HC

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Fallon and others**

Respondent: **Hidden Assets Limited**

Heard at: **London Central Employment Tribunal** **On: 26 June 2020**

Before: **Employment Judge H Clark (sitting alone)**

RECONSIDERATION

The Claimants' (Mr Dean Fallon and Mr Ashley Dixon) applications for a reconsideration of the rejection of their claims on 3 June 2020 is refused.

REASONS

1. By an email dated 17 June 2020 the Claimant asked for a reconsideration of the Tribunal's rejection of Ashley Dixon and Dean Fallon's claims pursuant to rule 13(1)(b) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. The Respondent opposes the application for reasons set out in an email dated 23 June 2020.

The Law

2. The Tribunal has the power to reconsider the rejection of a Claim Form under rule 13 of the 2013 Regulations, which provides as follows:

"13.—*(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—*

(a)the decision to reject was wrong; or

(b)the notified defect can be rectified.

(2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.

(3) If the claimant does not request a hearing, or an Employment Judge decides, on considering the application, that the claim shall be accepted in full, the Judge

shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the claimant.

(4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified."

The Application

3. The Claimants' applications are made on the basis that the reason for the Tribunal's rejection of the Claim Form was that the wrong form had been used (an ET1 as opposed to an ET1A Form). It is pointed out that the omission of the Claimants' addresses from the Claim Form has now been rectified. The other reasons put forward for why the Tribunal should accept the Claims is that it was a technical point only and there would be no prejudice to the Respondent in adding additional Claimants, the pleadings have addressed all three Claims and the Respondent was given leave to file its Response Form out of time. The Claimants did not request a hearing to determine this application.

4. The application was copied to the Respondent (who would not normally receive it, as Claim Forms are normally rejected before the involvement of the Respondent). Accordingly, the Respondent has made submissions as to why the Claimants' applications should be rejected. Firstly, it is said that the Claimant has misunderstood the basis for the rejection of the Claims and, thus, has not addressed matters relevant to the rejection. Further, the Respondent points out there will be implications in terms of costs and time in hearing three claims rather than one. The fact that the Respondent obtained an extension of time is irrelevant to this application and the Claimants' claims are now substantially out of time (an issue which is not addressed in the Claimants' submissions). The Claimants were professionally represented at the time the defect in their claims occurred and, as such, any remedy for a failure to file a timely claim should lie against their representative (*Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379).* Although Mr Whalley appears to be a non-practising Solicitor, pursuant to *Ashcroft v Haberdashers Askes' Boys School UKEAT/0151/07*, a remedy lies against the Claimants' representative. The Respondent suggests that there are public policy reasons why the Claimants' potential remedy should lie against Edgecote & Co, on the basis that, it is said, the latter are "*operating unregulated and without exemption and failing to conduct litigation to the standard required and expected of a professional legal service."* In the alternative, the additional Claimants' claims should be struck out for being significantly out of time in circumstances when it was reasonably practicable for them to be submitted earlier.

5. The Respondent objects to the tone in parts of the Claimants' application, which implies that the Respondent "opportunistically" seized on a technical point and put the Tribunal under "considerable pressure" in its submissions. For the avoidance of doubt, the Tribunal considers that the Respondent's representative has acted entirely properly in furtherance of his client's interests and in accordance with his duty to the Tribunal in this context.

Conclusions

6. Paragraph 9 of the record of the telephone case management hearing dated 3 June 2020 provided, "*Although the additional Claimants have since provided their addresses (on 27 March 2020), if they wish to apply for a reconsideration of the rejection, they will have to do so in accordance with rule 13, which will include providing their addresses inserted on form ET1A*." It is noted that this does not appear to have been done. Further, the Claimants' representative has made no submissions concerning the effect of their default on the primary time limit for the claims.

7. In reaching a decision under the 2013 Rules, the Tribunal must give effect to the overriding objective in Rule 2 to deal with cases fairly and justly. This includes avoiding unnecessary formality and seeking flexibility in the proceedings, saving expense and avoiding delay.

8. The Tribunal does not accept the Respondent's submission that the addition of two Claimants will materially increase the length of the final hearing or the costs of defending the claims, subject to what appears below in relation to jurisdictional issues (time limits). There is nothing in the pleadings which suggests that the three individual Claimants (who are all related) were treated any differently by the Respondent in relation to their terms of engagement and they appear to have been dealt with consistently by the Respondent in relation to any alleged deductions from their pay. Whilst there may be a marginal difference in relation to the payment figures, the alternative to hearing all three cases together in the Employment Tribunal will be for one claim to be determined in the Employment Tribunal and the other two in the County Court. As such, it would save both parties expense and avoid delay for all three claims to be heard together in one forum.

9. The fact that the Respondent was granted an extension of time to file a Response Form is not a relevant consideration in the context of this reconsideration. It merely demonstrates a circumstance in which the Tribunal has exercised a discretion under the Rules. The primary difficulty with the Claimants' application relates to their own delay in rectifying the original defect, which has meant that their claims are many months out of time. Whilst it is right for the Tribunal to take account of the fact that it appears that the prospective Claimants' Claim Forms were not formally rejected and returned to them by the Tribunal when they were presented on 15 September 2019, the Tribunal has been provided with no explanation for the original default.

10. The two additional Claim Forms were rejected due to the omission of the prospective Claimants' addresses. This defect was rectified on 27 March 2020, following a hearing before EJ Stout on 10 March 2020, when they were ordered to provide confirmation of their contact details, including their addresses, by 27 March 2020. 27 March 2020 is deemed to be the date of presentation of the prospective Claimants' claims (rule 13(4) of the 2013 Rules). The Claimants' claims relate to deductions which were made from their pay in April 2019, therefore, so their claims are substantially out of time.

11. The claims are subject to the time limit set out in section 23 of the Employment Rights Act 1996 of 3 months (as extended by section 207B to allow for early

conciliation) unless it was "*not reasonably practicable"* for them to have been presented within that limit, in which case they can be considered if "*presented within such further period as the Tribunal considers reasonable."*

12. The interplay between the substantive time limits and rules 10 and 12 of the 2013 Regulations have been considered by the Employment Appeal Tribunal in two cases, namely, *Adams v British Telecommunications PLC* UKEAT/0342/15/LA and *North East London NHS Foundation Trust v Zhou* UKEAT/0066/18. In the former, a claim was filed with the incorrect EC number and defect was corrected but the claim was 2 days outside the time limit. It was held that the Tribunal should have focused on whether there was any impediment to the timely presentation of the second claim. It does not automatically follow that a represented Claimant who presents a defective timely claim, will fall foul of the test of reasonable practicability in relation to a corrected but late claim. In *Zhou* the facts were similar, although the remedied Claim Form was only 1 day out of time. In that case the EAT applied the principle in *Dedman v British Building and Engineering Appliances Ltd* [1973] IRLR 379 to the effect that where a Claimant is professionally represented, they are bound by the conduct of their professional representatives. If the latter's conduct was unreasonable in failing to file an accurate and timely claim, the Claimant will be fixed with that conduct. The Tribunal is unclear whether Mr Whalley of Edgcote & Co is acting in his capacity as a Solicitor, but as Ashcrof*t v Haberdashers Aske's Boys School* UKEAT/0151/07 makes clear, the *Dedman* principle still applies.

13. The fact that the prospective Claimants' Claim Forms were presented out of time is not necessarily a barrier to the Tribunal's accepting their Claims, subject to the jurisdictional issue being determined in the usual way at an Open Preliminary Hearing or at the full merits hearing. However, it is clearly a relevant consideration in the exercise of the Tribunal's discretion at this stage. The prospective Claimants' have been professionally represented throughout and the burden lies on them to prove either that it was not reasonably practicable to have presented a timely claim or that if it was, the defect in the original claim was remedied within a reasonable time. Mr Whalley has offered no explanation in his application for reconsideration either for the original default (indeed he has partially mischaracterised the default) or for the delay in remedying it. Failing to provide the addresses for two of three Claimants, when that is prescribed information is a qualitatively different default than a typing error in relation to an EC Certificate (the default in the two reported cases referred to above).

14. When the Claimants received a copy of the proposed Response Form on 6 March 2020, they would have been alerted to the Respondent's position that there was only one Claim properly made. The prospective Claimants were then given until 27 March 2020 to confirm whether they were pursuing their claims and to provide their addresses. It was left until 27 March 2020 to provide these details and no explanation has been provided for this further delay.

15. Accepting the two additional Claims following a reconsideration would involve a further hearing to determine the Tribunal's jurisdiction to hear them, given they were presented out of time. This, in itself, will create additional delay and cost to both parties. In the absence of any reasons put forward by the Claimants as

to why it was not reasonably practicable for them to have filed timely claims or as to why they waited until 27 March 2020 to correct the default, there is nothing to suggest that the Claimants would succeed in demonstrating that the Tribunal has jurisdiction to hear their claims. Whereas, refusing the request for reconsideration will not prevent the existing Claimant, Mr David Fallon, from pursuing his claim in the Employment Tribunal. If he is successful in his claim, it is likely to strengthen any potential claim by the prospective Claimants in the County Court. The balance of cost and delay, therefore, points to refusing the application for reconsideration. It is hoped that it would not be necessary for the prospective Claimants to issue such proceedings in the event that the Respondent is unsuccessful in defending the Employment Tribunal claim of Mr David Fallon.

16. The Tribunal is invited to find that Mr Whalley is operating unlawfully by charging the Claimants for his services and that this gives rise to public policy reasons for refusing the application for reconsideration. The basis on which Mr Whalley is representing the Claimants was a concern raised by EJ Stout in the record of her case management hearing. Given the possibility that the FCA will need to investigate this, the Tribunal declines to make a finding about the basis on which Mr Whalley is representing the Claimants purely based on inference. This has not, therefore, formed part of the exercise of the Tribunal's discretion in refusing the Claimants' request for reconsideration.

……
Employment Judge Clark
Dated: 29 June 2020

DECISION SENT TO THE PARTIES ON

07/07/2020

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS