EMPLOYMENT TRIBUNALS

Claimant: **Mr R Rawski**

Respondent: **A and H Structures Limited**

Heard at: **Nottingham** **On:** **Wednesday 15 May 2019**

Before: **Employment Judge P Britton (sitting alone)**

Representatives

Claimant: **Mr O'Donovan, Employment Consultant**
Respondent: **Ms S Fergusson, Director**
Assisted by Mr M Allen, Employee

Approved interpreter in Polish: Magdalena Johnson

JUDGMENT

1. The claim is permitted to proceed it having been presented in time.

2. The hearing listed currently for three days is reduced to two days.

REASONS

Introduction

1. My task today in accordance with the direction of my colleague Employment Judge Brewer, sitting at an attended Preliminary Hearing on 25 March 2019, is to determine whether this claim which is primarily for unfair dismissal and breach of contract (failure to pay notice pay) was presented out of time. To assist me I have been provided with additional documentation by Mr O'Donovan. And in the context of that I have taken myself to Section 207B in particular of the Employment Rights Act 1996. I bear in mind that the issue of whether or not the claim was presented out of time was quite properly something Mr Brewer initiated having had consideration of the file. It was not an issue raised as such by the Respondent which is not legally represented.

2. For the reasons I will now set out it is now clear that the claim was presented in time.

Why it was presented in time

3. The Claimant was employed by the Respondent as a welder commencing 23 May 2011. He dismissed or resigned effective 16 April 2018 latest. That would mean that the last date for bringing his claim within the 3 month limitation period would have been 15 July 2018 but the claim was presented on 30 July. But this is subject to the statutory requirement for ACAS early conciliation (ACAS EC) as a precursor to presenting the claim and which can extend time as per s207B of the Employment Rights Act 1996 (the ERA). This case is not one of the limited exceptions where ACAS EC is not required.

4. What I now have is clear cut evidence of the following from ACAS. That is to say on 9 July 2018 the Claimant entered into early conciliation and he was issued with an e-mail to that effect via ACAS confirming that ACAS EC had therefore started on 9 July. The conciliation number was given as being R286188/18. According to ACAS the conciliation period having ended on 16 July it therefore issued a certificate that day and which was dated the same. As it is it seems that the Claimant, who is present today and whose English appears to be limited, whether by himself or via somebody else then entered into what seems to have been a second period of conciliation or is it that there was confusion at ACAS? All that needs to be said is that therefore a certificate number R288851/18 was issued on 27 July with the start of the ACAS EC period being 16 July. In other words the same date as the closure of the first certificate. It is the second certificate which accompanied the ET1 which was presented to the Tribunal on 30 July. Also the claim only referred to EC no: R288851/18

5. Thus applying Section 207B(2) of the ERA in terms of the second certificate day A would be 16 July and day B would be 27 July, thus it would not extend time as per 207B(3) because it started after the end of the 3 month period. Thus EJ Brewer was entitled to flag up the out of time issue: hence the first preliminary hearing on 25 March 2019. He did not have before him the first EC certificate or the ACAS correspondence which is before me.

6. However the first certificate would have extended time and indeed would have meant that as per 207B(4) the time for filing the ET1 would now have extended to 17 August. Thus the claim was in time. So what happened? It would seem from the ACAS correspondence before me that unfortunately the first certificate got destroyed. But it does not matter. All that was required was did he enter into ACAS early conciliation during the time of the 3 month limitation period? Yes he did. Was a certificate issued? Answer yes. Thus does it extend time? Answer yes. The second certificate is therefore irrelevant. Thus the claim is in time and the Respondent does not wish to disagree with that proposition.

The issues

7. I have then discussed this case, picking it up from Employment Judge Brewer's published record of the case management summary on 25 March. As he rightly identified there is only one issue in this case which is did the Claimant in effect resign on Friday 13 April or was he dismissed. The following Monday he did come in with an interpreter and hand in a resignation letter purporting to give 2 weeks' notice. But he was told he had already resigned. Furthermore, was he genuinely intending to work and work out his notice period. If so, as he was sent away this could constitute dismissal as the resignation was on notice. Hence that would still leave a claim for unfair dismissal albeit somewhat limited in scope. The

Respondent says he clearly wasn't intending to work as he came in dressed in casual clothes with a witness/interpreter. But the resignation letter that I have before me clearly states he is prepared to work out his 2 week notice period. In other words was that a sham or was it a genuine intention? There is a stark conflict between the parties today on these fundamental issues, thus there is a triable case and which is not for me today. There is no claim based upon discrimination. I wish to make that plain because although his letter before action via the Citizens Advice Bureau appeared to be raising this as a core issue, it is not part of the claim presented to the Tribunal and Mr O'Donovan is not instructed to amend it.

8. As to the number of witnesses required, the Claimant will give evidence: he will need an interpreter as was clear to me from today. He will also be calling the gentlemen who accompanied him on the 16th April and third, unless the evidence is accepted, the person from the agency who obtained him his new employment. The significance of her evidence is that she agreed with the new employer that the start date could be deferred to 28 April because the Claimant had said he needed to work out his notice period with the Respondent. Obviously if correct, then it would support the Claimants stated intention as per his resignation letter to work out his notice period and thus could undermine the Respondent's contention that there was no such intention. For the Respondent at present the only witness to be called is Michael Allen. He is a very long standing senior employee of the Respondent whose evidence is that the Claimant made plain to the workforce his dissatisfaction with the Respondent and that he was leaving and added insult to injury by borrowing without permission a welding mask from the Respondent for his test for the new job and commandeering a new pair of boots. Finally, he had bragged that he was going to milk the Respondent before he left which would fit with Mr Allen finding him on the Friday at 5:15 pm long after the other workers had left, purporting to do unnecessary and unauthorised overtime at which Mr Allen told him to stop and go home. If the Claimant did not then resign with immediate effect but was dismissed, obviously an issue could be substantial contribution, and of course he suffers no loss from 19 April as he was able to bring forward the start date in the new employ the earnings from which are greater. If he resigned on the Friday, but was asked to bring in his notice on the Monday, which he did, then it is back to was the notice period unilaterally cut short by the employer in which case it becomes a dismissal. If so, the measure of loss apart from basic award[1] is limited as to losses to a matter of days. This is subject to a matter of law which is whether the Claimant can require payment of his notice pay, and which as a matter of statute would be 4 weeks[2] where his willingness to work out the contractual notice period of two weeks is cut off by the Respondent. And does he in any event have to give credit for his new earnings during that period? As there is a breach of contract claim prima facie he would have to give credit[3] but this will be a matter for determination by the presiding judge at the main hearing.

9. There was then the issue of whether the Claimant is owed any outstanding holiday pay. But as per Ms Fergusson the Respondent appears to have kept impeccable records and has made plain in writing that the Claimant had taken all his holiday leave entitlement for the holiday year which commenced on 1 January. It may be and I say no more, albeit I have had some indication from

[1] 4x £508 = £2032

[2] The statutory entitlement as per s86 Employment Rights Act 1996 as he had 4 years of completed service.

[3] See Westwood v Secretary of State for Employment 1985 ICR 209 HL and the commentary in IDS Handbook: contracts of Employment, November 2014 edition: para 10.114

Mr O'Donovan, that that issue will no longer be engaged.

10. Thus what this case is really about more than anything else is a basic award which will engage if the Claimant was dismissed. But of course if the background events as alleged by the Respondent particularly via Mr Allen, and which prima facie fundamentally undermined trust and confidence on the part of the Respondent, are found be proven by the Judge, then there is bound to be a very significant reduction for contributory conduct pursuant to s122 (2) of the ERA.

11. I therefore in a quasi mediatory way explored as to whether this case was capable of settlement. As it is currently such are the conflicts and the ensuing emotions that this is not possible.

12. That brings me back to the directions that were made last time, listing this case for 3 days of hearing commencing on 15 July. Having been able to today discuss the issues more fully today and indeed look at some of the documentation, it is my judicial opinion that this case needs at the most 2 days of hearing even factoring in for some degree of interpretation for the Claimant into the Polish language because he does appear to lack a complete grasp of day to day conversational English. Therefore 17 July will not be needed.

13. Finally the parties have complied with Employment Judge Brewer's directions and so I don't need to do anything else.

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Employment Judge Britton

Date: 21 May 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE