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# EMPLOYMENT TRIBUNALS

| ***Claimant*** | | ***Respondents*** |
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| Mr J Bradley | **AND** | Breanstar Limited<br>[in members voluntary liquidation] |

**Heard at**: London Central **On**: 1 February 2019

**Before:** Employment Judge Palca

**Representation**
**For the Claimant:** Mr P Burke, Lay Representative
**For the Respondent:** Mr A Watson, of Counsel

## JUDGMENT

The Claimant's claims are struck out on the basis that they have not been presented within time and there is no reason to extend time. In addition, the Claimant's claims for interest are struck out on the basis that the Tribunal has no jurisdiction to hear them.

## EXTENDED REASONS

Parties

1. The Claimant was a construction worker employed by the Respondent in 2008. He claims that he has never been informed that his employment has terminated, and that therefore it continues. The Respondent claims that the Claimant's employment was terminated on 5 April 2012. The Respondent is a property management, investment and development company which went in to members voluntary liquidation on 5 May 2016. Section 87 of the Insolvency Act 1986 provides that in cases of voluntary winding up the company shall from the commencement of the winding up cease to carry on its business, except so far as maybe required for its beneficial winding up, though the corporate state and powers of the company continue to exist until dissolution.

Evidence

2. The Claimant did not attend the Hearing. There was a witness statement produced for the Claimant, which the Tribunal read. However, given the inconsistencies between the witness statement and several comments made on behalf of the Claimant in formal documents such as ACAS submissions and his ET1, the Tribunal did not attach significant weight to the statement. The evidence for the Respondent was given by Mr A Thorne, the Company Secretary of Creative Accounting Services Limited ("Creative"), a company which provided accounting and payroll services to the Respondent, and Mr J Aaron, the Respondent's liquidator. The Tribunal had a bundle of documents, and a bundle of authorities.

Issues

3. The key issue for the Tribunal to determine is whether or not the Claimant's claims have been brought within time. If not, was it reasonably practicable for the case to have been presented in time, and if it was not reasonably practicable, the Tribunal must consider whether the claims were presented in such further time as it considers reasonable.

4. Additionally, the Tribunal should consider whether it had jurisdiction to hear the Claimant's claims in any event.

Facts

5. One of the problems that the Tribunal faces in this case is that there is no direct relevant evidence. The Claimant did not give evidence. Mr Bard, with whom the Claimant made arrangements, died in 2017. There are also very few material documents. There is no contract of employment, no P45, and no communications between the parties at the material time. The only relevant documents are the Claimant's pay slips which end in March 2012.

6. There are material inconsistencies in the evidence given by on or behalf of the Claimant. In a document submitted to ACAS as part of the conciliation process before these proceedings began, ACAS was told that the Claimant was, unknown to him, employed by the Respondent. The document states that the Claimant at that stage in 2018 was not aware for what exact reasons he was employed by the Respondent but only became aware of it when he applied for a UK state pension. ACAS was informed that the Claimant sought payment in full of all net pay due to him arising out of his employment and payment of any statutory redundancy amounts due to him. In the Claimant's ET1 submitted to the Tribunal on 13 August 2018 the Claimant claims that he remained employed by the Respondent under a contract by which he was to be paid £20,000 per annum, but that he never received any of the payments due.

7. In documents submitted in the liquidation of the Respondent the Claimant claims interest on salary due to him, compounded, from 2008 onwards, thereby indicating that the Claimant's position was that he should have been paid at the material time.

8. In letters dated December 2018 it is claimed on the Claimant's behalf that the Claimant had agreed with the Respondent that he would work for the company but would be paid at a later date in an accumulative arrangement as the net pay due to him was being used by the company to finance its projects.

9. This argument had not been advanced before and it is frankly implausible, given the circumstances where the Tribunal was being told that the Claimant was not well-funded and where, on the voluntary liquidation of the Respondent, around £50 million has been paid to its shareholders. The Tribunal was also told that regular very large payments in cash were being made by Mr Bard, who was the Manager of the Respondent and part owner, to suppliers and for wages.

10. The Employment Tribunal therefore gives little credence to the witness statement of the Claimant who was not present either to swear to its accuracy or to be cross-examined upon it.

11. The facts in this case must therefore be decided on the balance of probabilities.

12. The Tribunal is uncertain exactly what services the Claimant performed for the Respondent. His nephew Mr Floyd was an employee of the Respondent and also separately Project Managed construction projects for the Respondent using a separate company. The Claimant claims to have provided specialist services to Mr Floyd. The evidence given to the Tribunal by Mr Thorne was that before 5 April 2012 Mr Thorne, who provided accounting and payroll services to the Respondent and whose employer company was an alternative Director of the Respondent, would see the Claimant from time to time on various of the Respondent's construction sites under the control of Mr Floyd, and that he would also see him from time to time in Mr Floyd's van. Mr Thorne's evidence was that he never saw the Claimant after 5 April 2012.

13. It is now accepted by both parties that the Claimant was employed by the Respondent form 2008 until 5 April 2012. Pay slips were produced showing payments of PAYE which were made to HMRC and payments due to the Claimant marked as payable by cheque. There were no payments of National Insurance since even when the Claimant joined the Respondent he was 67 and therefore beyond the age at which National Insurance is payable.

14. The Claimant claims he was never paid any money whatsoever. Mr Thorne's evidence was that he believed that the Claimant's net pay was paid in cash, probably via Mr Floyd, to whom Mr Bard would frequently give money. It is clear from the evidence of Mr Thorne that the Claimant's services were physically provided to the Respondent on site.

15. In April 2012 Mr Thorne was told by Mr Bard that Mr Floyd had told Mr Bard that the Claimant had stopped working for the Respondent and had returned to Ireland. There is no dispute that from that date the Claimant performed no work for the Respondent. The Claimant claims that he was on call. This seems

surprising given that he worked on site and had returned to Ireland rather than being available for work in England.

16. Mr Bard is unfortunately dead, and so no relevant information can be ascertained in relation to arrangements made between him and the Claimant. It is perhaps significant that the Claimant did not make any claims to have been under-paid until Mr Bard had died.

17. Based on the fact that the Claimant appears when he worked for the Respondent to have carried out physical work on site and that he returned permanently to Ireland in 2012 it seems logical that either his employment ended then by agreement with Mr Floyd who was at the time was an employee of the Respondent, or that he repudiated the contract by rendering himself unable to work by moving to Ireland, which repudiation was accepted by the Respondent stopping keeping him on the payroll and stopping providing him with pay slips.

18. The Tribunal accepts the Respondent's argument that entry into a contract including a clause whereby the Claimant would be on call, albeit living in Ireland, was implausible and therefore on the balance of probabilities the Employment Tribunal concluded that no such clause existed and that the Claimant's employment terminated on 5 April 2012.

19. Alternatively, if the Tribunal is wrong on that point, the Tribunal notes that the Respondent stopped trading in late 2015 and went into members voluntary liquidation, on 5 May 2016. From that date it ceased to carry on business, save as necessary for a beneficial winding up. Since the company had already ceased trading it had no need for employees after that date and as an alternative to the Tribunal's primary view, the Claimant's employment must have ended on the date the company went in to liquidation.

20. The Claimant was aware that the Respondent was in liquidation at least by July 2017 when he filed proof of debt. From that date the Claimant's representative Mr Burke began communicating with the Respondent. On 21 February 2018 the Claimant signed a letter formally instructing Mr Burke to represent him in respect of net payroll, interest and redundancy. It is implicit at that point that the Claimant knew that he was no longer employed by the Respondent.

21. On 1 May 2018 Mr Thorne wrote to whom it may concern confirming that the Claimant had ceased to be an employee of the Respondent on 5 April 2012.

The Law

22. Section 23 of the Employment Rights Act 1996 provides that complaints of unlawful deductions from wages (including nonpayment of wages) should be presented before the end of the period of three months beginning with, where there is a series of deduction of payments, the last deduction or payment in the series. Section 23(4) provides: -

> "*Where the Employment Tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end*

*of the relevant period of three months, the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable".*

23. Section 164 of the Employment Rights Act 1996 provides that: -

(1) *An employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date [essentially the effective date of termination of employment]*

*(a) the payment has been agreed and paid,*

*(b) the employee has made a claim for the payment by notice in writing given to the employer*

*(c) a question as to the employee's right to, or the amount of, the payment has been referred to an Employment Tribunal or*

*(d) a complaint relating to his dismissal has been presented by the employee under s.1.*

*(2) An employee is not deprived on his right to a redundancy payment by subsection 1 if, during the period of six months immediately following the period mentioned in that subsection, the employee*

*(a) makes a claim for the payment by notice in writing given to the employer,*

*(b) refers to an Employment Tribunal a question as to his right to, or the amount of, the payment or*

*(c) presents a complaint relating to his dismissal under s.111.*

*and it appears to the Tribunal to be just and equitable that the employee should receive a redundancy payment.*

*(3) In determining under subsection 2 whether it is just and equitable that an employee should receive a redundancy payment an Employment Tribunal shall have regard to*

*(a) the reason shown by the employee for his failure to take any such step as is referred to in subsection 2 within the period mentioned in subsection 1 and*

*(b) all the other relevant circumstances.*

24. Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that Employment Tribunals shall not entertain a complaint in respect of an employee's contract claim unless it is presented

*"(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim or*

*(b) where there is no effective data of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated or …..*

*(c) where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within which ever of those periods is applicable, within such further period as the Tribunal considers reasonable.*

Submissions

25. The Claimant's representative submitted that the Claimant had been employed by the Respondent. There was no evidence to show that his employment had ended in 2012. The nature of his employment was that he was not paid on a monthly basis. There are no accounting records to show that he was paid at all. The arrangement was that he was to be paid at some point later. The Claimant only learnt that he had been dismissed on receipt of a letter from Mr Thorne dated 1 May 2018 that he was not on the payroll. The Claim was therefore being presented in time. The reason for discrepancies in the Claimant's evidence is that he had been very concerned and afraid that telling the truth might have tax or other penal consequences.

26. The Respondent submitted a detailed list of written submissions. In essence, they were that the Claimant's employment had ended on 5 April 2012 either by agreement, or because the Claimant was in breach (relying on the case of **Geys v Societe Generale [2012] UK SC63B**), or by renunciation (relying on **Universal Cargo Carriers Corporation v Citati 1957 CA 401**), or by abandonment (relying on **Andree v Marine Translation Limited CA 1981 1QB 694**). On any of those bases, the Respondent argued that there was no way that one could construe a contract persisting after 2012.

27. Alternatively, the Claimant's claim appeared to be that he was advising another of the Respondent's employees, Mr Floyd. Mr Floyd ceased to be employed by the Respondent on 28 February 2015, and the Claimant's employment would have ceased at that point. In the further alternative, the company ceased trading in 2015 and was placed in liquidation on 5 May 2016. By virtue of s.87 Insolvency Act 1996 the company would have ceased to carry on its business from that date, save insofar as might be required for its beneficial winding up. Since the company's activities had already ceased before that date there was no reason for anybody to continue to be employed after that date, particularly on the construction side. Had anybody continued to be employed by the company at its liquidation, which they were not, their employment would in any event have come to an end by reason of frustration.

28. It appeared that the Claimant had known that the Respondent had gone in to liquidation during 2016. On 5 July 2017 he submitted proof of debt which acknowledged that the date of the resolution for voluntary winding up was 5 May 2016, so he was clearly aware that the company was in liquidation from at least that point.

29. Finally, the Respondent argued that the Tribunal had no jurisdiction to award an interest payment nor to increase an award by 20% to pay for the Claimant's representative.

Conclusion

30. The Claimant's employment with the Respondent began in 2008 and ended on 5 April 2012. It was terminated by virtue either of agreement or repudiatory breach. His effective date of termination is therefore 5 April 2012.

31. The fact that the Claimant performed no work for the Respondent, moved to Ireland and did not complain of nonpayment of wages supports the Tribunal's conclusion. The argument, only advanced by the Claimant to the Respondent or the Employment Tribunal in December 2018 that it had been agreed that the Claimant's claim pay would be postponed until some unspecified future date is implausible and is therefore not accepted.

32. Alternatively, the Claimant's contract of employment ended by frustration on 5 May 2016 when the Respondent company went into members voluntary liquidation and ceased all business activity.

33. On wages act and contract claims, claims should be brought within three months either of, in practice, the last date that payment of wages was due; or within three months of the effective date of termination of employment; or the last day the Claimant worked for the Respondent, in the first case 30 April 2012 and in the second 5 April 2012. The Claimant is therefore clearly out of time to bring claims of breach of contract or nonpayment of wages. The question of whether time should be extended is a very strict test in both circumstances. Extensions are only granted if the Tribunal accepts that it had not been reasonably practicable for the Claimant to have submitted his claim on time and that it had been submitted within a reasonable time thereafter.

34. The Tribunal had no evidence before it whatsoever as to whether or not it had not been reasonably practicable for the Claimant to have submitted his claim on time. What is certain is that he appreciated that he had a claim by mid-2017 at the latest. His claim was not brought until 13 August 2018, over a year after that point. This is a very long time in all the circumstances, particularly given that the appropriate time limit is three months. The Tribunal concluded that there was no evidence before it that it had not been reasonably practicable for the claimant to have brought the claims within time, and that in any event once it was clear that the Claimant was aware of the claims in May 2017, they had not been presented within a reasonable time thereafter.

35. The same arguments apply assuming that the Claimant's contract of employment ended on 5 May 2016. Again, proceedings should have been brought within three months, and were not with no explanation as to why it had not been reasonably practicable to have done so. Again, the material facts were known at least by mid-2017 and no claim was brought until 2018. This was not a reasonable extension of time.

36. There is also the issue whether or not fair hearing could be possible. The events in question took place at some point between 2008 and 2012, when the Claimant's contract and any variation might have been agreed. The Respondent's witness is Mr Bard, who is very sadly now longer with us. The Respondent is therefore not able to give evidence and there is no relevant documentary evidence.

37. So far as the redundancy claim is concerned, there is no evidence that the Claimant might have been made redundant in 2012. The Respondent's business was still thriving. At that point the Claimant's contract ended by agreement or by repudiation, not by reason of redundancy.

38. If his contract ended in 2016, then it is arguable that the Claimant might have been made redundant. In effect, any claim for redundancy must be brought within at the outside twelve months of the date of termination of employment. The Claimant therefore had at the latest until 4 May 2017 to bring his claim. He did not do so. Again, there is no reason to extend the time period.

39. In any event the Tribunal noted that it has no power to award interest on the matters that are the subject to the claim and therefore any claim for interest would equally have been dismissed.

40. For all the reasons set out above the Claimant's claims are struck out.

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Employment Judge Palca

Dated: 14 February 2019

Judgment and Reasons sent to the parties on:

15 February 2019

For the Tribunal Office