



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
MR S REALEY

AND

Respondent
ISLAND SECURITY LTD

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 6TH MARCH 2023

EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)

MEMBERS:

APPEARANCES:-

FOR THE CLAIMANT:- MR T STREET (SOLICITOR)

FOR THE RESPONDENT:- MR M BISHOP / MR R FOREMAN

DRAFT JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant's claim for unpaid statutory notice pay was presented out of time and is dismissed.
- ii) Time for the presentation of the claimant's claim for statutory redundancy pay is extended.
- iii) The claimant's claim for statutory redundancy pay is well founded and the respondent is ordered to pay the claimant the sum of £9292.85.

Reasons

1. By a claim form submitted on 16th December 2022 the claimant brings claims for statutory notice pay and statutory redundancy pay. As is set out below it is not in dispute that both claims were presented out of time; and as a result there are two fundamental issues in the claim. The first is whether in principle the claimant is entitled to a statutory redundancy payment and/or to statutory notice pay. The second is if he is, his claims having been presented out of time, whether time should be extended

Facts

2. There is no dispute between the parties of that the claimant was dismissed on the 4th March 2022. At that point, because of the diagnosis of serious illness of Mr Bishop, the company immediately ceased trading and the claimant was dismissed along with all the company's other employees. Mr Bishop describes the company at present as dormant and having no assets. It is not in dispute that the claimant was not paid either a statutory redundancy payment or a statutory notice payment.
3. On the face of it therefore the claimant would be entitled to both notice pay and redundancy pay; as it is not suggested that he was dismissed for any reason than redundancy, the company having ceased trading; or that he had lost his entitlement to statutory notice pay for any reason.
4. However, the evidence of the respondent it is that Mr Bishop arranged through his contacts for all employees of the respondent to be found work with other employers. In the case of Mr Realey he was found work employed on a seasonal fixed term contract by the company Sandhills Holiday Park Limited. Mr Bishop contends that that was the claimants choice and that there were alternative at full time roles which were offered to him but which he declined in favour of working at Sandhills Holiday Park. The essential point that is made on their behalf that is that it is morally unjust for the claimant to have obtained employment immediately after his dismissal through the efforts of Mr Bishop, and simultaneously to claim that he is entitled to notice pay and redundancy pay when his employment continued, albeit with another employer, with no or little break, and thus with no or little loss of income.
5. The claimant asserts that whatever the emotional background and previous friendship of the parties to the litigation in principle this is a very simple claim. Whether the claimant was able to find employment after dismissal does not affect his right to redundancy pay at all, and only affects the claim for the failure to pay notice pay to the extent that any earnings during the notice period may have to be set off against his losses. Fundamentally the claimant asserts that he is unquestionably entitled to notice pay and to redundancy pay in principle, given that he was dismissed necessarily by reason of redundancy when the company ceased trading in March 2022. Irrespective of the respondent's beliefs as to the morality of his making this claim, the simple fact is that these are both statutory entitlements and he is on the face of it entitled to both.

It is not asserted that the employment he obtained was with the respondent itself or an associated company, nor is there any evidence at that there was a TUPE transfer of the claimants employment to Sandhills Holiday Park Limited, he simply took a new job with a new employer. In those circumstances it is inevitable that he is entitled in principle to notice pay and a redundancy payment.

6. In my judgement the claimant is clearly correct as to that and in principle he is entitled to both statutory notice pay and redundancy pay.
7. There is a factual dispute which would only affect the claim for statutory redundancy pay which is whether the claimant commenced employment on the 1st of March 2003 or the 16th of February 2004, in other words whether he has 19 full years employment or 18. The claimants evidence is that he recalls specifically that he began on the 1st March 2003 as had previously been living in Scotland and had returned and took up the job with the respondent. The respondents evidence is that they have checked their pay records and the earliest that the claimant is recorded as being paid it is the 16th of February 2004. On any analysis the claimants has more than 12 years continuous employment and is therefore entitled maximum statutory notice pay.
8. In terms of the calculations both parties are content that I use the respondents figures as being the most accurate which gives a weekly wage of £379.30. That gives statutory notice pay of £4551.60. In my judgement it appears to be more logical if the parties are agreed that the respondents records are the more accurate for earnings purposes, that I should use the date of 16th February 2004 the start date of employment and therefore the claimant it has 18 full years of employment. That would give a redundancy payment £9292 85.
9. In principle in my judgement those are sums to which the claimant is entitled.

Time Limits

10. However the primary limitation period for the claim for breach a contract in the failure to pay notice pay is three months from the date of dismissal which is 3rd June 2022. In respect of redundancy pay in order to give the tribunal jurisdiction one of the events set out in section 164 Employment Rights Act 1996 would had to have occurred within six months of the date of termination. It is not in dispute that none of those events occurred and it follows both claims have been presented out of time , the claim having been presented on 16th December 2022.
11. In respect of the redundancy pay claim I have the discretion to extend time if it is just and equitable to do so (s164(4) ERA 1996). In respect of the notice pay claim I can only extend time if I find that it was not reasonably practicable for it to have been presented within time, and that it was prevented that within a reasonable time thereafter. As the tests are different the answers as to whether time should be extended will not necessarily be the same in respect of both.
12. The claimant submits that the reason for the failure to take advice, and to submit a claim in time is that fundamentally he was aware of Mr Bishop having a diagnosis of a

potentially terminal illness, and he did not wish to burden him with pursuing these matters. It was only when he had not received anything after several months that he consulted a solicitor and discovered that he was entitled to both notice pay and redundancy pay but that he was out of time for presenting a claim. The claimant submits that in determining whether it is just and equitable to extend time that firstly his conduct was reasonable in not wishing to disturb Mr Bishop at a time when he was understood to be very seriously ill, and that other than losing a windfall defence there is no prejudice to the respondent particularly given that there is no fundamental dispute as to any of the factual events and therefore no question of the evidence being affected by any delay at all.

13. Equally in respect of notice pay the claimant accepts that the test is different but he contends that the reason for not presenting both claims is the same and that if it is just and equitable to extend time for the redundancy pay given that the same reason applies that that I should conclude that it's also was not reasonably practical to have presented the claim within time.
14. The respondent submits that essentially for the reasons set out above that this is a claim which may be soundly based legally, but is not morally justifiable and that in those circumstances I should not extend time in respect of either claim. In addition they contend that even if it was reasonable of the claimant not to contact Mr Bishop that there was no reason he could not have contacted Mr Foreman and there is no good reason for the delay.

Time Limits – Redundancy Pay

15. Where the test for extending time is whether it is just and equitable to do so, the burden of proving that it is just and equitable to extend time to enable a claim to proceed is on the person seeking the extension. In Robertson v Bexley Community Centre t/a Leisure Link (2003) IRLR 434, the Court of Appeal stated that when employment tribunals consider exercising the discretion under s123 Equality Act 2010, '*there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.*'
16. Some relevant factors can be derived from s33 Limitation Act 1980 (as identified in British Coal Corporation v Keeble (1997) IRLR 336). S 33 Limitation Act 1980 requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, to -

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had co-operated with any requests for information.

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

17. However, the ET has a broad discretion and those factors should not be considered or applied mechanistically; as is set out in Adedeji v University Hospitals Birmingham NHS Trust (2021) EWCA Civ 23:- *“Keeble did no more than suggest that a comparison with the requirements of section 33 might help “illuminate” the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and “the Keeble factors” and “the Keeble principles” still regularly feature as the starting-point for tribunals’ approach to decisions under section 123 (1) (b). I do not regard this as healthy... “ and “Rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion... The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular “the length of, and the reasons for, the delay”. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking”.*

18. In this case relation to the question of why the claims were submitted out of time the claimant relies on the reason set out above, that he did not want to contact Mr Bishop when he understood him to be seriously ill. Even if that is not a good reason, as is asserted by the respondent, I have still have to balance that factor with any prejudice to the respondent. Applying Adedeji (above) in my judgement the fact that the claims were submitted out of time without a good reason for doing so is only one factor; the length of the delay is not great and it appears to me that here is no evidential prejudice to the respondent. I accept that other than the loss of the windfall defence there is no prejudice, as the facts which give rise to the entitlement to redundancy pay are not in dispute.

19. Looked at overall and balancing these factors I am persuaded that it would be just and equitable to extend time in respect of the redundancy pay claim.

Time Limits / Notice Pay

20. The test in respect of the notice pay claim is different, whether firstly it was reasonably practicable or the claim to have been presented in time.

21. The claimant does not assert that there was any impediment to him doing so other than his reluctance to contact Mr Bishop when he was seriously ill. As set out above the respondent does not accept this saying that it was always open to him to contact Mr Foreman. Even if that is incorrect there was clearly no impediment to the claimant researching his rights on dismissal for redundancy. In the circumstances it appears to me impossible to conclude that it was not reasonably practicable to have brought the claim in time.

Conclusion

22. Whilst this gives the unfortunate conclusion that time is extended in respect of one claim but not the other that is the consequence of the different tests I have to apply..
23. For the reasons set out above judgment is entered for the statutory redundancy payment.

Employment Judge Cadney
Date: 7 March 2023

Judgment sent to the Parties: 21 March 2023

FOR THE TRIBUNAL OFFICE