



EMPLOYMENT TRIBUNALS

Claimant: Mr D. Barnes (C1)

Respondent: Thorn 3PL Services Ltd.

HELD AT: Liverpool

ON: 1 August 2019

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Litigant in person

Respondent: Mr. T. Edwards (Managing Director)

JUDGMENT having been sent to the parties on 20th August 2019 written reasons were requested out of time but repeatedly by Mr D. Barnes (C1) at the apparent behest of the Redundancy Payment Office which, the tribunal is told, is refusing payment of monies due to him in accordance with the judgment without such written reasons; the following reasons are provided solely in respect of the judgment in favour of C1 (as none of the other co-claimants has requested them, and because of the potential implications for other parties of such provision of reasons when they have not made a request) to accommodate his request and facilitate resolution in his case:

REASONS

1. The Issues in C1's case:

- 1.1. Did C1 present his claims against the respondent that it failed to pay him holiday pay and wages within three months of non-payment, or of the last in a series of non-payments, or did he at least commence early conciliation within that period and present his claim within one month of the early conciliation certificate?
- 1.2. Did C1 present his claim against the respondent that he was entitled to receive from it a redundancy payment within six months of a due payment, or did he at least commence early conciliation within that period and present his claim within one month of the early conciliation certificate?

- 1.3. If C1 was out of time in respect of any of his claims was it reasonably practicable for him to have presented the claims in time? If it was not so reasonably practicable, did he present them within a reasonable time after it became practicable?
- 1.4. Was there a transfer of business from MAM Processing Ltd ("MAM") to the respondent?
- 1.5. If there was a transfer of business from MAM to the respondent was C1 employed by MAM immediately before that transfer, such that his employment rights and any employer liability was protected by transfer to the respondent?
- 1.6. Was C1 dismissed where the reason, or if more than one the principal reason, for dismissal was a transfer of business from MAM to the respondent?

2. The facts relating to C1 and the respondent (R):

- 2.1. C1 commenced employment with MAM on 7 July 2008; Mr M.D Boutcher was its managing director.
- 2.2. MAM encountered financial difficulties towards the end of 2017 and early 2018. Mr Boutcher held discussions with his accountants and sought advice about the company's ability to continue trading or its options should it cease trading. It then received a local authority business rate demand which in the view of Mr Boutcher tipped the balance towards cessation of business as the company could ill-afford to pay those rates. In the light of advice received from accountants and liquidators Mr Boutcher decided to cease business, make the premises secure, make employees redundant and leave the business affairs to the liquidator to either liquidate assets to pay creditors or see whether or not it could find a buyer for the assets.
- 2.3. Mr Boutcher was advised that if the business activity should continue MAM's employees' employment would be protected and their contracts would transfer to the buyer of the business. He decided to close the business and "walk away" so that he could consider his personal future, leaving the liquidators to resolve matters with creditors.
- 2.4. C 1 was dismissed by reason of redundancy on 16 March 2018 when MAM's business closed.
- 2.5. The respondent's managing director, Mr Edwards, approached Mr Boutcher about acquiring MAM's assets and was referred to the liquidators whereupon Mr Boutcher had no further dealings with the matter. Instead Mr Edwards, who managed an entirely different business in close proximity, made enquiries.

- 2.6. On 19 March 2018 MAM was wound up with a creditors voluntary liquidation and FRP was appointed practitioner/liquidator.
- 2.7. Mr Edwards held exploratory talks with FRP in the period 19th of March to 28th March 2018 to ascertain what if any assets were available for purchase and which, if any, of MAM's previous clients could be gained. At that time there were no current employees of MAM and there was no business activity. At the time of these enquiries Mr Edwards was uncertain as to whether he could afford to purchase MAM's assets and to manage a warehouse business in addition to his own separate business if that was an otherwise viable option.
- 2.8. The respondent completed the acquisition of MAM's assets from FRP on either 27th or 28 March 2018. The respondent acquired its leasehold premises, computer system, warehouse racking, forklift trucks and office equipment. Mr Gibson, a former employee of MAM, assisted Mr Edwards such that the respondent was able to commence a warehouse business on MAM's site on 2 April 2018. The respondent did not retain all the former clients of MAM, some of whom had left that warehouse site although some remained on site, even when it was locked up and effectively closed, and became the respondent's clients.
- 2.9. The respondent is still operating the warehouse facility that commenced activity on 2 April 2018, in accordance with Mr Edwards' plan and decision devised and made on the 27 or 28 March 2018. Signage has recently been put in place and the start-up has evolved over time from April 2018 to date. Since 2 April 2018 the respondent has therefore also operated a warehousing facility.
- 2.10. At the time of the termination of C1's employment on 16 March 2018 he was unaware, and could not have been aware, of the potential interest of the respondent in acquiring any assets from MAM's receiver. He was told, advised and led to believe that TUPE Regulations were irrelevant and that was his opinion based on personal knowledge. He understood that his entitlement to redundancy monies would be met by the Redundancy Payment Office (RPO). Once his claim was rejected by RPO the claimant acted within a reasonable time to commence early conciliation and to present a claim against the respondent upon the issue of an early conciliation certificate. It was not reasonably practicable for him to do so earlier pending rejection of what he knew to be a correct application to RPO for payment of redundancy money. C1 gave notification to ACAS of early conciliation on 11 September 2018 and an early conciliation certificate was issued on 24 September 2018. The claimant commenced his claim at tribunal by presenting an ET 1 claim form on 26 September 2018.

3. The Law:

- 3.1. Regulation 3 TUPE Regulations 2006 ("TUPE") provides that those regulations apply to a transfer of an undertaking, business or part of an undertaking or business, situated immediately before the transfer in the

United Kingdom, to another person where there is a transfer of an economic entity which retains its identity. An “economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central for ancillary.

3.2. Regulation 4 TUPE provides that except where certain objection is made a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees the subject the relevant transfer; any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee. In this context any reference to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed “immediately before the transfer”, (or someone who would have been so employed if he had not been dismissed in circumstances specified within the regulations which do not apply in this case).

3.3. Regulation 8 TUPE provides that where there are insolvency proceedings with a view to liquidating assets at the time of any transfer, under the supervision of a practitioner, then regulation 4 TUPE above does not apply.

3.4. The Employment Rights Act 1996 specifies time limits within which certain claims can be made to an Employment Tribunal by the presentation of a claim form in respect of statutory protection of various employment rights. In respect of claims for breach of contract, in respect of unauthorised wages, or unpaid holiday pay, claims ought to be presented within three months of non-payment or breach of contract as appropriate. In respect of claims of entitlement to redundancy pay however a potential claimant has six months within which to present a claim to the Employment Tribunal from the effective date of termination of employment by reason of redundancy. Those claims are subject to ACAS early conciliation provisions such that early conciliation must be commenced within the stated primary time limit which effectively stops the clock and may provide for a one-month extension of time for presentation of any claim. That said, a late claim may be accepted in circumstances when it was not reasonably practicable for a claimant to present a timely claim provided the claimant then presents the claimant within a reasonable time after.

4. Application of the law to the facts:

4.1. The claimant’s claim that he was entitled to receive a redundancy payment from the respondent was presented to the tribunal within time by virtue of the extended limitation period following early conciliation. He notified ACAS of conciliation within six months of the date of termination of employment by reason of redundancy and presented his claim form claiming a redundancy payment to the tribunal within one month of the issuing of an early conciliation certificate.

- 4.2. There was no transfer of business from MAM to the respondent. MAM ceased trading and matters were taken over by the liquidator. The liquidators sought interested parties who might wish to acquire the leasehold of commercial premises and some plant and equipment.
- 4.3. The respondent acquired the leasehold property and some plant and equipment from the liquidators on the 27th/28 March 2018. C 1 was not employed by MAM on those dates, nor immediately before them. Prior to 27 March 2018 the liquidators were looking for parties interested in acquiring assets through their various contacts in the market during which time there was no activity being carried out by MAM and it had no employees. Even if, therefore, there had been a TUPE transfer the claimant's contract of employment was not protected and would not have transferred to any transferee.
- 4.4. There is no evidence before me to suggest, and I do not find, that C1 was dismissed in circumstances where the reason, or if more than one the principal reason, for that dismissal was a TUPE transfer.
- 4.5. Liability for C1's entitlement to notice pay, payment of accrued wages, holiday and redundancy monies did not transfer from MAM to the respondent. Those claims fail against the respondent.

Employment Judge T V Ryan
22.10.19

REASONS SENT TO THE PARTIES ON

28 October 2019

FOR THE TRIBUNAL OFFICE

[tvr]