



EMPLOYMENT TRIBUNALS

Claimant: Maxwell Valentine

Respondent: LDG Capital Limited

Heard: in private by CVP

On: 03 February 2022

Before: Employment Judge Codd

Appearances

For the claimant: **Maxwell Valentine (Person)**

For the respondent: **Daniel Obertellie (In Person)**

JUDGMENT

1. The claimant has presented the claim out of time.
2. The claim is dismissed as the court has no jurisdiction to proceed with the case.

My reasons are set out below

Employment Judge **Codd**

03 February 2022

JUDGMENT SENT TO THE PARTIES ON
7 February 2022

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FOR THE TRIBUNAL OFFICE

Reasons

Background

1. This is an application by Maxwell Valentine against LDG Capital limited. The Claimant was employed as a chief operating officer for a property development company. The Claimant claims various matters Pursuant to S13 Employment Rights Act 1996. These include; a failure to pay notice, non-payment of wages for a 3-month period, non-payment of holiday pay and non-payment of a contractual bonus. This Judgment deals only with preliminary case management matters which I identified at the outset of what had been listed as a full merits hearing.
2. The Claimant appeared in person representing himself. The Respondent was represented by its sole owner and Director Mr Obertellie. Neither party had a legal representative present. The Respondent defended the claim upon the basis that the claimant was not employed by LDG capital Ltd but was an employee of another company within the group of companies namely London Development Group (Residential) Ltd (hereafter referred to as LDG Residential Ltd). LDG Residential Ltd was in liquidation at the time of my hearing the claim. It should be noted that Mr Obertellie was a shareholder and director of both companies.
3. I have received a bundle of evidence supplied by the Claimant which I have reviewed in full prior to the hearing. All matters considered below are considered upon the balance of probabilities to the normal civil standard of proof.

The Issues

4. It appeared to me at the outset of these proceedings, that there were two preliminary issues which I needed to resolve before I could hear any substantive claim. These were; a) whether there was any application for amendment to the identity of the Respondent (and the impact of any insolvency proceedings); and b) whether the claim was presented in time.
5. I explained to the parties that I would hear submissions on the preliminary matters and subject to the outcome of these we would then proceed to hear evidence upon the substantive claim.

Amendment of Claim/Respondent.

6. The first issue which I invited submissions upon, was whether there was any application to amend the claim given the contention that an alternative company was the correct Respondent. I invited submissions from the Claimant. Before doing so, I explained that the Court had the power to amend the claim to substitute the

Respondent (if appropriate), should he wish to persuade me to do so. I explained at the outset as 'London Development Group (Residential) Limited' (according to Companies House) was in liquidation. I explained that if I agreed to amend the claim, that section 130 of the Insolvency Act 1986 would apply and I would be left with no option but to 'stay' the proceedings pending further application within the insolvency proceedings.

7. The reason why I identified this as a preliminary issue is because the Respondent claims it as a defense, but also on a preliminary review of the evidence before me there seemed a number of items of evidence which suggested that payments and pay slips were being made to the claimant from LDG (Residential) Ltd rather than LDG Capital Ltd as asserted by the Claimant. It has not been necessary for me to determine which of the legal entities the claimant was employed by or indeed if he was a worker within the meaning of S230 ERA 1996 for LDG Capital Ltd and I make no specific finding in that regard.
8. The Claimant was emphatic that he did not wish to amend his claim and he believed he had identified the correct respondent. He made it clear to me that LDG Residential Ltd was a special purchase vehicle (SPV) and that he would never have agreed to be employed by it due to the risk of future insolvency proceedings (as has now transpired) and he asserted that the claimant had a history of using search operations. This is why he negotiated a written contract with LDG Capital Ltd (discussed later).
9. Accordingly I made no order in respect of an amendment to the proceedings.

Limitation Period

10. I therefore proceeded to deal with the second of the preliminary matters, namely whether the claim was presented in time?
11. The Claimant's ET1 was received by the Tribunal on the 3rd of December 2021. Within that document the effective date of termination is identified as the 1st of November 2021. Having reviewed the evidence it appeared to me that the acts complained regarding non-payment of wages took place between June and 2nd of August 2021, potentially placing them outside the limitation period. I shall deal with my findings on this matter in due course.
12. I explained to the parties that there was a statutory limitation of three months to present a claim and that whilst ACAS early conciliation may extend that period, I

was concerned that the claim may be out of time. I therefore invited submissions and heard from both parties including the Claimant twice. I explained to the Claimant that the tribunal had a discretion to extend the time scales but only if it is satisfied (on the balance of probabilities) that; a) it was not reasonably practicable to present the claim within the time and b) thereafter it was presented within a reasonable time period. I allowed the Claimant some time to prepare his submissions and he helpfully assisted me with answering a number of my questions.

13. It was common ground between the parties that there had been disruption in the payment of wages in June 2021 and a nonpayment of wages in July/August 2021. The Claimant was expecting a payment of wages on the 1st of August 2021 and he anticipated that this would include payment for the arrears of wages previously not paid. Mr Obertellie accepted that there had been disruption in the payment of wages but that this was the responsibility of LDG Residential Ltd, which was at that point in significant financial difficulties and which is now in liquidation. It should be noted that Mr Obertellie was a shareholder and director of both companies.
14. On the 2nd of August 2021, having not received payment of July's wages the Claimant asserts that he withdrew his labour, and began attempts to negotiate payment of his outstanding monies, to no avail.
15. I questioned the Claimant about whether he was claiming that he was in effect dismissed at that point, (either constructively or because of fundamental breach of contract). He accepted that in effect that contention was correct. The Respondent did not seek to persuade me otherwise.
16. The Claimant contended that his effective date of termination should be in accordance with his contract of employment. That contract purportedly came into existence part way through the Claimant's employment and contained a 3 month notice period. That contract and its terms were never finalised. The Claimant contended that I should consider the effective date of termination from the expiry of what the notice period within the contract would have been. In short three months from the point he withdrew his labour on 2nd of August 2021. The claimant was expecting the payments of his wages to continue up to and including 1st of November, under his contention that he should have received notice pay (each month) and in effect that non- payment of the monthly notice pay is a continuation of the series of non-payments.

Effective Date of Termination

17. I am not persuaded that that should be the case. The Claimant had withdrawn his labour and was clearly treating the contract at an end on the 2nd of August. He had not given notice within the terms of that contract. I had seen emails dated 12th August 2021 requesting pay slips and a P45. It is clear that by one party or the other, the contract had been brought to an end. It is clear to me and I find as a fact that the effective date of termination was the 2nd of August 2021. All of the acts complained of pre-date this date. The last non-payment being the 1st August 2021 as part of a series of deductions. The notice period also formed part of the Claimant's claim for a Breach of Contract, again re-enforcing the contention that the effective date of termination should be treated as 02nd August 2021. Finally, when questioned by me, he accepted that a dismissal (in some form) had taken place, at the point he withdrew his labour.
18. Accordingly (subject to ACAS conciliation extensions - which I shall consider later) the last date for submission of the ET1 would have been 01.11.21. The claimant's ACAS certificate notes that early conciliation was requested on 19 November 2021 with the certificate being issued on 03.12.21. The ET1 was issued on 03.12.21.
19. I invited the Claimant to explain why it was not reasonably practicable to approach ACAS at an earlier stage or to submit the claim within the statutory time period. The Claimant contended that the liquidation of LDG Residential Ltd had caused confusion. He had originally approached the liquidator regarding his wages and provided me with an account of the delays that this caused. He told me that in late August or early September he approached ACAS for conciliation against LDG Residential Ltd, and had a certificate issued in the middle of September, which I note is well within the statutory time period. I note that this fact (and the ACAS Certificate) were not provided in his written evidence. However, I accept his assertion that he approached ACAS in the manner explained in September 2021.
20. The Claimant explained to me that he had then taken advice from various friends, professionals, ACAS and the Liquidators of LDG Residential Ltd and decided that his claim should be against LDG Capital Ltd, because that was the name on the (draft) contract. He said he tried to change the Respondent with ACAS at the time, but was forced to re-start the process. Something which he did not do for a further 2 months.

21. The Claimant explained that he was working every day with the Liquidator that he was chasing matters up throughout this time. The confusion about who the correct legal entity he should be claiming against was also raised as a factor.
22. Although it was not necessary for me to resolve this point, there seemed a number of evidential factors that pointed to LDG (Residential) Ltd being the likely employer, whilst the day-to-day role may well have been for a number of companies within the group. I can well understand why he approached the Liquidator first and engaged ACAS regarding LDG (Residential) LTD as a first port of call. I note in passing that the Claimant has not provided any written evidence from the Liquidator, regarding his contention that they advised him to pursue a claim against LDG Capital.
23. The deciding factor for the Claimant appears to be a firmly held belief that because he had negotiated a contract which he believed placed his actual or implied employment with LDG Capital Ltd. He therefore resolved that he should reframe his claim against that entity. Something which he subsequently did.

Conclusions

24. Having heard the submissions I find that the claim is submitted out of time. It should have been submitted by 01.11.21 and ACAS should have been approached prior to that date (in respect of LDG Capital Ltd). I have considered the case of [Pearce v Bank of America Merrill Lynch and ors EAT 0067/19](#) and note that in these circumstances the ACAS early conciliation extension provided by S207B ERA 1996 does not apply, where the substantive limitation period has already been exhausted.
25. The claim presented on 03.12.21 is therefore over 4 weeks out of time. I have been at pains to establish the reason for that. I have afforded reasonable opportunity to the claimant to explain the delay and justify the position, noting that the burden of proof rests upon him to do so, and to demonstrate why it was not reasonably practical to submit the claim in time.
26. I make the following findings in respect of his conduct. The Claimant clearly understood the process having attended early conciliation regarding LDG (Residential) Ltd. What persuaded him to change tact is unclear to me. He was at pains to tell me he never considered himself employed by LDG (Residential) Ltd, yet he embarked on the ACAS conciliation in relation to a potential claim against them and was in discussions with the Liquidator. Unfortunately that action is in

direct conflict with what he told me about who he believed his employer to be, regarding his contract negotiations.

27. He may well have been badly advised by the liquidators, upon the basis of a purported contract with LDG Capital Ltd. A contract which was unsigned, contained numerous 'track changes' (including the identity of the employer) and could barely be considered more than a working draft. The arrangements surrounding his employment appear on the face of it far from satisfactory. No doubt the whole situation has caused an enormous amount of stress. I make no specific finding as to the conduct or identity of his employer as it has not been necessary for me to do so.
28. However, applying the legal test as I must, I am simply not persuaded that there was an appropriate reason (or series of reasons) to justify the contention that, it was not reasonably practicable to issue the claim in time. The Claimant's first ACAS approach (regarding LDG (Residential) Ltd) concluded in September 2021, at this point he had ample time to reframe his case and issue it afresh (if he wished). The reasons he provided for not doing so were, opaque. What occurred in the 2 months between that process and the second approach to ACAS on 19th November was unclear. The Claimant was emphatic that he always believed LDG Capital Ltd to be his employer.
29. Accordingly, there was insufficient evidence or reason, to persuade me (upon the balance of probabilities) that it was not reasonably practicable to issue the claim in time. The extension provided by S207B ERA 1996 for early conciliation does not apply here as I have found above. In any event the reason that ACAS were approached some 18 days out of time, is again unclear to me.
30. In considering the second limb of the test, I do not consider that I need to consider this limb of the test specifically, as I have already found that it fails the first. However, I give due regard to the fact that the Claimant was engaged in an ACAS conciliation between 19th November 2021 and 3rd of December, and the ET1 was issued the same day he received the certificate. However, I do not consider that the period of conciliation can be weighed as a factor, when considering the reasonable period of presenting the claim. The reason I say this is because ACAS, were approached 18 days late, and I have already found that there was not an adequate reason for that. It follows that the claim also fails the second limb of the test, that it was not presented within a reasonable period.

31. Accordingly I conclude that the claim is out of time and I have no jurisdiction to hear the claim. I therefore dismiss the proceedings.

32. That is my Judgment.

Employment Judge Codd

Dated 03.02.2022