



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr S Brunskill

v

Draeger Safety UK Ltd

PRELIMINARY HEARING

Heard at: Watford by CVP

On: 23 March 2021

Before: Employment Judge Reindorf

Appearances:

For the claimant: In person

For the respondent: Ms E Wilkinson (solicitor)

JUDGMENT

1. The claim for a redundancy payment is dismissed on withdrawal.
2. The remainder of the claim is dismissed.

REASONS

Introduction

1. The claimant lodged his ET1 on 19 November 2019. In Box 8 he ticked “redundancy payment” and “notice pay”. The particulars contained in box 8.2 and on a sheet entitled “Additional information” referred to the claimant’s view that he was not given enough money when he entered into a settlement agreement which terminated his employment with the respondent in August 2017 and that he was not in a fit mental state to sign it because he was suffering with alcoholism and mental instability at the time.
2. In its ET3 the respondent argued that the claimant was not entitled to a redundancy payment, that he had not been made redundant, that he had not been dismissed,

that he was bound by the settlement agreement, that his claims were out of time and that his claims had no reasonable prospects of success.

3. The present hearing was listed to determine those applications.

The evidence and hearing

4. The hearing was conducted remotely by video (CVP). The parties did not object to this. A face to face hearing was not held because it was not requested and all issues could be determined in a remote hearing.
5. The hearing took place over three hours. Judgment was given orally. After the hearing the claimant requested written reasons. These reasons are produced pursuant to that request. Insofar as they may differ from those given orally, these written reasons take precedence.
6. I did not hear evidence. The respondent produced a witness statement in the name of Tracy Robinson (HR Business Partner) but in the event her evidence was not required. The claimant had not produced a witness statement despite having been asked by the respondent whether he intended to do so. Ms Wilkinson did not wish to cross-examine him and I was content that evidence under oath from him was not necessary. Both parties made oral submissions.
7. There was an agreed bundle of 69 pages produced by the respondent. The claimant had had an opportunity to contribute documents to the bundle.
8. Ms Wilkinson for the respondent produced helpful written submissions.

The facts

9. The claimant was employed by the respondent as a Regional Service Manager until the termination of his employment by agreement on 28 July 2017 under the terms of a settlement agreement dated 1 August 2017. The termination was agreed between the parties after concerns about the claimant's capability and conduct had been raised.
10. The claimant's gross pay was £4,166 pcm plus benefits and a bonus.
11. The claimant had been provided with legal advice before he signed the settlement agreement. This was paid for by the respondent. The claimant accepted before me that the solicitor who advised him was independent and working in his interests.
12. Under the settlement agreement the claimant was given:
 - 12.1. various taxable sums in respect of accrued benefits and bonus; and
 - 12.2. an ex gratia payment of £21,000.00 including £12,500 as a payment in lieu of his notice pay. This was paid gross and was not taxable.
13. At para 6.1 the settlement agreement stated:

The Employee agrees that the terms of this agreement are offered by the Company without any admission of liability on the part of the Company and are in full and final settlement of all and any claims or rights of action that the Employee has or may have against any Group Company or its officers or employees whether arising out of her employment with the Company or its termination or from events occurring after this agreement has been entered into, whether under common law, contract, statute or otherwise, whether such claims are, or could be, known to the parties or in their contemplation at the date of this agreement in any jurisdiction and including, but not limited to, claims of Wrongful Dismissal, Unfair Dismissal, Breach of Contract, Unauthorised Deduction of Wages, Discrimination and Harassment on the grounds of Age and Disability and the claims specified in Schedule 1 (each of which is hereby intimated and waived).

14. On 9 July 2019 the claimant lodged an Early Conciliation Notification with ACAS. He was issued with an EC Certificate on 31 July 2019. The ET1 was lodged on 19 November 2019.

Discussion and conclusions

The redundancy payment claim

15. Before me today the claimant accepted that he did not wish to bring a claim for a redundancy payment and that he had not been made redundant. That claim is dismissed on withdrawal.

The notice pay / wrongful dismissal claim

The claim

16. The claimant accepted before me today that under the settlement agreement of August 2017 he had been given a sum which was greater than his entitlement to notice pay. However he pursued his claim for notice pay (which is a claim for wrongful dismissal). The claim appears to be based on the assertion that the claimant was not given enough money under the settlement agreement. That is plain from his ET1 and he reiterated it in the hearing. He felt that his length of service warranted a higher sum in settlement.

Validity of the settlement agreement

17. I find that the claimant is bound by a valid settlement agreement and therefore cannot bring a claim of wrongful dismissal against the respondent.
18. The claimant asserted that the settlement agreement was not valid because he was not in a fit state to sign it in 2017. He said that he was suffering from alcohol dependency syndrome at that time. He also made mention of anxiety syndrome and mixed depression, although it was not clear whether these were conditions which he claims to have been suffering from at the time that he signed the settlement agreement.

19. The test for mental capacity is contained in s.2(1) of the Mental Capacity Act 2005. The proper approach is set out in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889:

the test to be applied was whether the party to legal proceedings was capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case might require, the issues on which his consent or decision was likely to be necessary in the course of those proceedings; that although the decisions actually made were likely to be important indicators of the existence or lack of understanding, a person was not to be regarded as unable to make a rational decision merely because a decision he had made would not have been made by a person of ordinary prudence, or conversely as having mental capacity merely because his decision appeared rational; that a person was not to be regarded as incapable of pursuing or compromising a claim merely because he would not be capable of taking investment decisions in relation to any large sum ultimately received in compensation”

20. There is a presumption in favour of capacity. Therefore the burden is on the claimant to show that he lacked capacity to sign the settlement agreement.
21. The claimant adduced no evidence in support of this argument. He mentioned in his ET1 that he had evidence of his mental state (which he referred to in connection with the time point). He knew that the respondent intended to produce evidence in a bundle, because he was asked by them whether he wished to add anything. He did in fact add some documents to the bundle, but not in relation to this issue. He was also asked by the respondent in advance of the hearing whether he wished to submit a witness statement, but did not do so. The respondent produced a witness statement.
22. Accordingly there is no evidential basis on which I could find that the claimant lacked mental capacity to enter into the settlement agreement in August 2017. He has failed to satisfy the burden of proof.
23. I find that the claimant has failed to show that he lacked capacity to enter into the settlement agreement. He is bound by it since it is valid, and he may not pursue a claim for wrongful dismissal against the respondent. The claim for notice pay / wrongful dismissal is dismissed.

Time point

24. I find that, in any event, the notice pay / wrongful dismissal claim is brought out of time and the Tribunal does not have jurisdiction to determine it.
25. The claim should have been brought within three months of the termination of the claimant's employment (plus any extension for ACAS Early Conciliation): Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 art 7(a).

26. If it was not reasonably practicable for the claimant to bring the claim in time, I can extend time for such further period as I consider reasonable: Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 art 7(c).
27. The claim was brought 2.5 years after the termination of the claimant's employment. He relies on his mental ill health as the reason for this. I am not satisfied that he has shown that it was not reasonably practicable to bring the claim in time because of his health. I refer to the comments I have already made about his failure to adduce any evidence in support of his assertions about his state of health.
28. Even if it was not reasonably practicable for the claimant to bring his claim in time, he did not bring it within a reasonable time thereafter. He had sufficient capacity to approach ACAS in July 2019 and yet did not lodge his claim until November 2019. No explanation for this has been advanced.

Prospects of success

29. I find that, in any event, the notice pay / wrongful dismissal claim has no reasonable prospects of success.
30. On termination of employment the claimant was given an ex gratia payment which significantly exceeded his entitlement to notice pay. It expressly incorporated £12,500 in lieu of notice pay. I can therefore see no prospects of success for the wrongful dismissal claim at all.

Summary of findings

31. In summary, I dismiss the claim for notice pay / wrongful dismissal because:
 - 31.1. it is debarred by a settlement agreement; and
 - 31.2. in any event it is out of time and there is no basis for extending time; and
 - 31.3. in any event the claims have no reasonable prospects of success.

The claimant's application to amend to add a complaint of unfair dismissal

32. The claimant indicated at the hearing for the first time that he wishes to amend his claim to bring a complaint of unfair dismissal. This application was not listed to be determined at this hearing. The respondent was not ready to deal with it. I have not decided this application. The claim has been dismissed in its entirety and if the claimant wishes to bring a claim of unfair dismissal he will need to do so afresh.
33. On the basis of the submissions that I heard from the claimant at the hearing, I would not have granted the amendment for the following reasons:
 - 33.1. it is the addition of a new cause of action and is a very substantial amendment;

- 33.2. it has been made extremely late in the day – almost four years after the termination of the claimant’s employment;
- 33.3. no good reason has been suggested as to why the application was not made earlier. I note that the claimant had the benefit of legal advice at the time of the termination of his employment; and
- 33.4. in light of my findings above as to the validity of the settlement agreement, the prospects of success in the unfair dismissal case would appear to be extremely poor since the claimant’s employment terminated by consent under that agreement rather than by dismissal.

Employment Judge Reindorf

Date: 29 April 2021

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.