EMPLOYMENT TRIBUNALS

Claimants: Mr Stillings (1)
Mr Lomax (2)
Mr Short (3)

Respondents: Touch Electrical Engineering Limited (In voluntary liquidation) (1)
Secretary of State for Business, Energy and Industrial Strategy (2)
Demain Limited (3)
Touch EE Limited (4)

Heard at: Nottingham **On:** 6 February 2020

Before: Employment Judge Clark (sitting alone)

Representation

Claimants: In person
First Respondent: Not represented
Second Respondent: Mrs Rose, presenting officer
Third Respondent: No response entered and not represented
Fourth Respondent No response entered and not represented

JUDGMENT having been sent to the parties on 15 February 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Introduction

1.1 The first respondent is in creditors' voluntary liquidation. As a result, the second respondent was joined because the Secretary of State may have been liable for certain

payments to the claimants. She defends the claim, for the same reasons as she rejected the claimants' claims made directly to her at an earlier date. Namely, that there was a transfer of the claimants' employment under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). As a result, the third or fourth respondents were added, neither of which subsequently entered a response.

1.2 A David Colin arrived late for this hearing. He was previously a director and controlling shareholder of the first respondent and is the director controlling shareholder of the third respondent. His attendance, however, was apparently not in his capacity as a director of any of the respondents, but in what he understood to be his capacity as a claimant. It appears he submitted a claim for payments to the Secretary of State. He has not, however, presented a claim to the employment tribunal. He has not submitted any witness statement in these proceedings in any capacity and no one else intimated a desire to call him. I therefore declined to hear from him.

2. Background

2.1 The claimants' claims arise out of the closure of the first respondent eventually leading to its insolvent liquidation. All claimants were immediately offered new jobs with one of two new companies set up by Mr Colin. In the case of Mr Stillings and Mr Lomax, they moved to the third respondent, Demain Ltd. Mr Short moved to the fourth respondent, Touch EE Limited.

2.2 The claimants, along with most if not all of the employees of the first respondent, made claims to the Secretary of State for BEIS for unpaid wages, holiday pay, redundancy pay and notice payments. The Secretary of State rejected the claims on the ground that there was a TUPE transfer from the first respondent to either or both the third and fourth respondents. The Secretary of State's decision was sent to the claimants by letter dated 17 May 2018.

2.3 The claims were presented in the employment tribunal against the insolvent company on 28 September 2018. Following which, the second respondent and then subsequently the third and fourth respondents were added.

3. Issues

3.1 The issues were explored at a preliminary hearing before Employment Judge Evans on 11 July 2019. The issues for determination at this hearing were identified as: -

a) Time limits.

b) Whether the claimants were dismissed by the first respondent.

c) Whether there was a relevant transfer between the first respondent and either or both the third and fourth respondents and if so whether the relevant claimants were assigned to the economic entity transferring. And,

d) The date of insolvency for the purposes of regulation 8 of TUPE.

4. Facts

4.1 On the claimants' case, in respect of which there is no evidence to the contrary, they say they were "dismissed" by the first respondent on 28 February 2018 when they were told that the business "had gone down". Immediately before then, Mr Stillings and Mr Lomax had been employed as metalworkers in the fabrication part of the business although I find from time to time they would occaisionally help out with installations. Mr Short had been employed as an office manager.

4.2 On 1 March 2018, all three were offered and accepted new positions with either the third or fourth Respondents. They all commenced their new employment on 2 March 2018. In the case of Mr Stillings and Mr Lomax they then worked for Demain Limited, a company set up to deal with what had previously been the fabrication division of the first respondent. I find they were the only two metalworkers employed and they continued to enjoy the same terms and conditions, working on the same machines, at the same premises, satisfying the same customers and, indeed, finishing off the contracts that the first respondent had been working on in the days immediately before it closed down. They continue to work for the third respondent to this day.

4.3 Mr Short had been the office manager. He moved to the fourth respondent, another company set up by Mr Colin to focus on the installation side of the first respondent's business and, again, operated out of the same premises serving the same customers and using the same equipment and stock. I find his employment with the fourth respondent was not materially different to the arrangements that had existed before the closure of the first respondent. He no longer works for that employer. He left the fourth respondent after about a year in or around February 2019.

4.4 Aside from the three claimants before me, I find all the staff previously employed by the first respondent obtained new employment with either of the two new entities.

4.5 I find all the plant and machinery continued to be used as it had been used before. There was a sale of assets and goodwill by the insolvency practitioner to the fourth respondent. The third and fourth respondents operate so closely together as to be viewed to the outside world as if they were a single entity. There is no distinguishing signage at the premises that they jointly occupy. Although the premises are made up of two industrial units, there is an adjoining door between the two. Indeed when looking for points of similarity between the identity of the economic entities before, and after, 28 February 2018 it is easier to identify the only difference. I find the only material difference between the alleged transferor and alleged transferees is the split of the two divisions of the transferor into two new companies. However, because I am satisfied the two new companies reflected a natural and existing split in the two divisions of the alleged transferor, there is no material difference in the continuing identity of each part as a discrete economic entity.

4.6 I find the first respondent did not declare insolvency until 21 March 2018. This is around three weeks after the date of transfer. It is technically therefore not an insolvent transfer.

4.7 From March onwards, there was a period of time when the claimants (and no doubt a number of the other employees) were under the impression that their claims for payments was being handled as a group claim by Mr Colin. That turned out to be be partly mistaken. It apparently was the case that Mr Colin did coordinate a group claim to the Secretary of State for payments outstanding on the insolvency of the employer, but not any claim to the Employment Tribunal. The Secretary of State declined and gave the same reasons for doing so as she relies on in these proceedings.

4.8 Her letter of rejection of those claims dated 17 May 2018 is an important point in the chronology. Not only does it reject the claim and set out why it is rejected, it also gives clear information on how to present a claim to the Employment Tribunal, when to do it and included advice on the need to involve ACAS before doing so. I find all claimants have received this letter and there can be no basis thereafter for any reasonable misunderstanding about what needed to happen and by when.

4.9 I need to say something more about Mr Colin. He was not simply another co-worker, he was the sole director and shareholder with a controlling interest of the first respondent. On 14 February 2018 he incorporated Demain Limited, the third respondent, and became sole director and controlling shareholder of that legal entity. On 20 February 2018 incorporated the fourth respondent and became sole director and controlling shareholder of that entity. With effect from 1 March 2018, Mr Colin ceased being a director of the fourth respondent and his shareholding was altered such that Hannah Colin, his wife, became the majority shareholder of the fourthrespondent. She replaced him as sole director.

4.10 Returning to the chronology, the three claimants grouped together to advance their claim in the Employment Tribunal. The other employees who were part of the claim to the Secretary of State (including Mr and Mrs Colin) did not present claims to the Employment Tribunal. The three entered early conciliation on 3 July 2018 and a certificate was issued on the same day. There is then a largely unexplained delay until 28 September 2018 when the claimant's presented their ET1 bringing these claims.

4.11 I found all claimants to be honest and candid in their explanation of what has happened and the circumstances explaining the delay in presenting their claim to this tribunal. I accept it was initially a turbulent and confusing time, they accepted they knew enough to seek advice from CAB for other similar bodies or individuals, they accepted they had not read the Secretary of State's rejection letter carefully enough to notice the helpful explanation of how to bring a claim. There was no cogent reason or reasons for the further delay.

5. The Law On Time Limits

5.1 It is necessary to understand the different types of claims being brought, the time limits for each and when time starts to run. It is convenient to group the claims accordingly.

5.2 In respect of the claims before me, i.e. the claims brought against the insolvent employer, the claims fall into 2 groups. The first group is in respect of claims for notice pay, unpaid wages and accrued but untaken holiday. The time limit for bringing those claims ran from the EDT at the latest and therefore expired on 27 May 2018. Those are all claims for

which the time limit may be extended where it was not reasonably practicable to present the claim within the 3 months of the primary time limit and where the tribunal is satisfied that the further time within which it was presented was itself a reasonable further period.

5.3 The second type of claim against the first respondent is a claim for a redundancy payment. Such a claim has different time considerations to the other three claims. To claim a redundancy payment the claimant must do one of the four things set out in section 164(1) of the Employment Rights Act 1996. That is, in short, either to demand a payment in writing from the employer or present a claim. Such a claim under section 164 must be presented within six months of the effective date of termination. In this case that is 27 August 2018. As can be seen, the claim actually presented is still out of time even by this longer time period. However section 164(2) priovides a power to extend time where the claims are presented within the next period of 6 months immediately following the first, but only where the tribunal is of the view that it would be just and equitable that the claimant should have the redundancy payment. In this case the claim was presented within that second period of 6 months. The question for me will be whether the just and equitable test is satisfied. Whether it is just and equitable includes all the circumstances of the case which can include the prospects of the claimants establishing the entitlement to the redundancy payment in the first place. In that regard, there are certain factors to take into account which loom large in the circumstances of this case. These go to the merits of their entitlement to a redundancy payment and bring into account the law relating to both continuous service and TUPE transfers. In respect of both of those I set out below why they undermine any prospect of a successful claim for a redundancy payment.

5.4 So much for the claim that is actually before me. That is, the claim presented against the old employer. This is not, strictly, a claim against the decision of the Secretary of State under section 188 of the 1996 Act. For completeness, however, even if this were treated as such a claim I have concluded that the claimants face equally insurmountable problems.

5.5 By section 188 of the 1996 Act, time starts to run from the date on which the decision of the Secretary of State was communicated to the applicant. That is not, as the Secretary of State argues, the date of the decision letter, but the date it was received and the claimants' had reasonable opportunity to read it. In these circumstances, I find that would be the next working day, that is Friday, 18 May 2018. Three months beginning with that date means time runs out on 17 August 2018 which, again, is still out of time. Such a time limit is also subject to a provision permitting an extension of time but, again, only where it was not reasonably practicable to present the claim within that three month time limit and the period within which it was submitted was itself a further reasonable period.

5.6 Finally, there is a right under section 170 of the 1996 Act for claimants to make a referral for the payment of redundancy on the insolvency of their employer. There is no time limit stated and if such a claim had been meade, it would be properly before me.

5.7 I should add however that in this case Mr short has made clear that he is not claiming a redundancy payment. Only Mr Stilling and Mr Lomax are seeking their redundancy

payment. All Mr Short seeks is the wages he is owed from the first respondent immediately before it ceased trading.

6. Discussion and Conclusions

6.1 I start with the claims based on a 3 months time limit (that is all claims except redundancy).

6.2 I recognise there are some issues in the early stages of a the claimant's attempts to secure their money where it may be said that they misunderstood what was happening in the joint claim. Mr Colin was not a professional adviser and these were turbulent times for all. However, I am not satisfied that those reasons give a basis for saying it was not reasonably practicable for the claims to be presented within 3 months (whether that time runs from the effective date of termination or the rejection letter, either way both are out of time). But there may be arguments that it is not until the Secretary of State declines the claim that their awareness of the need to bring their claim within the employment tribunal actually arises. I'm afraid to say that too works against the claimants as the correspondence from the Secretary of State clearly sets out what it is that is needed to happen and by when.

6.3 It follows that I am satisfied it was reasonably practicable to present the claim within three months. But even if this was not the case, the information given to the claimants counts against them in respect of the second limb of the test. They initiate early conciliation on 3 July 2018. They must therefore have been sufficiently aware of the steps involved in bringing a claim before the employment tribunal (as, indeed, I find they were from the contents of the rejection letter). There is no satisfactory explanation for the delay of very nearly 3 months (based on the claim before me) or of 6 weeks (based on an alternative claim against the rejection by the Secretary of State) before the claim was actually presented. Even if it was not reasonably practicable to present a claim within time, what I have before me does not provide a basis to me to conclude that the time in which was in fact presented was itself a further reasonable period.

6.4 It follows that I must decline to accept jurisdiction in respect of the claims for deduction of wages, unpaid notice pay and payments for accrued but taken holiday.

6.5 Before moving on to redundancy, it follows that as Mr Short is not claiming a redundancy payment, my decision on these time limits means I do not have jurisdiction to determine Mr Short's claims which are therefore struck out for want of jurisdiction.

6.6 I then turn to consider the redundancy claims of Mr Stillings and Mr Lomax. Theoretically, I could have jurisdiction to deal with this, notwithstanding the time limit, insofar as it might be a claim capable of being brought as a referral on the rejection of such claim by the Secretary of State. Even then, however, that would require me to consider whether there was a TUPE transfer or other reason why the claimants do not in fact have a right to a redundancy payment. Those are also relevant to the time limit considerations, in partricular the just and equitable test, and I consider them together.

6.7 In respect of the application of TUPE, I have had regard to Regulation 4 of TUPE which preserves the contractual relationship as had existed with the transferor which then continues with the transferee as if it had always been made with the transferee. I have also had regard to the guidance contained in the case of *Cheesman and others v R Brewer contracts Ltd [2001] IRLR 144*. That case provides guidance on all the circumstances to be taken into account in determining whether there was a transfer of part of the economic entity to which the claimant was assigned and which retained its identity after the transfer.

6.8 For reasons I stated within my findings of fact, I am satisfied that that was the case here in respect of the employment of Mr Stillings and Mr Lomax and as between the first respondent and the third respondent. In particular, their employment continued without any material changes immediately after the transfer, the commercial contracts of the transfer continued by the transferee. The plant, machinery and stock continued to be available to the transferee seamlessly over the transfer. The third respondent retained the same premises as the economic entity to which the claimants had occupied immediately before the transfer when previously assigned to that part of the first respondent. The two entities retain the same marketing and sales contacts. Across the third and fourth respondents, the same workforce has been retained doing the same work as it had previously done for the first respondent, within each of the two parts. There is no fragmentation of the workforce. Those working on each of the two sides of the single entity transfer to work in the same part albeit it becomes two separate legal entities.

6.9 The effect of this is that the contract of employment between the claimants and first respondent transferred to Demain Limited as if they had always been made between them. The second consequence is that there was no dismissal. If there was no dismissal, there cannot be an entitlement to a redundancy payment nor a notice payment, nor any accrued holiday on termination. Thirdly, the claimant's continuous service for the purpose of any employment rights under the 1996 Act continues from the start date of their original employment with the first respondent. In other words, the third respondent inherited the time they have served already. Fourthly, as to holiday and unpaid wages, whilst the claims brought against the first respondent were brought out of time, there may be aspects of those rights which roll over or continue today as against Demain Limited either in the calculation of annual leave being carried over or in respect of a claim of breach of contract for unpaid wages in another jurisdiction. I cannot rule on those potential claims today as they they are not properly before me.

6.10 Consequently, to the extent that the time limit is based on the claim for a redundancy payment against insolvent employer itself, and in exercising discretion as to whether to extend time under that provision by reference to the merits of the claim, I would not extend time. For the same reasons, any claim before the tribunal for a redundancy payment cannot succeed where there has not been a dismissal in law.

6.11 There is, in addition, an alternative legal analysis which arrives at the same conclusion. If I am wrong about TUPE, it seems to me the same outcome arises by virtue of the effect of sections 218(6) and 231 of the 1996 Act for these reasons. On 28 February the claimants were employed by the first respondent. It was a company controlled by Mr Colin as the

majority shareholder. If there was a redundancy or dismissal on that date, the very next day, on 1 March 2018, Mr Colin offered and the claimants accepted employment with Demain Limited, the third respondent, which was also a company controlled by Mr Colin as the majority shareholder. The two companies were therefore associated employers under section 231 of the 1996 Act, being companies controlled by the same third party. The effect of the offer and acceptance of the new employment is that it potentially falls to be considered as an offer of suitable alternative employment even if the original decision did amount to a redundancy. The offer and acceptance all happen not only within 4 weeks of the alleged redundancy, for the purpose of the statutory provisions relating to suitable alternative employment, but in any event the two employers' relationships with each employee is such that each employee can point to a continuation of an employment relationship through each statutory week as is necessary for the purpose of establishing continuous service.

6.12 The fact it was the same job on the same or better terms and the fact that both claimants continue to be so employed means I would be bound to conclude such an offer was a suitable alternative offer of employment and continuity is not broken. Irrespective of the particular provisions for maintaining continuity of employment in a redundancy situation, continuity of employment is preserved in certain other circumstances set out in section 218. One such circumstance is set out in section 218(6) which provides that where an employee of an employer (e.g. the first respondent) is taken into the employment of another employer (e.g. the third respondent) at the time they were associated employers. On any analysis that is what happened here. The effect, again, is that there was no termination of employment and once again if there is no termination there can be no redundancy or notice pay or entitlement to holiday on termination.

6.13 Whilst that means the claimants cannot succeed in a claim for a redundancy payment it may give rise to some glimmer of good news for them in so far as their continuous service with the old employer has been inherited by their new employer and it may mean they have some alternative basis for asserting their rights with the third respondent for unpaid wages and outstanding holiday. That is a metter for the parties.

6.14 For those reasons the claims are each struck out or dismissed accordingly.

EMPLOYMENT JUDGE R Clark

DATE 5 March 2020

JUDGMENT SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

……...…….

FOR SECRETARY OF THE TRIBUNALS