gave rise to the COT3 agreement.)

17. It is also common ground that the employment began on 25 May 2001.

18. I questioned Mr Sweetinburgh about the circumstances of his employment ending. He accepted that his last day of work was around late August 2002 and followed a dispute with his employers. He explained that he refused to accept a cut in his commission, in response to which the company fabricated a claim against him for misuse of his fuel card, he refused to accept the deduction from his wages which they proposed to make of about £700 and so he resigned or was dismissed. In any event, his employment came to an end.

19. He contends however that this is not the same as the effective date of termination, which as a matter of law continued after he left, on the basis that he pursued a claim for unfair dismissal, involving a remedy or potential

remedy of reinstatement, and if granted his employment would have carried on.

20. He relied on the case of *Hawes and Curtis Ltd v Arfan and anor 2012 ICR 1244, EAT*: In that case the two appellant's, A and M were both summarily dismissed for gross misconduct on 5 October. Both men appealed in accordance with the employer's non-contractual internal appeal procedure. In a letter dated 4 November, the employer stated that the decision to dismiss summarily had been upheld but that the effective date of termination would now be the date of that letter. Accordingly, A and M were paid up to this date under the employer's PAYE system. In subsequent proceedings, an employment tribunal found that the effective date of termination was 4 November and, on appeal, the Employment Appeal Tribunal approved this ruling. The tribunal's findings about the decision taken on appeal, the communication of that decision, and the way in which the employer had acted on that decision by continuing to pay A and M until 4 November, justified its conclusion that the effective date of termination was indeed 4 November. In the course of its judgment, the Employment Appeal Tribunal said that just as the contract revives indefinitely if an appeal reinstates the employee, so it revives for a limited period if an appeal varies a summary dismissal to a dismissal on notice or a dismissal on some other date.

21. However, that decision related to an internal appeal, not an Employment Tribunal claim. It also depended on the particular facts, including that the employees had been paid throughout. The effective date of termination is defined by section 97 in clear terms. Essentially the contract ends when any notice expires or, if no notice is given by an employer, when dismissal takes effect. This avoids any argument that where an employee is summarily dismissed, the notice period is added on to extend the contract.

22. Section 219 provides for continuity of service on reinstatement or re-engagement. In the absence of that remedy, there is no such extension, or there would be no need for this clause, and it is not automatic on bringing a claim of unfair dismissal. The application of section 97 to the present claim therefore means that the contract of employment ended on the expiry of one week's notice, whether given by employer or employee, and on the basis of the previous ET1 I take it to be 5 September 2002.

Time limit

23. Section 188 provides that any complaint must be presented within 3 months on the decision, which expired on 22 November 2006, or within such further time as the Employment Tribunal considers reasonable in a case where it was not reasonably practicable to bring the claim within that period.

24. No reason or explanation has in fact been advanced as to why it was not reasonably practicable to submit the claim in time, so on that simple basis the claim has to be regarded as out of time.

25. If that conclusion is wrong for any reason, the next question is whether it was brought within such further period as was reasonable. But this is a period of over ten years, an extraordinarily long period, especially when set

against the normal time limit of 3 months. I was not able to get any clear understanding for the delay. Mr Sweetinburgh relied on the email from Mr Hunter dated 6 November 2017 as prompting the claim, but this merely set out the information on the respondent's files. It did not in my view disclose any new information, or at least any information which could not have been obtained by Mr Sweetinburgh with reasonable diligence at a much earlier stage. This is an issue on which the onus was on Mr Sweetinburgh to explain and justify the delay. It is difficult to imagine circumstances in which such a long delay could be justified under section 188, but nothing of any substance was put forward.

26. One point made in this email from Mr Hunter was that the payments made were based on his basic salary of £14,000 at that time, or £268.49 per week, whereas the statutory cap at the time was £280. *Lock v British Gas Trading Ltd* considered the interpretation of the Working Time Regulations 1998, which incorporated the definition of a week's pay from the Employment Rights Act 1996. It follows that commission ought to have been included in that calculation, but this claim too is out of time.

27. Finally, Mr Sweetinburgh urged me to simply disapply section 188 so as to give effect to EU law, relying on a case of *Cofidis v Fredout C-473/00*. This was in the context of unfair terms in contracts for the sale of goods, and the Court of Justice found that procedural rules such as time limits, which prevented effective enforcement of EU rights, must be disapplied.

28. In the employment context, although not raised before me, this principle was demonstrated in *Bleuse v MBT Transport Ltd and anor 2008 ICR 488, EAT.* The Employment Appeal Tribunal had to consider the territorial scope of the Working Time Regulations 1998. Mr Justice Elias, then President, considered it highly relevant that the Working Time Regulations exist to give effect to the rights contained in the EU Working Time Directive, and emphasised that domestic courts must, if at all possible, construe the Regulations so as to give effect to those rights. He held that statutory provisions should be construed so as to ensure that directly effective EU rights can be enforced by the English courts. Otherwise, the European principle of effectiveness would not be satisfied in that there would be no effective remedy for a breach of the EU right.

29. Firstly however, the Employment Rights Act 1996 is not a measure designed or intended to give effect to an EU provision. It is a piece of purely UK legislation.

30. Secondly, even in cases which do aim to implement EU Directives, there are limits to a Tribunal's powers. Tribunals have to *interpret* provisions so far as possible to comply the aims or intentions of the Directive but cannot simply disregard them terms of the regulations. For example, in *Ross v Eddie Stobart Ltd EAT 0085/10* the Employment Appeal Tribunal noted that there was no right to claim automatically unfair dismissal where the reason for the dismissal relates to rights for working time under the Road Transport Regulations. They expressed surprise at this omission, but held that they could not "interpret" it by adding these Regulations to the list when Parliament had clearly chosen not to do so.

31. In the same way, I am not able to simply disapply section 188 of the 1996 Act, even if it was an EU measure.

32. It follows, in summary, that:

    a. all of the complaints are all out of time;

    b. that no claim for holiday pay has been validly presented; and that

    c. the claims based on length of service were misconceived in any event, as the effective date of termination cannot be extended in the way suggested.

33. Accordingly all of the complaints must be dismissed.

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Employment Judge Fowell

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Date 04 June 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE