EMPLOYMENT TRIBUNALS

Claimant: Mr M Charlton

Respondent: Mullholland Composites Limited

Heard at: By CVP

On: 29 September 2020

Before: Employment Judge Dyal (sitting alone)

Representation:

Claimant: Mr Jones, Counsel

Respondent: Mr Rozycki, Counsel

RESERVED JUDGMENT

1. The tribunal does not have jurisdiction to hear the Claimant's claim brought under the Transfer of Undertakings (Protection of Employment) Regulations 2006 and it is dismissed.

REASONS

The issues

1. The issues are these:

   1.1. Were the Claimant's complaints that there were failures relating to information and consultation under regulations 13 and 14 of the Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE) presented within the primary limitation period?
   1.2. If not should time be extended?

2. It was in agreed that the primary limitation period ended on 27 February 2020 and that the claim, which was lodged on 5 May 2020, had therefore been presented out of time. The controversy was therefore limited to extension of time.

The hearing

3. The hearing took place by CVP. For the most part the technology worked well. When problems arose we found swift solutions.

4. I was presented with, and read, a 39 page bundle of documents. Curiously the bundle did not contain all of the pleadings and, as I notified the parties, I also read and had regard to the pleadings which I obtained from the case file.

5. The bundle included witness statements from the Claimant and from Mr Mulholland. The Claimant was cross examined. Mr Mullholland was not called to give evidence. Both counsel agreed that the evidence in his witness statement was immaterial.

6. The bundle also included one authority: *Porter v Bandridge Ltd 1978 ICR 943, CA 1150.* There is more to the applicable case-law than just this authority so I sent counsel copies of further authorities (limiting them to what I considered to be the basic minimum needed to properly identify the legal framework). I did this at the outset of the hearing. Counsel had the chance to consider the additional authorities, most or all of which are very well known, during an adjournment.

7. After the evidence, counsel made submissions which I have briefly summarised below. I gave my judgment and full reasons at 2.30pm following the break for lunch.

Findings of fact

8. I make the following findings of fact on the balance of probabilities.

9. The Claimant was, until his dismissal, employed as a Sales Director. This was a senior role that attracted a six figure salary. That the Claimant was employed in such a role corroborates the impression I formed of him today, namely, that he is a very intelligent, preceptive, able and experienced man of business. The Claimant is not a lawyer and has no legal experience – he is a lay person. But as lay people go he is surely at the upper end of the range when it comes to things like:

    9.1. awareness of the existence (in general sense) of employment rights and of the Employment Tribunal as a place to enforce such rights;
    9.2. having the good sense to anticipate that there are likely to be rules and procedures that govern the exercise and enforcement of employment rights;
    9.3. having the ability to make inquiries as to what his rights may be in particular scenarios.

10. The Claimant was originally employed by EPM Composites Limited (EPM). EPM fell into administration and was purchased out of administration by the Respondent. The Claimant's employment transferred to the Respondent on 28 November 2019.

11. It was uncontroversial before me that the Claimant was aware that his employment had transferred to the Respondent contemporaneously with that happening. He was thus aware there had been a transfer on around 28 November 2019.

12. The Claimant also must have been aware that there had been no information and consultation process prior to the transfer, though I accept his evidence that he was unaware that TUPE made provisions in respect of the same, until much later (when he instructed the second set of solicitors, see below).

13. The Claimant was, however, aware that there was a piece of law known as 'TUPE'. He was also aware that it was law that related to the transfer of employment when businesses were bought/sold.

14. The claimant resigned on 2 January 2020 giving six months' notice. On 3 January 2020, he was suspended pursuant to disciplinary allegations which the Respondent characterised as gross misconduct. A disciplinary process followed.

15. The Claimant swiftly instructed Heald Solicitors. I find this was in early January 2020, though I was not given an exact date. The Claimant was referred to Heald Solicitors by his father. They did not have an employment specialist and the Claimant's matter was handled by a commercial solicitor.

16. The Claimant was unable to say whether or not there was a written retainer between himself and Healds (he could not remember) and none was put before the tribunal.

17. Having heard the evidence, I find that the Claimant instructed Heald Solicitors to give him advice *specifically* in relation to the disciplinary allegations he was facing and to assist him with that disciplinary process. He did not instruct them or seek their advice generally in relation to his employment nor in relation to the transfer nor any matter surrounding it.

18. In the course of instructing Heald in respect of the disciplinary process, the Claimant did recount the general background of his employment. That including the fact that there had been a TUPE transfer on 28 November 2019. However, this was simply part of the general factual background and he did not ask for any advice about the transfer or the process surrounding it nor was he asked about it. Transfer related matters were simply not material to the task at hand which was defending the allegations of gross misconduct that had nothing at all to do with the transfer.

19. The relationship with Heald Solicitors proceeded pretty informally. The Claimant continued to give them instructions about the disciplinary process as it unfolded and they continued to advise him about that. There was no focus at all on the TUPE transfer and Heald did not investigate that matter with the Claimant at all as the relationship progressed (e.g. they did not ask him whether there had been information and consultation and he did not tell them).

20. Turning back to the disciplinary process itself, the Claimant attended a disciplinary hearing on 31 January 2020. He was summarily dismissed on 14 February 2020. He appealed. He learned that the appeal had been dismissed on around 12 March 2020.

21. At around this stage Heald Solicitors told the Claimant that he should take specialist advice; they recommended Altor Employment Solicitors. The Claimant first spoke with Altor on 25 March 2020. He decided to instruct them with a couple of days thereafter.

22. By this point normal life had been seriously disrupted by the coronavirus pandemic. This had a modest impact on the timeframes for giving instructions and receiving advice. It all had to be done over the telephone in bits rather than at a single face to face meeting. Over the course of a week or so the Claimant gave Altor detailed instructions about his employment history.

23. Altor's plan, was to send the Respondent a letter before claim. In the course of drafting that letter before claim the potential claim in respect of information and consultation was picked up by the solicitor. She appreciated immediately that it was already out of time. The letter before claim was sent to the Respondent on 9 April 2020 in which among other things the complaint in respect of information and consultation was raised.

24. Early conciliation was commenced on 21 April 2020. In the intervening period between 9 April and 21 April 2020 there was correspondence between the parties (which I have not seen) but which both counsel are content for me to be aware related to alternative dispute resolution.

25. The Claimant was asked to explain this approach and in particular to explain why early conciliation was not started on 9 April 2020 at the same time as the letter before claim was sent. The Claimant was not aware (and had not been advised) that this was a possible course. The reason that this course was not taken was because his solicitors considered that it would be sufficient to put the Respondent on notice of the claim in a letter before claim and attempt ADR for a short period before troubling ACAS.

Submissions

26. In summary Mr Jones submits that:

    26.1. The Claimant was not aware of his rights. The rights in question are less well known emp rights. His ignorance was reasonable and he was not on notice to make any inquires;

    26.2. The Claimant's advisors were not at fault:

        26.2.1. Heald's instructions were limited to the disciplinary process
        26.2.2. Altor acted reasonably swiftly in handling the Claimant's claim once instructed.

27. Mr Rozycki's submits:

    27.1. The Claimant ought to have been aware of his rights if he was not and ought reasonably to have made inquiries to establish what they were.

    27.2. Heald solicitors were negligent/culpable in failing to "spot" the TUPE point;

    27.3. Altor solicitors were negligent/culpable in failing to start early conciliation on 9 April 2020 when they sent the letter of claim. Their conduct of the case was not otherwise impugned.

Law

28. The Claimant's complaints arise under regs 13 and 14 of TUPE. The limitation period is set by reg. 15

    (1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14,
    (a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;
    (b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;
    (c) in the case of failure relating to representatives of a trade union, by the trade union; and
    (d) in any other case, by any of his employees who are affected employees.

    […]

    (12) An employment tribunal shall not consider a complaint under paragraph (1) or (10) unless it is presented to the tribunal before the end of the period of three months beginning with—

    (a) in respect of a complaint under paragraph (1), the date on which the relevant transfer is completed

    […]

    or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.

29. This time limit is amended by regulation 16A TUPE. I will not set that regulation out for reasons of economy.

30. It is clear that the onus of proving that it was not reasonably practicable to present the complaint within a period of three months is upon the employee. That imposes a duty upon him to show precisely why it was that he did not present his complaint (*Porter v Bandridge Ltd 1978 ICR 943, CA 1150.)*

31. It is clear from *Palmer v Southend-on-Sea Borough Council* [1984] 1 WLR 1129, that:

    31.1. "not reasonably practicable" is best understood as meaning "not reasonably feasible";
    31.2. the tribunal should investigate the effective cause of failure to comply with statutory time limit.

32. There is some learning on the relevance and proper analysis when a claim is lodged late because of the employee's ignorance of the law or time-limit.

33. Lord Denning MR said this in *Dedman v. British Building & Engineering Appliances Ltd* [1974] 1 W.L.R. 171 at p177

> *"It is difficult to find a set of words in which to express the liberal interpretation which the English court has given to the escape clause. The principal thing is to emphasise, as the statute does, 'the circumstances.' What is practicable 'in the circumstances'? If in the circumstances the man knew or was put on inquiry as to his rights, and as to the time limit, then it was 'practicable' for him to have presented his complaint within the four weeks, and he ought to have done so. But if he did not know, and there was nothing to put him on inquiry, then it was 'not practicable' and he should be excused."*

34. Scarman LJ said this at p. 180:

> *"Contrariwise, does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion, no. It would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to disregard it, relying on the maxim 'ignorance of the law is no excuse.' The word 'practicable' is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance."*

35. In *Porter v Bandridge Ltd 1978 ICR 943, CA 1150* the issue was put succinctly like this: *"…ought the plaintiff to have known and, if he did not know, has the applicant given a satisfactory explanation of why he did not know"*

36. There is also a body of learning on the significance of fault on the part of legal advisors. It is known as the *Dedman* principle. Lord Denning MR put is like this: "*If a man engages skilled advisers to act for him — and they mistake the time limit and present it too late — he is out. His remedy is against them."*

37. In *Northamptonshire County Council v Entwhistle,* Underhill J (as he was) summarised the case-law on the *Dedman* principle and its subsequent development at [5]. For economy I will not set that paragraph out. In relation to skilled advisors Underhill J went on at [9]:

> *In my judgment the judge was right not to read Lord Phillips' endorsement of the Dedman principle in Williams-Ryan as meaning that in no case where a claimant has consulted a skilled adviser and received wrong advice about the time limit can he claim that it was not reasonably practicable for him to present his claim in time. It is perfectly possible to conceive of circumstances where the adviser's failure to give the correct advice is itself reasonable. The paradigm case, though not the only example, of such circumstances would be where both the claimant and the adviser had been misled by the employer as to some material factual matter (for example something bearing on the date of dismissal, which is not always straightforward).*

38. In *Paczkowski v Sieradzka* (EAT) [2017] ICR 71, HHJ Eady QC (as she was) said this in the context of an employment tribunal applying the *Dedman* principle: *"I consider that the employment tribunal could only arrive at a final conclusion on these issues once it had made findings as to the instructions given and questions asked, and as to the status of the advisers and the advice received."*

39. Finally In *Cullinane -v- Balfour Beatty Engineering* unreported UKEAT/0537/10, considered the second limb of the limitation test. In a passage that should be better known than it is, he stated that:

> *"…the question of whether a further period is reasonable or not, is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. Instead, it requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted having regard to the strong public interest in claims being brought promptly and against the background where there is a primary time limit of 3 months."*

Discussion and conclusion

40. Claim was presented out of time. The primary limitation period expired on 27 February 2020. The first question is whether it was reasonably practicable to present a claim in time.

41. I found this a difficult case that was close to the borderlines at a number of junctures. However, ultimately I come to the view that it was reasonably practicable for the Claimant to present the complaint within the primary limitation period and thus that the tribunal does not have jurisdiction to hear the claim.

42. I accept that as a matter of fact, the Claimant was unaware during the primary limitation period, that a potential claim may have arisen out of the transfer. I also accept that this is why he did not make any inquiries or bring a claim.

43. I further accept that the claim in question, relating as it does to information and consultation rights under TUPE, is at the less well known end of the employment rights spectrum. That is what makes this a difficult case.

44. In the end, I do not think that the Claimant's ignorance of his rights, nor his right to make a claim to the employment tribunal nor the limitation period in respect of the same was reasonable ignorance.

45. The starting point is the Claimant himself. In my judgment he is a very intelligent and able man. This is relevant to at least two things

    45.1. What he can reasonably be expected to have known, to have thought about, to have inferred and/or have perceived;
    45.2. What he can reasonably be expected to have done to inform himself of his rights.

46. The Claimant was in fact aware that there had been a transfer and aware of this contemporaneously with the transfer. He was also aware that the transfer was a legal concept or event that arose out of a set of legal provisions known to him as TUPE.

47. The Claimant was, or ought reasonably to have been aware, that TUPE was a piece of law that had profound implications: it resulted in his employer changing from one entity to another.

48. I think it ought reasonably to have been clear to the Claimant that there were likely to be a range of employment rights and duties surrounding and arising out of TUPE transfers. If he had given it any thought, and I think if acting reasonably he would have done, it would have been obvious to a person of his intellect that there was a real possibility that there were things that employers needed to do in order to comply with the law when transferring employees. The Claimant was also aware that the transfer in his case had happened quickly and seemingly informally with not much if anything by way of procedure.

49. The Claimant must also have been aware that he did not himself know a great deal about TUPE and thus that in order to understand whether or not his employment rights had been respected he would need to make inquiries, whether through his own research or otherwise.

50. All in all, I think that the Claimant was sufficiently on notice of the possibility that there may be legal issues arising out of the transfer of his employment that he could reasonably be expected to make inquiries about his rights well within the primary limitation period.

51. The Claimant had all the abilities and skills needed to investigate whether he had any legal claims arising out of the transfer and if so where to pursue them, how and within what procedural framework. This certainly included:

    51.1. the ability to research the matter himself – there is a wealth of free information available on the internet including in relation to rights arising out of TUPE;
    51.2. the ability to seek paid for advice from professionals.

52. I further note that from no later than 3 January 2020 the Claimant was in dispute with his employer. He in fact instructed solicitors to assist him with that dispute in early January. He did not however seek any advice about TUPE or the transfer. This was a particular opportunity to do so and illustrates the more general point made in the preceding paragraph.

53. I have no doubt that if the Claimant had done his own research over the course of December, January or February, he could and would have discovered the possibility of bringing a complaint about TUPE, and, if he had wanted to do so, he could easily have brought a claim within the limitation period. Likewise if he had sought professional advice about the same.

54. So I conclude that it was reasonably practicable for C to bring the claim in time. As such the tribunal does not have jurisdiction to hear it.

Allegations of negligence

55. Two firms of solicitors' respective conduct of the Claimant's matters have been impugned. I have heard full argument and I think it is right I briefly express the views I formed.

56. I do not think that either firm of solicitors was negligent or acted in culpable way:

    56.1. As set out in my findings of fact, Heald solicitors were simply instructed to advise and assist in relation to the disciplinary allegations. They were not instructed to advise or assist in relation to any other matter. I do not accept the Respondent's submission that they were negligent or culpable or that they "missed" the TUPE point in any relevant sense. It is true that the solicitors were aware that there had been a transfer. However, that was simply a matter of background history. The Claimant made no point about the transfer and their advice upon it was not sought. Heald solicitors were not asked to advise the Claimant generally in relation to his employment or recent employment. I do not see that they were under any duty to investigate the detail or circumstances of the transfer or the procedure or lack thereof adopted. It was irrelevant to their task. Further, it would be most unfortunate to impose such a duty. It would make getting legal advice even more expensive if it could not be limited to the issues that the client actually wanted advice upon but had to include the solicitor's time scanning around for other potential claims in the employee's employment history (however minor).
    56.2. As to Altor Employment Solicitors, they are impugned for delaying the start of early conciliation. It is said by the Respondent that they should have concurrently started it when sending the letter of claim on 09.04.20. This gave me some pause for thought but I do not think this was negligent. It is important to note that by the time Altor were instructed, the primary limitation period had passed. Thus the applicable limitation provision they were working with was "…*such further period as the tribunal considers reasonable*". Their duty was, then, to ensure that the Claimant's claim was presented within such further period as was reasonable given what had gone already. The approach they took was to send a letter before claim

raising the TUPE claim (among others) and allow a pretty short (12 day) period of time to see where that letter took matters. In the intervening period attempts at ADR were made. Whilst this was clearly not the very safest approach to take, I do not think that it was either negligent or culpable. The period between the LoC and starting EC was kept short and it was used, so far as I can tell, sensibly and reasonably for the purpose of ADR.

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Employment Judge Dyal

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Date 01.10.2020