



EMPLOYMENT TRIBUNALS

Claimant: Mr P Plewa
Respondent: Waycon CP Limited

Heard at: Southampton On: 18 May 2022

Before: Employment Judge Dawson

Appearances

For the claimant: no attendance
For the respondent: Ms Douglass, representative

JUDGMENT

The claimant's claims are struck out.

REASONS

1. Pursuant to orders made at a hearing on 11 January 2022, the matter was listed to determine four preliminary issues as follows:
 - 1.1. Whether the claimant has a valid ACAS Early Conciliation Certificate and if not, whether (in the light of the Tribunal's letter of acceptance dated 28 May 2021) his claims can, in any event, proceed.
 - 1.2. The correct name of the respondent.
 - 1.3. If the claimant's claims are permitted to proceed, whether the claimant's complaint of unfair dismissal and /or claim for a statutory redundancy payment were, in any event, presented within the relevant statutory time limits (section 111 and 164 of the Employment Rights Act 1996 ("the Act")).

- 1.4. Whether, if the Tribunal has jurisdiction to entertain the claimant's claims for unfair dismissal and/or a statutory redundancy payment (or either of them) he, in any event, has the necessary two years' qualifying service to bring such claims including whether, his continuity of service was preserved pursuant to section 212(2)(c) of the Act.
2. The claimant did not attend the hearing and had not complied with directions given at the last hearing, which included providing the tribunal and the respondent, by 25 February 2022, with the ACAS Early Conciliation certificate which he relied upon for the purposes of the proceedings.
3. The respondent's representative told me that she had sent documents to the claimant but had not heard from him. I considered the tribunal file and noted that the case management order sent following the last hearing had been sent to the claimant's email address on the claim form and contained the date of this hearing. The claimant had not contacted the tribunal following the last hearing. In those circumstances I considered it appropriate to continue in the absence of the claimant.
4. I heard evidence from Mr Carpenter, the Construction Manager for the respondent, and was provided with a bundle of documents running to 79 PDF pages.

Background and Findings of Fact

5. The original claim form was presented to the tribunal on 4 January 2021. It did not have an early conciliation number.
6. The claim form was rejected by the tribunal on 28 January 2021 on the basis that the claimant had not provided an EC number and the claimant did not appear to be able to claim interim relief. The claimant's (then) representative replied giving an ACAS number of R221706/20. On that basis the claim was accepted but was treated as having been received on 31 March 2021, which is when the EC certificate number was given.
7. Mr Carpenter told me that at no point was the respondent contacted by ACAS in respect of early conciliation.
8. According to the Case Summary contained within the document "Case Management Orders" sent to the parties following the last hearing, as there was no copy EC certificate on the file the tribunal sought clarification from ACAS and was advised that the details provided did not match their records. I am unable to find that correspondence on the tribunal file but there is no reason to doubt the summary given by EJ Goraj and, given the claimant's failure to provide a copy of the certificate or otherwise engage with the tribunal process, I find, on the balance of probabilities, that the ACAS number given by the claimant's (then) representative does not correspond with an ACAS certificate which would relate to these proceedings.

9. Mr Carpenter also told me :
- a. That the claimant resigned from his employment with the respondent with effect from 18 January 2019. He has produced a resignation letter from the claimant
 - b. That the claimant was then re-engaged by the respondent from 4 February 2019 doing a different job.
 - c. That the claimant was dismissed by reason of redundancy from 31 August 2020. The claim was given one week's notice between 24 August 2020 and 31 August 2020. Mr Carpenter wrote to the claimant to that effect on 24 August 2020 and has produced a copy of the letter.
10. I accept the evidence of Mr Carpenter and make findings of fact accordingly.

The Law

11. Section 18A(8) Employment Tribunal Act 1996 provides that a person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).
12. Subsection (1) provides that before a person presents an application to institute relevant proceedings, that person must provide to ACAS prescribed information and subsection (4) provides that where settlement is not possible or the prescribed period expires, the conciliation officer shall issue a certificate.
13. It was made clear in *Pryce v Baxterstorey Ltd UKEAT EA – 2020 – 00323 – BA* that if a person presents a claim without an EC certificate there is no jurisdiction to consider it and what is sent to the tribunal is a nullity and should be rejected immediately (paragraph 10).
14. Section 111 Employment Rights Act 1996 provides that a claim of unfair dismissal must be presented to the tribunal before the end of the period of 3 months beginning with the effective date of termination or such further period as the tribunal considers reasonable where it is satisfied that it was not reasonably practicable for it to be presented before the end of 3 months.
15. Section 164 of the same Act provides that an employee does not have any right to a redundancy payment unless before the end of the period of 6 months either the employee has made a claim for the payment by notice in writing given to the employer or a question as to the employee's right to the payment has been referred to an employment tribunal.
16. Section 108 of the Employment Rights Act 1996 provides that a person does not have the right to not be unfairly dismissed unless he has been continuously employed for a period of not less than 2 years before the effective date of termination (unless certain exceptions exist). Section 155 of the same Act provides that a person does not have a right to a redundancy payment unless he has been continuously employed for a period of not less than 2 years ending with the relevant date.

17. In considering continuous employment, the law is helpfully summarised in the IDS Employment Law Handbook (volume 2) as follows

Although the period of continuous employment is measured in months or years, a week is a vital unit in calculating continuous employment. S.212(1) provides that any week during the whole or part of which an employee's relations with the employer are governed by a contract of employment counts in computing the employee's period of employment. And S.210(4) confirms that, subject to the exceptions set out in Ss.215–217 (which are dealt with in Chapter 3, 'Non-counting weeks that do not break continuity'), a week that does not count in computing the length of an employee's period of continuous employment breaks continuity. The critical issue of whether the employment relationship is 'governed by a contract of employment' during the whole or part of each week in question is discussed under 'Relations governed by contract of employment' below.

Week in this context means a week ending on Saturday — S.235(1). The whole period of employment must therefore be examined to see if, during a period claimed to be continuous for statutory purposes, there is a gap of at least a complete week from Sunday to Saturday which does not count under Chapter 1 of Part XIV ERA and which therefore breaks continuity. If such a gap exists, then the relevant period of continuous employment (for determining whether, for example, the employee has sufficient service to bring an unfair dismissal claim) runs from the end of the gap and the period of employment before the gap is disregarded.

Paragraph 1.40

Conclusions

18. As I have indicated, I find on the balance of probabilities that the early conciliation number provided to the tribunal does not match any early conciliation certificate which relates to these proceedings. The claimant has been given the opportunity to provide a copy of the relevant early conciliation certificate and has neither done so nor explained why he does not do so. I conclude that it is more likely than not that the claimant did not obtain an ACAS certificate before the claim was presented.
19. It follows that, pursuant to the Employment Tribunals Act 1996, the tribunal has no jurisdiction to consider the claimant's claims. Given that what was sent to the tribunal was a nullity, I do not consider (and it has not been argued) that the fact that the tribunal, in reliance upon an incorrect ACAS number, accepted the claim means that the claimant should be treated as having bought a valid claim.

20. The claim form presented by the claimant was a nullity and the claim should be struck out.
21. That is sufficient to dispose of the point, but given that all of the preliminary issues were listed for determination today, I will set out my conclusions in respect of them also.
22. The respondent has confirmed that there is no longer any issue in respect of its name.
23. Even if the claimant had given a correct conciliation certificate number, his claim is still properly to be treated as having been presented on 31 March 2021. That is 7 months from the date of his dismissal. Thus any claim for unfair dismissal would, on the face of it, be out of time. The claimant has not advanced any reason why it was not reasonably practicable to present the claim within time. Thus I find that the claim for unfair dismissal was not presented in accordance with the time limit set down in the Employment Rights Act 1996 and the tribunal lacks jurisdiction to deal with it.
24. The position in relation to a redundancy payment is slightly more complicated. It might be said (although this point has not been argued for the claimant) that insofar as the original claim form was sent to the respondent, the claimant has made a claim for payment by notice in writing given to the employer. On a proper reading of the claim form, I do not think that argument can be correct. The claim form makes a claim of unfair dismissal at box 8.1 and the claimant did not tick the box to say he was making a claim for a redundancy payment. Although in box 8.2 the claimant says that he was dismissed from his employment on sick leave and the company had not paid him any redundancy money, he does not go on to say that he is making a claim in respect of a redundancy payment. Although the tribunal has treated the claim form as including a claim for redundancy payment, in my judgment the claim form does not amount to a notice within the meaning of section 164 Employment Rights Act 1996. Thus, I find that the claim for a redundancy payment was presented outside the time provided in the Employment Rights Act 1996 and the claimant does not have any right to a redundancy payment.
25. Finally, I am satisfied that the claimant did not have 2 years qualifying service prior to his dismissal to enable him to assert either that he was unfairly dismissed or that he is entitled to a redundancy payment. There was a clear break in service between 18 January 2019 and 4 February 2019. That break included the week which ended on Saturday, 2 January 2019. Thus there was a break in continuity of service. There is no evidence that any of the exceptions to that rule (such as that in section 212(2)(c)) applied. Thus the claimant does not have the right to bring the claims of unfair dismissal and/or for a redundancy payment.
26. For those reasons the claims are dismissed.

Case Number: 1400024/2021

EMPLOYMENT Judge Dawson

Date 19 May 2022

Judgment sent to parties on
10 June 2022 By Mr J McCormick
For the Tribunal Office

Notes

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.

VHS

The hearing was conducted by the parties attending by Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because it was in accordance with the overriding objective to do so.