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EMPLOYMENT TRIBUNALS

Claimant: Mr P Thaitai
Respondent: Liberty Aluminium Technologies Limited
Heard at: East London Hearing Centre
On: 23 July 2018
Before: Employment Judge Prichard

Representation

Claimant: In person, accompanied by Mr J Bridge, previously HR Assistant, and colleague of the claimant at Amtek
Respondent: Mr S Willey, EEF Limited, Birmingham

JUDGMENT

It is the judgment of the tribunal that:-

- 1. The claimant's claims for breach of contract, unfair dismissal and accrued holiday pay were all presented out of time in circumstances where it was reasonably practicable to have presented them. They are therefore dismissed.**
- 2. His claims for a redundancy payment, and age and race discrimination were presented out of time in the circumstances where it is not just and equitable to extend time for the hearing of those claims and they are dismissed.**
- 3. The proceedings as a whole now stand dismissed**

REASONS

1 This has been a most unfortunate case. Mr Thaitai was paid a salary of £84,000 per annum as the group Director of HR and Corporate Affairs for his previous employer, Amtek Aluminium Castings (Witham) Limited. They ran into financial difficulty and went

into administration on 20 July 2017. The administrators were PWC.

2 The claimant was employed from June 2015. I have seen his contract of employment. His workplace was stated to be London and Frankfurt which is the European headquarters of Amtek. Amtek ran some 20 plants in continental Europe, in Sweden, Germany, and Italy. Amtek manufactured aluminium components for the automotive industry, suspension, engine castings, brake linings etc. At its height there were some 550 employees on site at Witham. The claimant's workplace in UK was in the Canary Wharf office of the company which he had fitted out. He worked in Frankfurt as well.

3 The present respondent, Liberty, oddly, changed its name from Liberty Insulation Limited to Liberty Aluminium Technologies Limited, 8 days before acquiring Amtek on 20 July. The claimant however had previously been made redundant. I have been shown Amtek correspondence first dated 10 May 2017 which is roughly when PWC were first involved, advising the claimant of the possibility of redundancy and talking of a consultation process. That was followed on 12 June by a dismissal notice from Amtek. It was signed by Cheryl Swann, personnel and payroll manager. He was told that his effective date of termination would be 1 September 2017. His contractual notice entitlement was six months. The letter states:

"I am writing to confirm your employment will end by reason of redundancy on 1 September 2017".

He was to take garden leave from that point and the remaining 14 weeks notice entitlement was to be paid in one lump sum payment on 1 September. He was told he was also entitled to receive a statutory redundancy payment of £1,467."

4 The claimant received none of these. All he received after that date was his June pay and then his July pay on 31 July in the normal way. There was no pay for August, and no lump sum payment. The administration had started. It was a prepack administration.

5 I have consulted regulation 4 of the Transfer of Undertakings Regulations 2006 and I am of the view that the claimant was employed immediately before the administration on 20 July and thus there was thus a transfer. However, following the decisions in *OTG Ltd v Barke*, & *KEY2LAW v Antiquis* [2011] IRLR, 272, EAT it seems that his remedy would have only been against the insolvent company, and not against the transferee Liberty. That is if the claim had been in time; it is however very late.

6 The claimant attempted an appeal. It seemed more in the nature of negotiating a severance package than challenging his redundancy selection. He was, it appears, the only person selected at that stage. His manager Malcolm Hayes who was the European MD of Amtek stayed on, as did his HR assistant Mr Bridge who is here today. Both of those individuals later had their contractual entitlements honoured by Liberty. Mr Bridge's was less because he had been there less than two years. He had only a month's notice entitlement under the contract apparently. It appeared in Liberty's view that there were too many highly paid senior staff in the operation for them to support. If the claimant's package was as good as it obviously is, it is likely that Malcolm Hayes' was better.

7 The respondent, Liberty Aluminium Technologies Limited, is part of the international Liberty group headquartered in Singapore and owned by Mr Sandeep Gupta. Liberty acquired Qatar industries, Tata Steel, Scunthorpe, and other steel works in Scotland. 2017 was a year of great growth for them. Amtek was a substantial buy - just the Witham operation. They acquired the assets of Amtek in a pre-pack administration. Pre-packs were the subject of all the OTG EAT appeals cited above

8 The claimant had solicitors over this period and tried to get pay from Amtek, to no avail. He was in correspondence with Cheryl Swann. He received correspondence on 24 July wrongly telling him that his employment terminated on 24 July. It was corrected to say it ended on 20 July. He was advised about his right to claim residual payments from the Dept of Business Innovation and Skills Insolvency Service. The claimant corresponded with PWC. He also corresponded with Mr Peter Stroud who is the Divisional HR Director for Liberty. Mr Stroud literally did not respond to him.

9 On 7 September PWC apparently told the claimant that Liberty had all the relevant correspondence and would be in touch with him. That did not happen, not at all. It seemed rude and discourteous but is the fact of the matter. Unfortunately for Mr Thatai it is not my brief to allow the claims simply because or potential respondents have been unfair and rude.

10 I make a finding first of all that the effective date of termination was 20 July not the later date of 1 September. If it was the later date, however, even the redundancy claim would be out of time (6-month time limit).

11 The claimant approached the redundancy payment service and they informed him in December 2017 that they would not meet his claim because his employment was TUPE transferred. Understandably this is deeply frustrating for Mr Thatai. Everyone is pointing the finger elsewhere. He is substantially out of pocket over this.

12 The claimant consulted Druces solicitors in London Wall. He spoke there to a Mr Avens who is an employment specialist solicitor. He was advised (which I find instinctively a surprising) that he could expect fees of as much as £50,000 for pursuing a claim like this. If they did nothing else helpful they advised the claimant to approach Acas for early conciliation.

13 That was done on 16 October 2017, in time, relative to the July termination date. At that stage only Liberty was a prospective respondent. The matter spent a month with Acas early conciliation and a certificate was issued on 16 November. But then no ETI claim form was presented. Why not?

14 I have to rely on Mr Thatai's sworn evidence that he was put off by the prospect of £50,000 fees. I would be astonished if he had not also been advised that there were strict time limits for the presentation of claims and how the mechanics of that all worked, and what the deadlines were before Druces signed off and left him to his own devices.

15 Further, it appears from his CV that the claimant gained an LLB in 2008, at the University of London. In addition he is an HR professional. He must know how litigation works, and be aware of the concept of a time limit / limitation period. This time limit is

particularly short but it is not the only 3-month time limit in law. There is a similar one for judicial review to the High Court. Further the Employment Tribunal limits are jurisdictional and not just procedural.

16 The employment situation in the workplace is a dynamic environment. Debts have to be sorted out before they get too old. It would be quite unworkable to have the normal 6-year limitation period in an employment context.

17 The claimant said he did not seek any other advice at the time. He did not then decide to do what he has done this time, which is to represent himself, for nothing. Instead of claiming to the tribunal he approached the Insolvency Service again with his predicament. They refused his claim a second time on 2 February 2018. After a month of getting nowhere he again opened early conciliation with (1) Secretary of State (2) Amtek (3) Liberty. He started that on 4 March 2018. Apparently none of those 3 organisations responded to the Acas conciliator. Therefore after only two weeks, on 19 March 2018 a certificate was issued.

18 This claim that I am dealing with now was received by the tribunal on 18 April just in time relative to the certificate date. As usually happens, it was listed for this preliminary hearing to decide the time limit as a preliminary jurisdictional point.

19 It is a preliminary point. The merits of the claim, while they may have partial influence on exercising a discretion under section 123 of the Equality Act 2010, really have no application under section 111 of the Employment Rights Act 1996 and the other relevant time limits in the Employment Rights Act relating to claims for arrears, for holiday pay and the redundancy payment claim.

20 The redundancy payment claim is subject to an extension of time provision that is similar to the discrimination time limit namely if it is "just and equitable" just like under section 123 of the Equality Act 2010. The ERA time limits are subject to a dispassionate and factual evaluation of the "not reasonably practicable" extension which has no relevance to the merits of the claim.

21 I have no hesitation in deciding that the unfair dismissal and breach of contract and wage arrears claims could have been brought before. The claimant was 90% there in setting up those claims up but he simply did not present the claim in October/November 2017 when it would have been in time.

22 For some odd reason, this time, having started conciliation against all 3 organisations he only elected to pursue one claim against Liberty. I really do not understand why. It may not be too late to approach the Insolvency Service in the light of the judgment I am now giving, particularly in view of the OTG appeals. That case law seems to point the finger of liability at the Insolvency Service rather than to either the transferor or the transferee, Amtek or Liberty. The claimant technically did transfer under Regulation 4 of Transfer of Undertakings (Protection of Employment) Regulations 2006, but liability did not, under Regulation 8 as interpreted in the OTG appeals.

23 So far as "just and equitable" is concerned for the redundancy and discrimination claims are concerned I am bound to consider the case of *Robertson v Bexley Community*

Centre [2003] IRLR, 434, CA. It makes a very trite and obvious point that the tribunal has to find that cases are in some way special or unusual to extend the time, otherwise the extension of time becomes the rule and not the exception. I fear nothing the claimant has told me is exceptional or unusual.

24 Potential respondents to proceedings are often rude, off hand, and unresponsive. People break their promises, go back on undertakings, and give misinformation. Despite Mr Bridge's assertion that there were grounds for optimism on the claimant's part I cannot see much ground for it from any of the correspondence I have been shown today. For whatever reason they set their faces against Mr Thatai's claims, including, surprisingly, the Insolvency Service.

25 If Mr Kevin Still, the UK Managing Director told the claimant that his non-transfer was a mistake I do not know why he did not do something about that earlier. It is all hopelessly late now.

26 The chief cause of not bringing the claim first time round was a fear of solicitors' bills. I fear that would not make it "not reasonably practicable". If he needed a solicitor at all it need not have been a City solicitor whose fees are going to be the highest.

27 Nor can I see why I should invoke the "just and equitable" extension of time provision, despite the fact that I have some sympathy with Mr Thatai, compared to Malcolm Hayes who did well out of Liberty.

28 I clearly had to ask Mr Thatai why he was claiming age discrimination. He was 67 I have not even asked how old the other ones were. I cannot see any circumstantial reason why at a tribunal might find that could be age discrimination.

29 As far as the race was concerned I was told the most bizarre account, corroborated by Mr Bridge. One Monday he turned up for work in Frankfurt and was denied access to the building. A receptionist there Isabel Kenke informed him that no Indians were to be allowed in the building. The jurisdiction for such claim would be complicated anyhow it is a German incident. Germany is subject to the EU Equal Treatment Directive. I am not sure how that would have worked out at this tribunal. The claimant stated that few Indians/Pakistani accountants had also been released from the German operation. I cannot comment about that other than to repeat what I have been told in evidence today. Apparently Fr Kenke was deeply upset about saying what she had said, on instructions. Where any such instructions came from I am not told.

Employment Judge Prichard 14.09.2018

JUDGMENT & REASONS SENT TO THE PARTIES ON
27.09.2018

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FOR THE TRIBUNAL OFFICE