EMPLOYMENT TRIBUNALS

Claimant: Mr. A Frost

Respondent: Paragon Land & Estates Limited

HEARD AT: Cambridge Employment Tribunal

ON: 14 December 2020 (by CVP).

BEFORE: Employment Judge Michell (sitting alone)

REPRESENTATION: For the Claimant: In person
For the Respondent: Mr Gregory Hine (solicitor)

RESERVED JUDGMENT

The claimant's claims are all dismissed, because:

(a) they were presented out of time, and the tribunal therefore does not have jurisdiction to hear them; and in any event

(b) (in the case of his claim of unfair dismissal, redundancy payment and breach of contact) the claimant did not have "employee" status at the material time; and/or

(c) (in the case of his unfair dismissal and redundancy payment claim) he did not have the necessary 2 years' continuity of service to bring a claim under s.94 of the Employment Rights Act 1996.

REASONS

INTRODUCTION

Progress of claim

1. By a claim presented to the tribunal on 17 December 2019, the claimant asserts that he was unfairly dismissed from his role as Chief Technical Officer ("CTO") for the respondent. He also asserts that he was discriminated against in 2016 on grounds of a (on his case, false) perception that he was bipolar. In the version of the ET1 which the respondent was sent by the tribunal, the claimant names Mr Parisi as his employer[1]. In the grounds of resistance, all allegations are denied.

2. A case management hearing took place on 25 June 2020. At that hearing, the issues were helpfully refined by EJ Spencer, who listed today's hearing to determine whether not the claims should struck out or a deposit order paid, on grounds that the claims (i.e. unfair dismissal, discrimination and non-payment of wages[2]) were significantly out of time, and also that "*there may have been no employment relationship between the parties*". (This last point is only strictly relevant to the claims requiring "employment relationship" status.)

3. The judge also explained to the claimant that insofar as he sought to assert that his dismissal was unfair[3] or discriminatory, he would need to clarify when and how (on his case) he was dismissed -unusually, the claimant was at that time "*unable to point to a specific act on the part of the respondent that is said to have amounted to a dismissal*". (Somewhat inconsistently, the claimant had also ticked the box at

[1] The claimant suggested in his evidence before me that various changes had been made to the ET1 by persons unknown. So, he produced another version of the ET1 with various 'corrections'- showing the above named respondent as the employer rather than Mr Parisi. There were various other substantive differences between the two versions. However, I think it likely the ET1 which the claimant originally submitted to the tribunal did in fact name Mr Parisi as the employer.

[2] This claim appears from EJ Spencer's summary to be in relation to salary and commission payable for work "undertaken up to 11 December 2016". The claimant told me he had in fact been paid for such work- albeit belatedly, following discussions in November 2019. But I deal with the issues of time in relation to this claim (whether put as one of unlawful deductions or a breach of contract) below, for the avoidance of doubt.

[3] Given my findings below as regards the December 2016 date of termination of the parties' relationship, the claimant did not in fact have the requisite 2 years' service to claim 'ordinary' unfair dismissal, even if he was an employee of the respondent- as to which, see further below.

section 5 in the ET1 to indicate his employment was continuing as at the date of presentation of the claim.)

4. The claimant said at the 25 June 2019 hearing that he wanted to amend his claim to add a whistleblowing claim (having ticked the box at section 10 of the ET1 but given no other details). EJ Spencer explained to him that if he wanted to do so, he would need to produce an amended claim form setting up the amended claims he wished to pursue, and make a written application for permission to amend. The claimant did not pursue this course. (He nevertheless confirmed to me that any protected act and detriment took place in or before December 2016. Hence, even if he had sought to amend his claim, similar 'time' issues would have arisen to those already at issue at the 14 December 2020 hearing.)

<u>14.12.20 hearing</u>

14 The 14 December 2020 hearing was by CVP. The parties did not object to that course being taken. A face to face hearing was not held because it was not practicable and the issues could be determined in a remote hearing.

15 In the lead-up to the 14 December 2020 hearing, the claimant did not provide the required clarification of the alleged effective termination date ("EDT"). At the 14 December 2020 hearing, for the first time, the claimant asserted that the EDT was in fact in November 2019.

16 I heard evidence from the claimant. He was intelligent, articulate and cogent, though at times not altogether consistent in his narrative. He did not suggest at any time that he had difficulties with understanding the issues involved, or the tribunal process. Beyond the obvious challenges which litigants in person often face in dealing with hearings such as this (which I did my best to accommodate), I did not consider the claimant was unduly disadvantaged. Nor did he suggest any adjustments were needed to accommodate him. I mention this because of the medical history described below.

17 I also heard from the claimant's father, Mr Graham Frost, and from a work colleague and friend, Mr Adrian Pickering. I also read three other documents apparently prepared for the claimant by three other individuals. For the respondent, I heard evidence from Mr Stephen Warburton, who is the CEO of a company of which the respondent is the parent.

18 Contrary to the order made at the June 2020 case management hearing for provision of a joint bundle of no more than 150 pages, both parties produced bundles for this hearing, both of which exceeded the 150 page limit. I was referred to various pages in them.

19 The volume of paperwork, and the more than expected number of witnesses who were called, meant that I had to reserve my judgment following oral submissions from the parties.

FACTUAL FINDINGS

Work for respondent

20 In 2015-2016, the claimant and Mr Parisi were involved in various commercial ventures together, including two other companies/ventures for whom the claimant did work -"Acorn" (of which he was 50/50 shareholder with Mr Parisi) and "Dynamite". In about August 2016, the claimant and Mr Parisi agreed that the claimant would be paid for doing half a day's work per week for the respondent, at a rate of £350 p.w. (or £1,400 pcm), "*to help you survive while Acord builds up*" (as Mr Parisi put it in his 1 August 2016 email). Previously in 2016, the claimant had been providing his services for the respondent for free.

21 The claimant agreed with Mr Parisi that he be known as CTO, and that was the title which was put on his business card. However, I accept from Mr Warburton that the title was largely for presentational purposes, and that there was nothing about the services he provided which particularly indicated he was an "employee", as opposed to an independent contractor.

22 The claimant worked from a company desk and a company desktop when he attended the office. Mr Warburton told me, and I accept, that various independent contractors who were engaged at the time operated in the same way at the office.

23 The claimant was duly paid his £1,400 pcm for the month of August and October, upon submission of invoices. (The invoices for November and December 2016 were not settled until 2019, following discussions between the parties.)

24 The invoices were in the same format as the invoices the claimant submitted in respect of his work for Acorn and Dynamite. The claimant asserted in evidence that this was mere 'laziness' on his part. I do not accept that contention. I think he invoiced in the same way in respect of all three entities because, at the time, there was felt to be no principled reason for distinguishing between the three when it came to the method of seeking payment for services rendered.

25 The invoices say the claimant was charging for "*consulting for [the respondent]".* Similar wording appears on the Dynamite invoices. The invoice summary also refers to him "*consulting*" for both the respondent and Dynamite.

26 The claimant has not at any time sought to assert that he had employee status as regards his work with either Acorn or Dynamite.

27 The respondent did not deduct tax or National Insurance Contributions in respect of monies paid to the claimant for any of his work- whether for the respondent, Acorn or Dynamite. (I understand the claimant himself has yet to submit any tax returns- they were delayed, initially at least, because of his unfortunate illness.)

28 The respondent did not pay the claimant in respect of holidays or sick pay. It did not make pension contributions (which it does apparently make with its employees), or provide other benefits. I accept Mr Warburton's evidence that the claimant could have declined work for the respondent if he had chosen to do so (and he would not have been paid in such case). He also had no formal set hours, beyond the two days per calendar month agreed between the parties. No disciplinary or grievance process was said to apply to him. Nothing restricted him from working for anyone else when not working for the respondent.

29 He had no formal written contract (of service or for services), though emails evidence the agreement for payment reached between the claimant and Mr Parisi. The claimant used time sheets to record work done, but I accept from Mr Warburton that this was because Mr Parisi wanted to be sure of the time spent on the work for which he was being asked to pay.

End of work for respondent

30 Regrettably, after some difficulties in the second half of 2016, the claimant was sectioned for assessment under Section 2 of the Mental Health Act 1983 due to mental health concerns. This happened on three occasions- on 12 December 2016 until 10 January 2017; on 20 January 2017 until early 2017, and at the beginning of August 2017 until some point in September 2017.

31 In an email dated 17 December 2016, which was sent short shortly after the claimant's first hospitalisation, Mr Parisi wrote to the claimant explaining that he would "*cover your November invoice to Paragon Land as a gesture of goodwill but please be aware that this is the last one and I will not agree any further payments*". Mr Parisi continues in his email, "*I know that your recent problems are not your fault but I'm sure you must understand that I cannot continue to work with you… I do not therefore want you to continue with the Dynamite software project… Sorry Alistair, it all ends here*".

32 The claimant in his evidence initially said he did not get that email, but he later accepted that he received it. He asserted that because of his state of mind at the time and the medication he was put on, he did not read the email as terminating his employment with the respondent/work with Dynamite/Acorn.

33 That may possibly have been the case at the time. However, as I construe it, on any objective interpretation the email is clear that Mr Parisi was ending his work relationship with the claimant. (Indeed, in questioning the claimant confirmed that the email was "*completely terminating work arrangements*".) Mr Warburton told me in his evidence, and I accept, that that was certainly Mr Parisi's intention.

34 It is very clear from other correspondence sent thereafter to various other individuals (though not to the claimant, who was apparently barred from having contract with Mr Parisi under the terms of police bail at about this time) that Mr Parisi considered the working relationship at an end. See for example his 25 January 2017 email, in which he says the claimant *"isn't involved anymore*".

35 The claimant later sent Mr Parisi an email on 4 January 2017, in which he asked whether or not his position as CTO for the respondent had been terminated. He told me he did not receive a response to that email. He accepted Mr Parisi might have blocked his emails by that time.

36 The claimant in evidence referred to a message from Mr Parisi, in which Mr Parisi said "*everything has been sorted out. I'm now working at Acorn. Trying to keep things going until you are able to pick it up again*". He tried to argue this indicated a continuation in the relationship. However, I do not think this helps the claimant, as the message was sent only on 12 December 2016.

37 The claimant did not make any attempt to return to work for the respondent (or Acorn/Dynamite), or to ask to be sent work, or complain about not being given work, at any point after January 2017. (In January 2017 he apparently went to the offices at some point, but was told that the police would be called if he did not leave. He duly departed.)

38 In his witness statement, the claimant suggests that he was made redundant by the respondent in February 2017 (and part of his ET1 claim is for redundancy payment). I asked him when he became aware of the fact that (on his case) he had been made redundant. He claimed he was not aware until about September 2019[4], when he was given various screenshots referring (he said) to his being replaced at the respondent in February 2017.

Discrimination claim

39 As regards the claimant's discrimination claim, The claimant clarified to me that the acts of perceived disability discrimination on which he relied involved him being

[4] This, of course, is inconsistent with the November 2019 termination date given at paragraph 15 above.

held hostage against his will in June 2016, being defamed at about that time, and being sectioned in December 2016 as a result of information Mr Parisi had allegedly given to the authorities.

Time limits

40 The claimant told me that he had heard about a three month time limit for bringing claims in the tribunal. (He is computer literate, and accepted he also could have done internet research in order to gain further information.) He said he was aware of those time limits in general terms even when in hospital in early 2017. He said he also knew about mitigating circumstances relating to time limits -he mentioned the fact that his father is a magistrate in this context, and said he had "read about them" as well- and thus he knew time could be extended in appropriate cases.

41 He was asked in cross examination about a letter before action dated 13 February 2017 which appears in the bundle, and which was apparently drafted by solicitors he had instructed in early 2017 in relation to potential 'unfair prejudice' proceedings. (He thus apparently had the ability to give at least some instructions in relation to those matters at that time.) The claimant explained that he had asked those solicitors whether or not they dealt with employment matters, but was told they did not have capacity.

42 He explained that he approached various other solicitors to try and get help with employment issues elsewhere, but was told he had a less than 50% chance of success as regards his proposed tribunal claim, because of the disadvantage cause by false perceptions about his mental health. He explained that his insurers also declined to assist (though he did not say when this was). He said that he said that as a result he gave up trying to get legal assistance, and that he "decided to do it myself".

43 The claimant produced medical evidence in the form of a 2 February 2018 letter from his then-treating doctor, Dr Waterbeach. It indicates that the claimant was discharged from acute mental health services on 29 September 2017, and that his antipsychotic medication was discontinued in November 2017. In Dr Waterbeach's letter, the claimant is said to be "*discharged from our services without diagnosis*

or treatment". Dr Waterbeach opines that the claimant's "*ability to concentrate and build trusting relationships improved*" since about November 2017. Importantly for present purposes, the doctor opines that "*after close observation for almost 5 months, I have not elicited any symptoms that might suggest that Allister suffers from major mental illness*".

44 So, by early 2018, according to Dr Waterbeach the claimant was not showing symptoms of major mental illness. Dr Waterbeach does not suggest that, nevertheless, the medication the claimant had been on up to November 2017 was still significantly affecting his cognitive abilities etc.

45 As regards the claimant's mental health thereafter, I heard evidence from the claimant's father, who struck me as a credible witness. He explained to me that the claimant had certainly been affected by the medication he had been given, and that the effect continued after the claimant had been taken off it and until early 2019. However, he explained that by early 2019, the claimant had returned "*more or less to his normal self*" (albeit with perhaps more emphasis on "less" than "more"). He did not seek to suggest that the claimant would have been incapable until early 2019 of seeking legal advice in relation to his employment claim (and indeed, as set out above, such advice had apparently been sought).

46 The claimant himself told me it took at least a year for him substantially to recover, once his medication stopped in November 2017.

47 However, the claimant did not produce any medical evidence to indicate that, throughout 2018, it would not have been possible or reasonable for the claimant to approach ACAS, present a tribunal claim or at least get further legal advice in relation to it.

48 Mr Pickering told me that he had spoken with the claimant on the telephone a few times in the last couple of years. He did not observe any behaviour which led him to suspect the claimant was suffering from any form of mental illness.

49 The claimant was asked in questioning why he had not begun the ACAS early conciliation process much earlier in 2019. He asserted (without any paper proof)

that ACAS had said it would not originally take his case on. He did not suggest that ACAS's alleged non-cooperation lasted any significant amount of time.

50 On 7 November 2019, the claimant drafted an 'employment report' for ACAS, in which he set out in some detail his assertion that he had been discriminated against on the basis of a perceived disability, and that he had been employed as CTO. He makes reference in that document to provisions in the Equality Act 2010 ("EqA"); 'employment status' etc.

51 Mr Warburton told me and I accept that discussions took place between the parties in the first couple of weeks of November 2019. He also explained -and I accept- there was no reason why the respondent could not have responded to approaches from ACAS at an earlier stage, if the claimant had commenced the early conciliation process sooner.

52 This evidence was in response to an allegation made by the claimant that the terms of bail conditions set in early 2017 -which he said still applied- prohibited him from communicating directly with Mr Parisi, and that he was thus not able to communicate with the company until around the middle of 2019 when Mr Warburton was appointed. (As set out above, the first iteration of the ET1 names Mr Parisi as the respondent.)

MATERIAL LEGAL PRINCIPLES

Time limits

EqA

53 Subject to the extension of time for ACAS early notification under s.140B, s.123(1) EqA provides for a primary time limit of 3 months and a fallback exception where it is "*just and equitable*" for the claim to be brought within a longer period of time.

54 When determining the issue of whether or not to grant an extension of time, the factors set out in s.33 of the Limitation Act 1980 can be of assistance by analogy. However, tribunal need not follow a formulaic approach and set out a checklist of factors that may be relevant, in particular where no reliance is placed upon them. **Hall v. ADP Dealer Service Ltd** (UKEAT/00390/13). The key turns on the facts of each case.

55 In **Abertawe Bro Morgannwg University Local Health Board v. Morgan** [2018] ICR 1194, the Court of Appeal explained the unfettered nature of the tribunal's 'just and equitable' discretion. Although it confirms there is no prescriptive list of factors that needs to be considered, the Court made clear it will almost always be relevant to consider:

a. the length of delay;
b. reasons for the delay, including the lack of proffered reasons; and
c. whether the delay prejudiced the respondent, including inhibiting investigation of the claim while matters were fresh: see **Morgan** at [para 17 and 22].

56 The Court of Appeal did not disturb the guidance given in **Robertson v Bexley Community Centre** [2003] IRLR 434 that [para 25]:

a. there is no presumption in favour of exercising the discretion;
b. it is for the applicant to convince the tribunal to exercise the discretion to extend time; and
c. extensions of time are the exception rather than the rule.

Employment Rights Act 1996 ("ERA")

57 The test under ERA is different, and generally harder to pass, than under EqA. An extension of time may be granted by the tribunal to validate a late complaint of unfair dismissal if, but only if, it is satisfied (the onus of proof being on the claimant) that it was "*not reasonably practicable*" for the complaint to be presented before the end of the three month period following the date of dismissal. See s. 111(2) ERA.

58 In such case, the complaint must still then have been presented within such further period as the tribunal considers "*reasonable*" (as opposed to 'not reasonably practicable'), in order for an extension to be granted. The wording quoted is repeated in virtually identical terms in several other statutory provisions conferring jurisdiction on the tribunal (e.g. 'whistleblowing' detriment; unlawful deduction of wages, breach of contract etc).

59 It is a question of fact in each case whether it was 'reasonably practicable' to present a claim in time, or whether time lapsing thereafter was 'reasonable'.

60 When an employee has knowledge of his or her rights to claim unfair dismissal, there is an obligation upon him or her to seek information or advice about the enforcement of those rights. See **Trevelyans (Birmingham) Ltd v. Norton** [1991] ICR 488. Accordingly, ignorance of time limits may well not be held not to be reasonable if the claimant was aware of the right to claim but made no further inquiries about how or when to do it.

61 There is an obligation on claimants to act expeditiously in asserting their rights in the tribunal. Even a relatively short delay beyond the point when it became reasonably practicable to present the claim may be more than is "reasonable", in the absence of an explanation for the further delay. See for example **Theobald v. The Royal Bank of Scotland Plc** EAT/044/06 [2007] All ER (D) 04 (Jan) where a delay of 13 days was held on the facts to be too long.

Employee Status

62 There are three essential elements that must be present to establish a contract of employment. These form the irreducible core of the contract of employment, without which a contract of employment will not arise:

a. the contract must impose an obligation on a person to provide work personally;
b. there must be mutuality of obligation between the employer and employee; and
c. the worker must have expressly or impliedly agree to be the subject of control of the person for whom he works to a sufficient degree.

63 If any of these three elements is not present, the contract is not a contract of employment. If each element is present, the contract *may* be a contract of employment - whether or not it is will depend on the assessment of all the other circumstances of the case. See for instance **Hall (Inspector of Taxes) v. Lorimer** [1994] All ER 260. So, for example, when looking at the overall picture

from the accumulation of relevant details, one ought to consider matters such as payment by wages or salary; whether the worker provides his own equipment; how tax is treated; whether the worker is subject to the employer's disciplinary and grievance procedures; the receipt of sick pay or contractual holiday pay; provision of benefits traditionally associated with employment such as a pension scheme, healthcare or other benefits; whether the worker is part of the employer's business, and whether there are restrictions on working for others.

64 Employee status is needed for a claim of breach of contract under the Employment Tribunals (Extension of Jurisdiction) Order 1994. Cf a claim for unlawful deductions under s.23 ERA, which requires only 'worker' status.

APPLICATION TO FACTS

65 The pre-December 2016 discrimination and money claims are on the face of it long out of time. So, too, is any unfair (or discriminatory) dismissal claim, given my factual findings in relation to the December 2016 date of termination.

66 In the light of the claimant's detention in late 2016 and early 2017, the deterioration in his mental health, and the medication he received, I accept that it may not have been reasonably practicable or just and equitable to expect his claim to have been presented or for ACAS to have been approached within the first three months of his December 2016 dismissal, or indeed for at least some of 2017. (I say "may not have been" rather than "was not" because the claimant was still able to give lawyers instructions for the purposes of a letter before action on related matters in February 2017, and was still then able to ask them if they dealt with employment law issues.)

67 However, the claim was still made about three years after the events at issue.

68 Even making all due allowance for the client's mental health and medication issues, I do not consider the claimant has given a satisfactory explanation, or really any proper explanation, as to why the claim could not have been brought considerably earlier. In particular:

a. The claimant was aware of time limits in tribunal claims as early as January 2017. He could and should have made further enquiry, in at least early 2019 if not long before (i.e. probably in 2018), in so far as he lacked specific detail of the application of those limits.
b. The claimant approached solicitors as early as 2017. Having apparently been rebuffed, he decided to deal with matters himself. That decision could -and, I find, should- have been made by at least early 2019, if not long before (i.e. probably in 2018).
c. In the light of the evidence I heard from the claimant's witnesses, and the *inter parties* correspondence, I do not accept that the effects of the claimant's medication, or any mental health issues on his part, precluded such steps being taken by early 2019, if not long before.
d. (The claimant provided no medical evidence to suggest that mental impairment meant it was unfair or unreasonable to expect him to approach ACAS and then present his claim within months of his February 2018 discharge from mental health services- let alone, as late as December 2019.)
e. I agree with the respondent's submission that when the claimant was negotiating with the respondent in October 2019, he should in fact have sought to protect his position by approaching ACAS and issuing proceedings at (if not long before) that stage - rather than waiting until December 2019 to present his claim.
f. Even after the ACAS certificate was issued on 28 November 2019, it still took the claimant until 17 December 2019 to present his claim. He did not give any satisfactory explanation for this yet-further delay, which in my judgment was (again) not reasonable.

69 I also accept Mr Hine's submission that the 3 year delay would in all probability cause prejudice to the respondent's witnesses as regards their recollection of events. If the claim had been brought far earlier, any necessary investigation could have taken place whilst memories were far more fresh. (There was no contemporaneous internal grievance process which might have assisted in addressing the issues at the time, either.)

70 I have considered these facts by reference to the distinct tests for which EqA and ERA provide in relation to extension of time.

EqA

71 Taking the matters set out at paragraphs 66-69 above into account, the claimant has not persuaded me, the burden being on him, that it is just and equitable to extend time in his case.

ERA

72 Taking into account the factors set out at paragraph 66-68 above, Even if I assume (despite my words in parentheses at paragraph 66 above) that it was not "reasonably practicable" for him to commence early conciliation/present the claim within three months of the EDT, the significant amount of time which elapsed thereafter was not "reasonable". This is the case even if the focus was only on delay from early 2019 (which I think would be probably unduly generous to the claimant).

Status

73 It follows from my factual findings above that even assuming the claimant was an employee in 2016, he did not have sufficient continuity of service to make a claim for ordinary unfair dismissal/a redundancy payment.

74 In any event, given those factual findings, in my judgment when looked at 'in the round' the claimant's work for the respondent was under a contract of services, as an independent contractor, rather than as an employee under a contract of service. He thus does not have status to bring claims for unfair dismissal, redundancy, or breach of contract. Moreover, those claims are out of time, as is any claim under EqA, or an unlawful deduction of wages.

Employment Judge Michell

14th December 2020

Sent to the parties on:

…29th December 2020….

For the Tribunal:

…R Darling……