



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Ms C McGrath

Plexus Law Limited

PRELIMINARY HEARING

HELD AT London South

ON 20 February 2017

EMPLOYMENT JUDGE BALOGUN

Appearances

For Claimant: In Person

For Respondent: Mr M Shrives-Wright, Solicitor

JUDGMENT ON PRELIMINARY ISSUE

1. The claim of failure to inform and consult pursuant to Regulation 15 of the TUPE Regulations 2006 is struck out for want of jurisdiction as it was presented out of time.
2. The breach of contract claim is in time and can proceed.

REASONS

1. By a claim form presented on 2 May 2016, the claimant brought complaints of breach of contract and failure to inform and consult pursuant to the TUPE Regulations 2006 (TUPE). The issue that I had to determine was whether the claim for failure to inform and consult was presented in time. It was conceded by the respondent that the breach of contract claim was in time.
2. Regulation 15(12) TUPE provides that the time limit for bringing a claim for failure to inform and consult is 3 months beginning with the date of the relevant transfer or such further period as the tribunal considers reasonable where it is satisfied that it was not reasonably practicable for the complaint to be presented in time.

3. "Relevant transfer" is defined at regulation 2 as a transfer or a service provision change to which the Regulations apply.
4. The claimant was employed as a Finance Business Partner for Parabis Management Limited, part of Parabis Group. The Group, which comprised a number of regulated and non regulated businesses, got into financial difficulties and decided to divest itself of a number of its business streams by selling their operating activities to multiple purchasers, one of which was the respondent.
5. Administrators were appointed for the parts of the business being sold and on 23 November 2015, the respondent entered into a sale and purchase agreement with the Administrators and a number of Group companies, including Parabis Management Limited, for the purchase of various business undertakings.
6. There was a dispute between the parties as to the date of the relevant transfer. The respondent contended that it was 23 November 2015 on the basis that the sale and purchase agreement expressly cites this as the transfer date. The claimant on her part argued that the transfer took place on 14 January 2016. This was the date her employment with Parabis Management Limited terminated and it is also the date the claimant contends she should have transferred to the respondent, but for her dismissal. Although the Claimant asserts that she should have transferred to the Respondent under TUPE, there is no unfair dismissal claim before the tribunal as the claimant had insufficient service.
7. Alongside the sale and purchase agreement was a Transitional Services Agreement, of the same date, under which the sellers agreed to continue to provide certain services to the purchasers on a transitional basis for a limited period of 3 months (subsequently increased to 6 months). The claimant contended that as she and others remained in the sold businesses and continued to provide the same services after 23 November 2015, until they were transferred or, in her case, dismissed, the relevant transfer could not have been 23 November 2015.
8. Having considered the above arguments, I am satisfied that the transaction described in the sale and purchase agreement was the relevant transfer and that the effective date of that transfer was 23 November 2015. A transfer occurs at a particular moment in time – in this case 00.01am on 23.11.15. That is not affected by any transitional arrangements or individual dismissal dates.
9. Based on a relevant transfer date of 23 November 2015, the normal time limit would expire on 22 February 2016. There are of course provisions extending the time limit where there is ACAS early conciliation. The claimant went through early conciliation and, according to the ACAS certificate, the date of first contact by her was 24 February 2016. As that would have been 2 days after the normal time limit expired, the claimant would not have received the benefit of any extension. The claimant said that the date on the certificate was wrong and that first contact was actually the 21 February 2016. However, there was no evidence to support that and therefore no reason to go behind the ACAS certificate. Even if the claimant is right, any extension would only have extended time to the 24 April 2016. The claim was presented on 2 May 2016 so, on either date, is out of time.

10. I went on to consider whether it was reasonably practicable to lodge the claim in time. It is a strict test and has been interpreted to mean reasonably feasible. The burden is on the claimant to show that it was not reasonably feasible to do so.
11. The claimant was aware at an early stage that she had a potential claim. On or before 19 November 2015, she was asserting that there had been a failure to inform and consult. The claimant said that she had researched TUPE online and had received some free advice from a solicitor acting on behalf of other affected employees. The claimant told the tribunal that the solicitor had advised her (during the time limit) to lodge her claim by 22 February 2016. On further questioning, the claimant clarified that the solicitor had been referring to her early conciliation application. However, that date is entirely consistent with the time limit for a relevant transfer on 23 November 2015. It does not correlate at all to a time limit for contacting acas where time was believed by the claimant to run from 14 January 2016. It is more likely than not that the informal advice given related to the tribunal time limit and it may be that this was misunderstood by the claimant.
12. The claimant says that she also took advice from ACAS and was told that the time limit for presenting her claim was 3 months less a day from date of termination. That is of course correct in respect of the claimant's breach of contract claim but she contends that ACAS made no distinction between her 2 claims. I did not have ACAS' account of the advice given but any advice is only as good as the information provided and we know that the claimant's position at the time was that the transfer occurred on 14 January 2016, the same date as her dismissal. Hence in that context, the advice would have been correct. I also bear in mind that it is the normal practice of ACAS to advise parties to seek their own independent advice on actual time limits applying in their case.
13. The claimant says that although she could have paid for legal advice, she chose not to do so due to cost. It seems, in any event, that she had been provided with the correct information on time limits informally by a solicitor and could have easily verified the information by diligent research.
14. Taking all of the above matters into account, I am satisfied that it was reasonably practicable to present the claim in time. The claim of failure to inform and consult is therefore out of time and is accordingly struck out.
15. Below are some case management orders in relation to the breach of contract claim, which is proceeding.

CASE MANAGEMENT ORDER
Employment Tribunals Rules of Procedure 2013
Rule 29

Hearing

1. By agreement, the current hearing dates will be vacated and the matter re-listed for 3 days on dates to be advised (Since the hearing the respondent has confirmed that it is unable to do the dates agreed of 8-10 May 2017).

Agreed List of Issues

2. The parties shall agree a list of legal and factual issues. The respondent shall prepare and send the claimant a first draft by **27 February 2017** and the claimant shall provide the respondent with her comments on the draft by **6 March 2017**.
3. The parties shall endeavor to agree a final list by **13 March 2017** but in the absence of such agreement, the respondent shall file the list in its draft form, highlighting the areas of disagreement.

Bundle

4. The respondent shall be responsible for preparing the Tribunal bundle.
5. On or before **27 February 2017**, the respondent shall provide the claimant with a revised bundle index for agreement and the claimant shall provide her comments by **6 March 2017**. The final bundle shall be agreed by **13 March 2017** and should contain only those relevant documents to which the parties intend to refer, either by evidence in chief or by cross-examination during the course of the hearing.

Witness Statements

6. It is ordered that evidence in chief in this case will be given by reference to typed witness statements. The statements will contain all the facts which the party or witness called on behalf of a party can properly tell the Tribunal, relevant to the issues identified. They must not include generalisations, argument, hypothesis or irrelevant material.
7. The facts should be set out in chronological order and in numbered paragraphs. If a party or witness intends to refer to a document in the statement, it must be cross referenced to a page number in the bundle.
8. It is ordered that statements be exchanged on or before **15 April 2017**.

Judicial Mediation

9. The parties shall write to the tribunal by **13 March 2017** indicating whether or not they are interested in pursuing Judicial Mediation.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Balogun
London South
Date and place of Order
2 March 2017