



EMPLOYMENT TRIBUNALS

Claimant: Mr R Rauf

Respondent: FGH Security Services Limited

Heard at: Manchester **On:** 22 January 2019

Before Employment Judge Wardle

Representation

Claimant: In person

Respondent: Miss L Holt - HR Manager

JUDGMENT & ORDER

The judgment of the Tribunal is that it does not have jurisdiction to hear this claim in so far as it relates to the claimant's complaints of constructive unfair dismissal and that he is owed notice pay, holiday pay and arrears of pay as it was presented outside the statutory three months time limit in circumstances where it found that it was reasonably practicable for him to have presented it in time. In relation to his claim for a statutory redundancy payment should the claimant still wish to avail himself of the opportunity to make representations in writing as to why it should not be struck out on the ground of it having no reasonable prospect of success he is directed to do so within 21 days of the issue date of this judgment and order.

REASONS

1. This case was listed for a Preliminary Hearing in order to determine the Tribunal's jurisdiction to hear the claimant's complaints.

2. By his claim form the claimant has brought complaints of unfair constructive dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("ERA"), of his right to a redundancy payment pursuant to section 135 of ERA and of his being owed notice pay pursuant to Article 3 of the Employment Tribunals' Extension of Jurisdiction (England & Wales) Order 1994, holiday pay pursuant to Regulation 13 of the Working Time Regulations 1998 ("WTR") and arrears of pay pursuant to section 13 of ERA.

3. The background to his complaints was ascertained to be as follows. His employment as a Security Officer transferred to the respondent in March 2010 by way of TUPE. In 2017 the contract that he was working on at TNT Ramsbottom was lost by the respondent and he was moved to another site in Rochdale in or about August 2017, where there were fewer hours available than those he had worked at the previous site. This relocation was, however, relatively short-lived as the respondent's contract to provide security services at the Rochdale site was awarded to another organisation in November 2017, at which time the claimant had the opportunity to transfer under TUPE to that organisation. However, the claimant objected to the transfer because of the fewer hours as compared with those that had previously been available at TNT Ramsbottom and the fact that Rochdale was not as convenient for distance of travel as the other site. In law this objection had the effect of terminating the claimant's contract with the respondent but it agreed to retain his services and to offer such shifts to him as they had available as a cover guard on an ad hoc basis. The claimant subsequently went on holiday between 15 November 2017 and 15 December 2017 before informing the respondent on 21 December 2017 that he was again ready for work, which saw it offering some shifts over the Christmas period. However, thereafter the requirement for the claimant to work on this ad hoc basis lessened and on or about the beginning of April 2018 the claimant decided to resign, with his effective date of termination established as being 6 April 2018 according to his P45 as produced by the respondent during the hearing.

4. With the exception of the claimant's claim for a statutory redundancy payment each of his other complaints has a statutory three months' time limit for its presentation as provided for in respect of his constructive unfair dismissal complaint by section 111 of ERA; in respect of his notice pay claim by Article 7 of the Extension of Jurisdiction Order; in respect of his holiday pay claim by Regulation 30 of WTR and in respect of his claim for arrears of pay by section 23 of ERA. In terms of an employment tribunal's jurisdiction to consider such complaints the above-mentioned statutory provisions state that it shall not consider a complaint unless it is presented before the end of the period of 3 months beginning with the date of the event giving rise to it unless it was not reasonably practicable for the complaint to be presented before the end of the relevant period, in which case the tribunal may consider it if it is presented within such further period as the tribunal considers reasonable.

5. In relation to his statutory redundancy payment claim it is the case that an employee will not lose his entitlement to this for a period of six months provided he has taken certain steps before the end of this period beginning with the effective date of termination, established here to be 6 April 2018, included amongst which is a reference to an employment tribunal for determination of the question as to the employee's right to, or the amount of, such a payment.

6. Having regard to the claimant's effective date of termination of 6 April 2018 this gives an end date of 5 July 2018, subject to any extension by reason of his engaging in the ACAS early conciliation process, for the purposes of the presentation of his complaints which have a primary time limit of 3 months and an end date of 5 October 2018 for his complaint in respect of his right to a statutory redundancy payment.

7. The claimant commenced the ACAS early conciliation process on 17 May 2018 and in circumstances where ACAS were unable to promote a settlement of his claim he was sent in electronic form on 5 June 2018 the Early Conciliation

certificate. In relation to the period beginning with the day after the early conciliation request is received by ACAS up to and including the day when the early conciliation certificate is received or deemed to be received by the prospective claimant the clock is stopped in respect of compliance with the statutory time limit for the claim's presentation. The effect of this in the claimant's case was to extend the primary time limit by 18 days from 5 July 2018 to 23 July 2018 in respect of those complaints having a time limit of 3 months.

8. However, his claim was not in fact presented until 3 October 2018, which is 72 days outside the expiry of the primary time limit as extended to 23 July 2018.

9. In explanation of this delay the claimant stated that he had sought help from a neighbour, who was lawyer, with the drafting of his claim. He further stated that the claim form was returned to him marked 'undelivered' early in September 2018, which he thought was some 6 weeks after it had been sent by recorded delivery because the correct amount of postage had not been paid. Given that items of mail sent by this means require the assistance of a post office employee, which involves the weighing of the item and the determining of the amount of postage it seemed unlikely that such a mistake could have occurred and rather suggested that the form had been sent by ordinary underpaid post. From that point in time it was the claimant's further explanation that he had then taken steps to repost it, which saw it being received in the Tribunals' offices on 12 September 2018.

10. Such presentation was not though made effectively as there was a problem with the claim form in that the ACAS early conciliation reference number had not been completed correctly as two of the digits were missing. Such reference number is an essential requirement for the purposes of completion of the ET1 claim form. This error necessitated the tribunal writing to the claimant on three occasions on 19 September, 24 September and 1 October 2018 pointing out that the reference number was incomplete before the claimant provided the full number on 3 October 2018. His explanation for this further delay was that he could not find the ACAS Early Conciliation certificate bearing the number.

11. Thus the claim was presented very significantly outside the primary 3 months time limit as extended giving rise to the question for the Tribunal as to whether it was reasonably practicable for the claimant to have presented it within this time limit, which as detailed above expired on 23 July 2018 allowing for the extension given by the claimant's engagement with the early conciliation process.

12. There is much case law on the test to be applied in determining whether an in time presentation was or was not reasonably practicable. In *Palmer and another v Southend-on-Sea Borough Council* 1984 ICR CA the Court of Appeal concluded that it means something like 'reasonably feasible' and in *Asda Stores Ltd v Kauser* EAT 0165/07 it was stated that 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible was done'.

13. The Tribunal had regard to this guidance and also to that given by the Court of Appeal in *Wall's Meat Co Ltd v Khan* [1978] IRLR 499 as to what might constitute an impediment that reasonably prevents, interferes with or inhibits the act of presentation. In this case the court stated in relation to impediments to performance at paragraph 44 of its judgment that "the impediment may be mental, namely, the state of mind of the claimant in the form of ignorance of, or

mistaken belief with regard to essential matters. such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a claim within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant not making such enquiries as he should reasonably in the circumstances have made.."

14. The claimant professed to be unaware that there were time limits within which his complaints had to be brought. However, it was established that it was him who had contacted ACAS to ask them to explore the possibility of a settlement of his complaints and it is in the knowledge of the Tribunal that prospective claimants are alerted in their literature which can be readily accessed on line, which was a medium that the claimant used, to time limitation issues. In the Tribunal's view the claimant ought reasonably to have researched this literature whilst participating in the early conciliation process. Furthermore the employment tribunals' own website at www.gov.uk/employment-tribunals advises of claims usually having to be made within three months of the act complained of and the Tribunal considered that this was an obvious source of information that the claimant ought reasonably to have referred to..

15. In addition he had the assistance of a lawyer friend, whom he said had helped with the completion of his claim form and having regard to the range of complaints covered in this the Tribunal considered that such friend was likely to be conversant with the fact that time limits apply to their presentation and that he would have shared this knowledge with the claimant. It was also noted based on the claimant's evidence that the form was returned to him early in September 2018 some six weeks after it was first sent that it must have been posted sometime approximate to the time limit's expiry date of 23 July 2018, which suggested an awareness of time limitations on someone's part.

16. Having regard to these matters the Tribunal considered that the reason for the claimant's failure to comply with the statutory time limit for his complaints was not his unawareness but rather his inability to ensure that the claim form was posted with the correct postage paid and that there was nothing that might be seen as amounting to an impediment reasonably preventing, interfering with or inhibiting the claim's presentation within the statutory period. In the Tribunal's view what was possible to be done here in terms of the claim's presentation within the statutory time limit was not done by the claimant, when it was reasonable to expect it to have been and that it was reasonably feasible for the claimant to have presented his claim in time.

17. The Tribunal therefore finds that it was reasonably practicable for the claimant to have presented his claim on or before 23 July 2018, and having found as such there is no basis on which to consider whether the primary time limit should be extended. It is therefore without jurisdiction to entertain this claim at least in so far as his complaints of constructive unfair dismissal and his being owed notice pay, holiday pay and arrears of pay are concerned.

18. In relation to his claim for a statutory redundancy payment, which has a longer period of six months for the purposes of presentation the Tribunal finds that the statutory time limit for this has not been exceeded having regard to the claimant's effective date of termination of 6 April 2018 and its presentation on 3 October 2018. It is therefore a claim, which is within its jurisdiction.

19. However, the Tribunal foresaw some difficulties for the claimant in respect of his establishing his right to a statutory redundancy payment having regard to the following matters. First, there was the legal effect pursuant to Regulation 4(7) of the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006 of his objecting to his transfer to the undertaking that took over responsibility for security provision at the site in Rochdale in November 2017. namely that it would have terminated his contract with the respondent but in circumstances where he would not be regarded as having been dismissed by it. Whilst the respondent re-engaged the claimant on what it says was an ad hoc basis as a cover guard with no guaranteed hours it would seem that there was a break in the claimant's continuity of employment between the date of the transfer in November 2017 and his resuming work on 26 December 2017. The claimant refers to his having been on holiday during this period but it is unclear whether this was a paid holiday under a contract of employment with the respondent or whether it was a case of the claimant taking some unpaid leave ahead of his beginning work again with the respondent on the revised terms. If it is the latter then such a gap would break continuity and disentitle the claimant to the right to claim a statutory redundancy payment, which requires an employee to show two years' continuous employment.

20. Secondly, in order to be entitled to a redundancy payment, it is for the claimant to prove, on a balance of probabilities, that there has been a dismissal. In this case having regard to the circumstances in which the claimant's employment terminated i.e. by his resignation because of the ad hoc work opportunities forming the basis upon which he had been re-engaged not being sufficiently frequent to bring a wage that he could live on it appeared to the Tribunal that the claimant would find it hard to show that he was entitled to terminate his contract by reason of the respondent's conduct such as to give rise to a constructive dismissal. As such it considered that this claim has no reasonable prospect of success, which is a ground for its striking out under Rule 37(1)(a) of the Employment Tribunals' Rules of Procedure 2013.

21. A claim may not though be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party at a hearing.

22. The claimant was made aware that the Tribunal was contemplating on its own initiative to strike out his claim for a statutory redundancy payment on this ground and he was asked if, and how, he wished to make representations in response to which he stated that he would like to do so in writing.

Date: 30 January 2019

Employment Judge Wardle

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

1 February 2019

Case No: 2415147/2018

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS