



EMPLOYMENT TRIBUNALS

BETWEEN

Daniel Binks

Claimant

AND

Nicholls Repair Shop Limited

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT Southampton ON
By Cloud Video Platform

22 June 2023

EMPLOYMENT JUDGE H Lumby

Representation

For the Claimant: In person
For the Respondent: Did not attend

JUDGMENT

The judgment of the tribunal is that the claimant's claim for a statutory redundancy payment is within time and he is entitled to a statutory redundancy payment of £6,240

REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims were presented in time. The claimant has brought a claim for a statutory redundancy payment.
2. I have heard from the claimant. The respondent had not filed an ET3 and did not attend. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties. It should be noted that I have

reconsidered the conclusions I reached at the hearing. The parties were invited to make further submissions on the revised conclusion and the amount of the statutory redundancy payment but no responses were received, despite chasing.

Facts

3. The claimant was employed by the respondent from 15 April 2013 until 29 March 2022. He worked as a sprayer in the respondent's repair shop. The respondent was owned and run by Mr Colin Nicholls.
4. In March 2022 the respondent took steps to close the business, selling off the equipment and giving the three employees two weeks' notice.
5. The claimant was informed by Mr Nicholls that he would be given an insolvency number to enable him to apply for a redundancy payment. The claimant chased Mr Nicholls for the allegedly required number over a number of weeks, repeatedly being told that it would be available the following month and that the accountant was not returning his calls. The claimant eventually asked to contact the accountant direct and was given his number.
6. The claimant was unaware at that point that the respondent was liable for any redundancy payment and was being misled by the respondent. He also believed that he had six months to bring a claim at the tribunal and was unaware of the requirements to obtain a conciliation number from ACAS.
7. On 20 August 2022, the claimant telephoned the accountant but was informed that he had a conflict of interest with the claimant and could not advise him what to do. The claimant realised on that date that he had been misled by the respondent and he needed to bring a claim.
8. The claimant therefore brought a claim to the Employment Tribunal in late August 2022 but this was rejected on 8 September 2022 as he did not have an ACAS conciliation number. At that point he realised he needed to go through the ACAS early conciliation process before bringing a claim. He began that process on 26 January 2023 and completed it on 13 February 2023, bringing this claim on 17 February 2023.
9. The claimant was 52 years old and the time of his dismissal and had worked for the respondent for eight years. His pay before tax and deductions was £520 per week.

Law

10. Having established the above facts, I now apply the law.
11. One of the relevant statutes is the Employment Rights Act 1996 ("the Act"). Under section 164(1) of the Act an employee will lose the right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date, he makes a claim for payment by notice in writing to his employer or otherwise refers the matter to an employment tribunal.
12. However, under section 164(2) of the Act, an employee's right to a redundancy payment does not necessarily expire at the end of the six-month period if none of the specified events has taken place. If during the six months immediately following the initial six-month period he or she makes a written claim for payment to the employer or refers a redundancy pay claim to a tribunal or presents an unfair dismissal complaint to a tribunal, then the tribunal has a discretion to award a redundancy payment. This discretion is to be exercised if it appears to the tribunal to be just and equitable that the employee should receive a redundancy payment, having regard to the reason shown by the employee for his or her failure to take any of the specified steps earlier and to all the other relevant circumstances.
13. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
14. The Employment Tribunal Rules of Procedure are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). Rule 10(1)(c) provides that the Tribunal shall reject a claim if it does not contain all of the following information - (i) an early conciliation number; (ii) confirmation that the claim does

- not institute any relevant proceedings; or (iii) confirmation that one of the early conciliation exemptions applies.” Rule 12 deals with rejection of claims and provides that the claim form is to be referred to an Employment Judge for consideration of potential rejection if the claim form is (for example and as set out in Rule 12(1)(d)) “one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply.” Rule 12(2) provides that the claim shall be rejected if the Employment Judge considers that the claimant is of a kind so described. The rules are prescriptive and no discretion is afforded to the Employment Judge.
15. The question of whether it is just and equitable to award a redundancy payment outside the initial six-month time limit should be considered having regard to the statutory authorities. The EAT considered this provision in Paul v C and J Stone Ltd EAT 209/80, held that some account needed to be taken of the merits of the employee’s claim — i.e. how likely he or she was to succeed in a claim for a redundancy payment if it allowed the claim to proceed.
 16. A case with not dissimilar facts to this case is Gadd v Maiseys (Kenilworth) Ltd ET Case No.5994/78 where the employer and the company accountants promised several times to do something about a redundancy payment but then refused to pay after the six-month time limit had passed. The employee referred her claim to a tribunal promptly after the refusal and the late claim was allowed.
 17. There is also an analogy with time limits for claims for unfair dismissal – here the only possible exception to the rule that cases must be brought within the applicable time limit is where there has been deliberate fraud on the part of an employer which has caused the employee to suffer a real injustice by missing the time limit — Grimes v Sutton London Borough Council 1973 ICR 240, NIRC. It is probable that, in the case of fraud, time would not begin to run until the fraud was, or ought to have been, discovered by the claimant.

Conclusions

18. In this case the claimant’s effective date of termination of employment was 29 March 2022. The initial six month time limit therefore expired at midnight on 28 September 2022. The claim has therefore been brought outside the initial six month period prescribed by section 164(1) of the Act.
19. However, the tribunal has a discretion to award a redundancy payment in the following six months if certain conditions are satisfied, including the making of a claim to the tribunal within that period. That second six month period expires at midnight on 28 March 2023. The claimant made his claim within that period (on 17 February 2023 having completed the ACAS early conciliation process) and therefore the tribunal has a discretion to consider whether to allow a payment.
20. The tribunal considered whether it is just and equitable that the claimant should receive a redundancy payment. The reason for the claimant’s delay in applying within the initial period was that he was unaware of the correct process and had been misled by the respondent into thinking he had to wait for insolvency number before applying. He realised on 20 August 2022 that he had been misled and needed to bring a claim. He was however unaware of the ACAS early conciliation requirements until his initial application was rejected on 8 September 2022. It also considered the strength of the claimant’s claim – the respondent has not responded to the claim and has not compensated the claimant for the loss of his job; the likelihood of success of a claim brought within time would therefore appear to be high. The prejudice suffered as a result of the misrepresentations mean that it is just and equitable that the claimant should receive a statutory redundancy payment.
21. Alternatively, applying Grimes v Sutton London Borough Council, the tribunal finds that the claimant was misled by the respondent’s misrepresentations and would suffer a real injustice as a result by missing the deadline to bring proceedings. As a result, this misrepresentation meant that time did not start to run for the six month period until he became aware of this; this occurred on 20 August 2022 and so the application needed to be made by 19 February 2023. The application was made on 17 February 2023, two days

- before the extended initial period expired. Accordingly, on this basis the case was also brought within the permitted time period, entitling the claimant to a statutory redundancy payment.
22. In conclusion therefore, the tribunal has jurisdiction to consider this claim.
 23. I have therefore considered the amount of the statutory redundancy payment to which he is entitled. He is entitled to 12 weeks pay on the basis that his eight complete years of employment with the respondent were all when he was over 41 years old; his entitlement is therefore eight weeks multiplied by 1.5, giving 12 weeks. His weekly pay of £520 before tax and deductions was below the statutory cap and therefore is all to be taken into calculating the total due; this is therefore calculated by multiplying £520 by 12, giving a total due of £6,240.
 24. The claimant is therefore entitled to a statutory redundancy payment of £6,240.
 25. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 3 to 9; a concise identification of the relevant law is at paragraphs 10 to 17; how that law has been applied to those findings in order to decide the issues is at paragraphs 18 to 24.

Employment Judge H Lumby
Dated 18 August 2023

Judgment sent to Parties on
05 September 2023 By Mr J McCormick

For the Tribunal Office