



EMPLOYMENT TRIBUNALS

Claimant: Mr P Dacey

Respondents: (1) Mr P Dodding (Stainless Restoration Ltd)
(2) Burnley Beadblasting Ltd (in creditors' voluntary liquidation)
(3) Secretary of State for Business Enterprise and Industrial Strategy
(4) SRL (Bead and Blast) Ltd

FINAL HEARING

Heard at: Manchester (in public by CVP)

On: 13 November 2020

Before: Judge Brian Doyle (sitting alone)

Representatives

For the claimant: In person

For the respondents: (1) Not in attendance or represented
(2) Not in attendance or represented
(3) Not in attendance or represented
(4) Ms R Freeman, Partner, Seftons Accountants

JUDGMENT

The claim was not presented in accordance with the statutory time limits in circumstances in which it was reasonably practicable to have presented the claim in time. To the extent that it was not reasonably practicable to present the claim in time, it was not presented within a reasonable time. The tribunal does not have jurisdiction to hear the claim and it is dismissed.

REASONS

1. This is the final hearing of a claim first presented to the tribunal on 20 August 2019. It is necessary to begin by rehearsing the background and the history of the claim.
2. The claim as originally presented named as the respondent Mr Peter Dodding and gave as his address the name of a company, Stainless Restoration Ltd. It is apparent that neither Mr Dodding nor Stainless Restoration Ltd were at any time the employer of the claimant, Mr Dacey, and I would have dismissed the proceedings as against them.
3. The claimant identified his place of work as being premises occupied by Burnley Beadblasting Ltd. In the course of these proceedings, that company has been added as a respondent. It is a company in creditors' voluntary liquidation. The winding-up commenced on 27 June 2018. Although the identity of the actual individual insolvency practitioners handling the liquidation has changed during its course, the liquidation has been handled by one firm throughout, Bridgestones. The liquidator initially provided very helpful information about the liquidation to the tribunal by letter with attachments on 20 November 2019. Subsequent inquiries of it by the tribunal appear to have gone unanswered.
4. Because of the Secretary of State's potential liability under the Insolvency Fund, he was invited to intervene in the tribunal proceedings. The Secretary of State presented an ET3 response on 17 February 2020 in which it was asserted that there had been a transfer of an undertaking from Burnley Beadblasting Ltd to SRL (Bead and Blast) Ltd on around 12-23 April 2018. SRL (Bead and Blast) Ltd is a company that had been incorporated on 9 March 2018 and whose sole director is a Mr Frank Morris, who is also a director of Stainless Restoration Ltd.
5. As a result, the claimant indicated his wish to join SRL (Bead and Blast) Ltd as a respondent on 6 April 2020. That company then responded to the claim in an ET3 in which it effectively expressed no knowledge of the matters that are the subject of the claim.
6. The claimant in his claim states that he was employed between 19 May 2008 and 12 April 2018. It appears that his employer must have been Burnley Beadblasting Ltd and that Mr Dodding was a director of that company. Without making any findings of fact to that effect at this stage, it also seems likely from the limited material before me that the entire workforce was dismissed without notice in or around 12 April 2018 and was left to make claims against the Insolvency Fund. Focusing just on Mr Dacey, his claim is for unfair dismissal, a statutory redundancy pay and unpaid wages, notice pay and holiday pay.
7. I pause there to note that all that I have recorded above is pretty much par for the course in the tribunal's experience of insolvency proceedings and employment rights.
8. Returning to the present claim, it was immediately apparent to me that a time limitation question arose in respect of Mr Dacey's claim before I could address any

question of what he might be owed, in what circumstances and by whom, and whether there had been (as the Secretary of State asserts) a transfer of an undertaking and thus a transfer of liability to another company.

9. In general terms the complaints that the claimant makes, whether under the Employment Rights Act 1996 or the Working Time Regulations, should be presented to the tribunal within the period of 3 months beginning with the effective date of termination of employment or the non-payment, as the case might be (the period in respect of a statutory redundancy payment is 6 months). The time limit might be extended if it was not reasonably practicable to make a timely complaint and if the claim was otherwise presented within a reasonable time. It is also possible for the time limit to be extended by up to one month while a claimant engaged with the Acas early conciliation scheme.
10. On the face of it, the time limit for Mr Dacey's complaints expired on 11 July 2018 (or 11 October 2018 in respect of the redundancy payment), with the possibility of an extension of up to one month if the Acas early conciliation provisions were engaged. In the event, the claim was presented to the Tribunal no earlier than 20 August 2019, in circumstances that I will now describe.
11. Mr Dacey has given me an honest account of the matter and I am able to accept that account.
12. When his employment ended on 12 April 2018 he was accepting of the position, particularly as Mr Dodding advised him of his ability to make a claim against the Insolvency Fund. He awaited contact from the insolvency practitioners. That was not immediate because it appears that Burnley Beadblasting Ltd delayed in entering liquidation. The liquidator had told the tribunal that the first contact with the company was on 24 May 2018 when the directors requested assistance with the financial affairs of the company. The company had ceased trading on 13 April 2018. A shareholders' meeting was then convened on 27 June 2018. An extraordinary resolution to wind up the company was passed.
13. At or about that time the liquidators provided the employees of the company, including the claimant, with the relevant forms to make claims against the Insolvency Fund. However, by August 2018 the Secretary of State had refused to make payments, relying in particular on his belief that there had been a transfer of an undertaking. The claimant had no experience or understanding of these issues. He engaged in email correspondence with officials about it, but significantly he did not appeal the Secretary of State's decision to an employment tribunal as he could have done.
14. Mr Dacey admits to me that at that time he was advised in those communications of the Acas early conciliation scheme. He gave notice to Acas on 17 September 2018 and an early conciliation certificate was issued on 19 September 2018. However, he took no further action in reliance upon that certificate. He told me that he did not realise that the certificate had "a limited shelf life". He had obtained new employment in August 2018 and he had also been distracted by a family illness (his mother had

fallen and broken her hip). He thought no more about the matter and accepted or assumed that he had no entitlement. It does not appear that he gave any consideration to appealing the Secretary of State's decision and/or bringing court or tribunal proceedings against his former employer (or anyone else) in respect of the debts owed to him.

15. Then almost a year later, in August 2019, he had a conversation with another former employee of Burnley Beadblasting Ltd, Mark Bird, who told him that he had received a pay out of sums owed to him. He was not clear as to who had paid him out or in what circumstances. That prompted Mr Dacey to seek advice from Citizens Advice almost immediately thereafter. He had not sought independent advice in 2018, but he now took independent advice in 2019. He presented an ET1 online on 20 August 2019.
16. The ET1 was not initially accepted by the tribunal, but was rejected. It appears that the Acas early conciliation number was incomplete. As it appears to me from the case file, the claimant had not gone through the Acas early conciliation process afresh, but he had relied upon his 2018 certificate. In due course the defect was corrected as of 27 September 2019. This was confirmed by the tribunal on 4 November 2019. Thus the relevant date of the presentation of the ET1 for time limits purposes is 27 September 2019.
17. Standing back from this account, may I permit the claim to proceed to be heard on its merits?
18. It is not difficult to be sympathetic to Mr Dacey in relation to the circumstances that I have described above. I make no findings or decision as to the merits of his claim. I am at present only concerned with whether the claim can proceed to be heard on its merits.
19. I am satisfied that it was reasonably practicable for this claim to have been presented to the tribunal in 2018 within 3 months (or 6 months, as the case might be) of the termination of his employment on 12 April 2018 (or the relevant nonpayments): that is, by 11 July 2018 or 11 October 2018, perhaps with the benefit of up to a further month resulting from engaging with the Acas early conciliation process.
20. The claimant knew that he was owed money arising on the termination of his employment. He took no independent advice at the time. He relied upon being successful in claiming against the Insolvency Fund. There was a delay during the second half of April 2018 and until the end of June 2018 before the company resolved to wind up, a liquidator was appointed and insolvency payment forms were distributed. However, that delay would not have served to make it not reasonably practicable to protect his position by making an employment tribunal claim, having first entered Acas early conciliation. That delay did not prevent him from making a timely claim. Had he taken advice at that time, or made general inquiries, he almost certainly would have been advised (or concluded so himself) to make a tribunal claim as well as a claim to the Insolvency Fund.

21. As his actions in August 2019 demonstrate, he was perfectly capable of seeking independent advice (on that occasion from Citizens Advice) and acting upon it. Yet in August 2018 he had received advice of sorts, albeit from an official of the Insolvency Service. When his claim to the Insolvency Fund was refused, he entered into correspondence about the matter and by one means or another he was aware of his right to appeal that decision and of the need to contact the Acas early conciliation service first.
22. He entered early conciliation on 17 September 2018 and exited it on 19 September 2018. By then he was already out of time for all his complaints bar the redundancy payment claim. His Acas early conciliation certificate would not have had the effect of extending time for the majority of his claims because the relevant 3 months' time limit had already expired by the time he engaged with the Acas process. Nevertheless, he took no action at all to prosecute a possible tribunal claim.
23. I have considered whether starting a new job in August 2018 and the illness of his mother at about that time provides evidence that it was not reasonably practicable to have presented a timely claim. I am prepared to assume for present purposes that it might have done so, but it cannot serve to explain why it took till August 2019 to present a claim to the tribunal, one that was treated as presented on 27 September 2019. Although the conversation with Mr Bird spurred the claimant into action, he was already aware of all the possible ingredients of his claim well before that conversation. It did not have the effect of changing the position as to time.
24. In all the circumstances, I am satisfied that it was reasonably practicable to present a timely claim. To the extent that it might not have been reasonably practicable, the claim was not presented within a reasonable time. The result is that the claim is out of time and the tribunal does not have jurisdiction to hear it. The claim is dismissed against all respondents.
25. For the avoidance of any doubt, I note also that the claim does not in any event, whether by amendment or otherwise, contain any appeal against the Secretary of State's refusal to make payments from the Insolvency Fund, even if such appeal would have been out of time in any event, which seems likely.

Judge Brian Doyle

DATE 13 November 2020

JUDGMENT & REASONS
SENT TO THE PARTIES ON
23 November 2020

FOR THE TRIBUNAL OFFICE