



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr Paul Essex

AND

Respondent

Bluesnow Limited t/a Richard
Thomas Conservatories,
Extensions & Windows

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT Plymouth **ON**
By Cloud Video Platform

7 April 2021

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person

For the Respondent: Mr K McNerney of Counsel

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claims for unfair dismissal, for breach of contract, and for accrued but unpaid holiday pay, were all presented out of time and are all hereby dismissed; and
2. With regard to the claimant's sole remaining claim for entitlement to a statutory redundancy payment, terms of settlement having been agreed by the parties this case is adjourned to allow those terms of settlement to be implemented. If neither party has made an application to the tribunal to re-list this remaining claim for hearing before 30 April 2021 then the claim will stand dismissed on withdrawal by the claimant as at that date.

REASONS

1. The claimant has brought claims against the respondent for unfair dismissal; for entitlement to a statutory redundancy payment; for breach of contract in respect of his lost notice period; and for accrued but unpaid holiday pay. This is the judgment following a Preliminary Hearing to determine (i) (with the exception of the redundancy pay claim which was brought within time) whether the claimant's claims were presented in time;

and (ii) (in respect of any claims within time) whether the claimant was an employee or alternatively a worker of the respondent.

2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a paginated bundle of documents running to 148 pages, the contents of which I have recorded. The order made is described at the end of these reasons.
3. I have heard from the claimant. Mr Michael Cook who is a Project Manager for the respondent was present to give evidence on behalf of the respondent in respect of the claimant's employment status, but he did not give evidence in connection with the time points.
4. I deal first with the initial preliminary issue as to whether the claimant's claims were presented out of time. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
5. The respondent company is Bluesnow Ltd trading as Richard Thomas Conservatories Extensions & Windows. The original proprietor of this business was Mr Richard Thomas. The claimant Mr Paul Essex commenced his relationship with Mr Thomas in May 2008. Mr John Fowler also commenced work with respondent at this time, and the claimant and Mr Fowler worked together as partners. Originally they fitted windows and conservatories. Mr Thomas then sold the business to Mr Ben Slatter (the proprietor of Bluesnow Ltd) in 2015, and this company is the current respondent. The claimant and Mr Fowler continued working for the respondent, but they concentrated on fitting conservatories because another team was engaged to fit windows. The claimant worked hard and had good feedback from his managers and his workmates.
6. In early 2020 a number of businesses were significantly affected by the Covid-19 pandemic. Nonetheless the claimant was surprised when at the beginning of the Covid-19 lockdown, on 27 March 2020, Mr Slatter of the respondent terminated their relationship with immediate effect. No warning was given, and no procedure was adopted, but the relation was terminated on that day with immediate effect.
7. There was subsequently a dispute between the parties as to the correct employment status of the claimant. The respondent asserts that he has always been self-employed. The claimant accepts that as at that time he understood that he was self-employed. At some stage in April 2020 the claimant then applied to HMRC for a government support grant which was available for self-employed personnel. The claimant says that his application was refused because HMRC doubted whether he was genuinely self-employed. He spoke to both HMRC and ACAS about his status, and

completed an on-line check list, and HMRC refused to process the application.

8. The claimant and Mr Fowler then had access to legal advice which Mr Fowler was able to obtain. By email dated 24 July 2020 the claimant and Mr Fowler wrote to the respondent confirming that they had received advice from “an employment solicitor and ACAS” and asserted that “we fit the worker category” and asked the respondent to deal with their solicitor, although it seems that they then chose to not pay to instruct the solicitor further.
9. The claimant first approached ACAS under the Early Conciliation Provisions on 31 July 2020 (Day A). ACAS issued the Early Conciliation Certificate on 14 September 2020 (Day B). The claimant presented these proceedings on 4 October 2020. By that time he had engaged a different (lay) representative who assisted him and was named as representative on his originating application to this Tribunal.
10. Having established the above facts, I now apply the law.
11. One of the relevant statutes is the Employment Rights Act 1996 (“the Act”). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, 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 that period of three months.
12. There are similar time limit provisions relating to the claimant’s claim for breach of contract, which are contained in article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.
13. The claimant also claims in respect of holiday pay for accrued but untaken holiday under the Working Time Regulations 1998 (“the Regulations”), and there are similar time limit provisions in Regulation 30(2).
14. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
15. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by

virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

16. I have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT;
17. In this case the respondent terminated the relationship with the claimant summarily on 27 March 2020. The normal three months' time limit therefore expired at midnight on 26 June 2020. The claimant first approached ACAS under the Early Conciliation Provisions on 31 July 2020 (Day A). ACAS issued the Early Conciliation Certificate on 14 September 2020 (Day B). The normal three months' time limit had already expired by the time the claimant approached ACAS under the Early Conciliation Provisions, and the claimant does not therefore enjoy any extension of time under those provisions. The claimant presented these proceedings on 4 October 2020, which date was more than three months out of time.
18. The claimant was unable to rely on any compelling grounds for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit. The claimant concedes that he thought he was self-employed at the time that the relationship was terminated, and only sought to challenge that status after April 2020 when HMRC refused to process his grant application. He had the use of the Internet and access to ACAS at that time. It is also clear that he and Mr Fowler had access to specialist employment law advice.
19. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
20. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the

circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-

21. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
22. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
23. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all

the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability ... the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).

24. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That 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. 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, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."
25. In conclusion therefore in this case: (1) there was no explicable cause for the claimant's failure to comply with the time limit. It seems that he was aware of his rights, but simply did not process an application; (2) there was no physical impediment preventing compliance, such as illness, or a postal strike; (3) the claimant apparently knew of his potential rights within the original time limit; (4) there is no suggestion that the respondent had misrepresented any relevant matter to the employee; and (5) the claimant and Mr Fowler had access to advice from both ACAS and a specialist employment Solicitor, and it cannot be argued that there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
26. The claimant has failed to establish that it was not reasonably practicable for him to have presented these proceedings within time, and I find it was reasonably practicable for him to have done so. Furthermore, the claimant has given no explanation as to why he then waited until 4 October 2020 before presenting these proceedings, and they were therefore not presented within such further time as was reasonable.
27. I therefore conclude that the claimant's claims for unfair dismissal, for breach of contract, and for accrued but unpaid holiday pay were all presented out of time, and are all hereby dismissed.
28. The claimant's sole remaining claim for entitlement to statutory redundancy payment was presented within the relevant time limit (which in general terms allows six months), but the parties reached agreement as to settlement of that remaining claim as explained in the summary of the Judgment above, and that therefore concluded this hearing.

29. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 9; a concise identification of the relevant law is at paragraphs 11 to 24; how that law has been applied to those findings in order to decide the issues is at paragraphs 25 to 28.

Employment Judge N J Roper
Date: 07 April 2021

Judgment sent to the Parties: 21 April 2021

FOR THE TRIBUNAL OFFICE