



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Booth

v

**Delstar International Ltd t/a SWM
International**

PUBLIC PRELIMINARY HEARING

Heard: By Skype for Business **On: 15 April 2020**

Before: Employment Judge JM Wade

Representation:

Claimant: Mr S Healy, of Counsel

Respondent: Ms R Mellor, of Counsel

JUDGMENT

- 1 The claimant's unlawful deduction from wages complaint is dismissed on its withdrawal before me today.
- 2 The Tribunal has jurisdiction to determine the claimant's claims: he has established that he was entitled to present these proceedings within Section 18A of the Employment Tribunals Act 1996.
- 3 It is just and equitable to extend time to 20 December 2019 for the presentation of factual complaints 1 to 3 as alleged Equality Act contraventions.

REASONS

Introduction

1. This has been a remote hearing to which the parties consented. The form of remote hearing was Skype for Business. A face to face hearing was not held because Presidential Guidance had directed that could not occur until July at the earliest. The Regional Judge had directed conversion to this Skype hearing to determine limitation issues and other matters arising.
2. The parties said this about the process: they considered the Skype hearing to have been satisfactory and fair in circumstances of having the evidence of only one witness (the claimant) to hear.
3. This judgment was delivered on an extempore basis but I provide these written reasons today from memory and without reference to the recording of the proceedings in order to assist the parties (it is not currently clear how transcription of judgments delivered at such hearings is to operate in this Tribunal).

4. The documents before me were the pleadings and orders in the case, and a core bundle of relevant documents of including grievances and the like. I also had the claimant's witness statement providing evidence in support of me setting a just and equitable time limit and allowing all claims to proceed. I also heard oral evidence from him: he was subject to cross examination by Ms Mellor on the contents of his statement. The claimant suffers from visual and memory impairment. Yesterday we conducted a "test-bed" hearing with all parties present to discuss and test the technology. Today's substantive hearing was recorded.

The Issues

5. In February of this year an Employment Judge identified that a one day public hearing would address: clarity in the claims; whether the Tribunal had jurisdiction to determine the claims in view of the Early Conciliation provisions; whether the Tribunal could consider the claims given the statutory time limits; and whether sums sought by the claimant properly fall within the definition of "wages".
6. In preparation for this hearing Mr Healy's skeleton argument, and Ms Mellor's concession on behalf of her client, narrowed those issues.
7. The skeleton precisely identified the complaints from the pleadings; the deductions from wages complaint was not pursued by the claimant; the respondent was satisfied that the claimant had complied with the ACAS conciliation provisions, or at least accepted on the information in the bundle that this was not a case of the Patel¹ kind, because it was clear there were communications to the claimant by both "SWM" and "Delstar" and he could have been unclear about the correct name of the employing company.
8. I indicated jurisdiction remains a matter for me, however, even if the advocates are content the EC provisions have been observed.

Findings of fact about the broad chronology

9. The claimant enjoyed long and stable employment with Smith & Nephew at its Gilberdyke site near Hull back to 1994 or so. From at least 2007 he had occupied the post of manufacturing technician.
10. On or around 1 January 2015 Smith & Nephew sold the division in which he worked to an American group, of which the respondent is one such company. The division traded as "SWM", and there were various communications setting out transfer of the claimant's terms and conditions and so on referring to both SWM and Delstar.
11. It is fair to say that alongside a defined benefit pension scheme the claimant's terms and conditions were such that they offered considerable comfort should life take a turn for the worse, whether that be ill-health or otherwise.
12. The claimant did encounter ill-health, an embolism, a mini stroke, a kidney condition and impairment to his vision and memory. That series of events and treatment resulted in considerable absence from work from February 2017, such that the claimant was eventually considered by occupational health to be unlikely to be able to return to his post.
13. The chronological factual complaints that he presents are as follows: –
 - 13.1. in the latter part of 2017 and early 2018 a failure to apply for income protection benefit for him;
 - 13.2. on 30 January 2018 and 5 February 2018, refusing to allow family members to accompany him at grievance meetings;
 - 13.3. on 5 February 2018, the respondent attempting to dismiss him;

¹ [2019] UKEAT 0286 – 18 - 1309

- 13.4. and throughout and continuing to the present day, the respondent failing to make pension contributions of 13.5% of his earnings, but instead, contributing only 7%.
14. The legal complaints are various forms of disability discrimination. The factual territory covered by the documents before me is considerably more complex (and to some extent covering a great deal of irrelevant territory), but the claimant's pleaded complaints are clear and concise. Before the meetings above in January and February 2018 the claimant had raised complaint and grievance about a number of matters relating to his treatment and that explains the breadth in the documents.
 15. In April 2018, on the advice of his Unison full-time official, he raised further grievances including addressing the income protection issue and the alleged refusal to permit family members, his wife, to accompany him.
 16. The claimant was informed around 14 September 2018 that his income protection claim had been made and would be backdated to 7 August 2017. He was also permitted to have family members present in meetings; but he had been without pay for a considerable length of time and he considers this and other treatment has worsened or caused further injury to his health.
 17. The outcome of his appeal against aspects of his grievance determination took from October 2018 to October 2019 to be finally communicated in writing.
 18. He received a call from his union representative in September 2019, informing him that he would receive an outcome in writing (and I infer, that it was not what he wished); he immediately commenced ACAS early conciliation identifying the name of his employer to ACAS as SWM International Ltd, which was his belief at the time, at the Gilberdyke address,.
 19. From that early conciliation notification on 10 September 2019, the claimant received a certificate on 15 October 2019. He had previously, certainly around August 2019 indicated his intention to seek legal advice beyond that available through his union; his union representative, the full-time official had retired, during this period, and he had been without advice for some 4 months or so.
 20. The claimant knew or believed that the respondent may be committing contraventions of the Equality Act during 2018 and 2019, but took advice that he must pursue the internal procedures first. He was in difficulty accessing legal advice beyond that available to the union because of a lack of funds.
 21. In relation to the pension contribution issue, the claimant was unable to obtain his original Smith & Nephew contract of employment from the respondent employer, and he felt that throughout, the measures in place to protect him in the circumstances he faced were not observed by the respondent.
 22. 2 days before his claim was presented by solicitors on 20 December 2019, they sought early conciliation on his behalf also with the company they had identified as the likely employer, Delstar International Ltd, identifying an address in Belfast. The respondent was named in the claim form as Delstar International Ltd trading as SWM International and a Bristol address was also identified, with the claimant specifying his place of work at Gilberdyke.
 23. The second early conciliation certificate was not issued until 6 January 2020, and its number does not appear in the claim form.
 24. Discussion and Conclusions
 25. I have considered for myself the provisions of Section 18A of the Employment Tribunals Act 1996. I consider the claimant has complied with them in the providing

of information to ACAS and the provision by ACAS of a certificate to him identifying the respondent company prior to his instituting of proceedings. The difference in the words used to identify the respondent to ACAS in the first certificate and on the claim form, was the use of a trading, divisional, or badging name, with the claimant being very clear to both ACAS and on the claim form that all he sought was to identify his employing company as he knew it (and as it had been communicated to him). The Tribunal has jurisdiction to determine the complaints (subject to limitation). The second certificate, albeit a belt and braces approach, is to me a red herring. I agree with the advocates that there is no prohibition on the Tribunal determining any complaints between the parties which survive limitation.

26. As to that I was properly directed to the Limitation Act factors. The length of and reasons for the delay: the first three allegations are some 15 or 16 months or so out of time working from a limitation date of 11 June 2019 and possibly longer for the first allegation; the reason for delay is the seeking resolution through internal procedures relying on trade union advice, and when that became unavailable, independent legal advice. The facts of the allegations are well documented and not likely to be greatly in dispute; this will largely be a case of applying the law to those facts. The allegations are sparse and focussed. The respondent has adduced no evidence that it will be particularly prejudiced or that any evidence will be unavailable – this is not a case where the parties are relying on memory alone as is often seen in lengthy, stale Equality Act allegations about conduct or comments.
27. There may well be particular documents (from Smith & Nephew) going to the reason why in relation to the in time allegation, which are not available, but that complaint and the background to it is going to be heard in any event.
28. I do take into account the respondent's conduct in taking a year or so to determine the grievance appeal, which included complaints akin to these pleaded allegations. I also take into account that as soon as he learned an outcome would be with him in writing and was not to be in his favour, the claimant acted promptly to contact ACAS as he must do.
29. The fixing of a just and equitable time limit is a matter of my discretion, pursuant to the Equality Act. I cannot properly address the alternative means by which these complaints may have been presented in time - conduct over a period - because to do that I would have to determine the allegations. There is not any suggestion that the handling of the grievance appeal was itself an act of discrimination.
30. I take into account that the limitation period for personal injury complaints is three years, and breach of contract complaints, six years; the claimant pursues complaints which relate to considerable sums to him, when one takes into account the compounding of pension contributions in a defined contribution scheme, in the circumstances in which he finds himself, which perhaps are pursuable in a different forum. Equally, his suggestion of further ill health and a theme (although not expressly pleaded) of personal injury caused by alleged contraventions further emphasises the importance of these proceedings between the parties.
31. There can be a fair hearing of these discreet complaints - it was not suggested otherwise. I also take into account that the claimant presents with disability throughout this period, although he was able to communicate by email and lodge grievances and so on. Nevertheless, it is clear he required support to raise these issues and in all the circumstances I exercise my discretion, exceptionally, to fix a just and equitable time limit of 20 December (when the claims were presented) in relation to the complaints related to factual allegations 1 to 3.

Employment Judge JM Wade

15 April 2020