



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr D J Parnall

AND

Respondent

Smith & Reed (SW) Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin

ON

25 January 2019

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Did not attend

For the Respondent: Mr Aireton, Consultant

JUDGMENT

The judgment of the tribunal is that:

1. The claimant was not an employee of the respondent and his unfair dismissal claim is therefore dismissed; and
2. In any event, the claimant's claims were presented out of time and are hereby dismissed.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims were presented in time.
2. The claimant was unable to attend this hearing, but confirmed by email dated 21 January 2019 that he was "happy for the hearing to go ahead in my absence" bearing in mind that the claimant had previously submitted written representations. I have heard from Mr Aireton on behalf of the respondent.
3. I find the following facts proven on the balance of probabilities after considering the representations made by the parties and after having considered the relevant documents before me.
4. The respondent is a recruitment agency which supplies recruitment services to a wide range of companies in the South West. Its correct name is Smith & Reed (SW) Ltd and the record is amended accordingly. It asserts that the claimant was engaged with it as an

- agency worker, but not as an employee, between 24 May 2017 and 15 June 2017. In May 2017 the respondent offered the claimant an assignment to work at Aluminium Castings Ltd, otherwise known as Crichton Manufacturing. Following a meeting with Mr Crichton, Aluminium Castings Ltd offered to employ the claimant and he commenced employment with that company on 19 June 2017. An incident arose between the claimant and another agency worker namely Mr Fletcher on the afternoon of 19 June 2017. An altercation ensued. It seems that Aluminium Castings Ltd then dismissed the claimant with effect from 21 June 2017. The claimant subsequently issued Employment Tribunal proceedings against Aluminium Castings Ltd under tribunal reference number 2420695/2017 ("the First Proceedings"). His claim under these First Proceedings for detriment arising after the termination of his employment on the ground of his having raised a protected public interest disclosure was successful.
5. The claimant subsequently issued these second proceedings against the current respondent Smith & Reed (SW) Ltd on 30 August 2018. It relies on an ACAS Early Conciliation Certificate under which ACAS was notified on 15 September 2017 (Day A), and the date of issue of the EC Certificate was 2 October 2017 (Day B). The claim arises from the same facts as the First Proceedings, namely the altercation with the other employee, and the claimant's dismissal. The claimant claims that he has been unfairly dismissed, which he has also described as a constructive dismissal, and claims detriment arising from whistleblowing.
 6. The respondent denies the claims and asserts inter alia that it was never the claimant's employer; that the claimant had not explained what public interest disclosures he claims to have made and why these might be protected; what detriment is alleged to have been suffered; and why the respondent can be said to be liable in any way, particularly as the claimant has pursued other proceedings against his former employer.
 7. The matter was listed by the Tribunal of its own volition for this preliminary hearing to determine whether the claims were presented out of time. In addition, the respondent has made an application to strike out the claimant's claims under Rule 39 because the claims have no reasonable prospect of success.
 8. Having established the above facts, I now apply the law.
 9. The relevant statute is the Employment Rights Act 1996 ("the Act").
 10. Under section 94(1) of the Act the right not to be unfairly dismissed is limited to employees.
 11. Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
 12. The claimant has also brought a claim for detriment arising from (an unspecified) protected public interest disclosure under section 47B of the Act. The right to bring a claim is not restricted to employees, and includes workers. Furthermore, section 43K of the Act extends the meaning of "worker" to include someone who works or worked for a person in circumstances in which he is or was introduced or supplied to do that work by a third person.
 13. Under section 48(3) of the Act an employment tribunal shall not consider such a complaint unless it is presented (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
 14. Subsection 18A(1) of the ETA provides that: "Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter." Subsection 18A(4) ETA provides: "If - (a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or (b) the prescribed period expires without a settlement having been reached, the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant."

- Subsection 18A(8) ETA provides: “A person who is subject to the requirements in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).
15. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
 16. In this case the claimant was not an employee of the respondent and accordingly his claim for unfair dismissal is dismissed. In any event I would have dismissed it as being out of time for the same reasons which apply to the remaining detriment claim.
 17. In this case the claimant's effective date of termination of his engagement with the respondent was 15 June 2017 and the effective date of the termination of his employment with Aluminium Castings Ltd was 21 June 2017 (as confirmed in the claimant's originating application). The three month time limit therefore expired at midnight on 14 September 2017, or possibly 20 September 2017. The ACAS Early Conciliation Certificate relied upon commenced on 15 September 2017 (Day A) and was issued on 2 October 2017 (Day B). If the time limit commences with effect from 15 June 2017 it had already expired the day before Day A. If the correct commencement date for limitation purposes is slightly later on 21 June 2017, then the normal three month time limit would have expired between Day A and Day B, and one month is therefore added to Day B so that limitation is extended from 2 October 2017 to 2 November 2017. The claimant failed to issue these proceedings until nearly 10 months later on 30 August 2018. The claims were therefore submitted approximately 10 months out of time.
 18. The claimant has not adduced any grounds for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit.
 19. Accordingly, I find that it was reasonably practicable for the claimant to have issued his unfair dismissal and public interest disclosure detriment claims within the period of three months. He has failed to do so. The claims are out of time and are therefore dismissed.

Employment Judge N J Roper
Dated 25 January 2019

Judgment sent to Parties on
28 January 2019