EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **Respondent**

Mr N Waite -v- Forester Life Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 09 February 2018

EMPLOYMENT JUDGE PSL Housego

Representation

For the Claimant: In person

For the Respondent: Mr A Midgley, of Counsel, instructed by Clarkson Wright & Jakes Ltd, solicitors

JUDGMENT

The judgment of the tribunal is that:

1. All the claims are struck out, save the claim for holiday pay, which is struck out save for the claim from 08 September 2016 to the date of issue of the claim, 31 May 2017.

2. I consider that the claimant's allegations or arguments that he was due holiday pay form 08 September 2016 to 31 May 2017 have little reasonable prospect of success.

3. The claimant is ORDERED to pay a deposit of £250 not later than 28 days from the date this Order is sent as a condition of being permitted to continue to advance those allegations or arguments. I have had regard to any information

available as to the claimant's ability to comply with the order in determining the amount of the deposit.

REASONS

Introduction and evidence

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claim was presented in time, and if not whether it was just and equitable to extend time.

2. I have heard evidence from the claimant, and I have heard submissions from him and from Mr Midgely on behalf of the respondent. 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 the factual and legal submissions made by and on behalf of the respective parties.

3. I considered the claim form, and a witness statement prepared by Mr Waite. I considered Counsel's skeleton argument and the respondent's response form. I considered also the decision of EJ Reed in the Preliminary hearing of 25 September 2017, and case reports of the CJEU decision in King v The Sash Window Workshop Ltd C-214/2016, dated 29 November 2017 and Blakely v On-Site Recruitment Solutions [2017] UKEAT 0134_17_05123 (both relating to holiday pay) ,

Facts found

4. Mr Waite suffered injuries in a car crash in 2005, which was entirely the fault of the other driver, who was prosecuted for driving under the influence of alcohol. Mr Waite recovered 2 years loss of earnings as a result of a personal injury action he brought with the assistance of a specialist solicitor. This was his oral evidence and not backed by any documentation, but is background known to the respondent. He suffered back pain, and suffered depression in addition.

5. During the time he was away from work he was diagnosed with a brain tumour and he has not worked since 2005, first by reason of the accident and then, from 2007 or so, by reason of the tumour. The effect of the tumour and of the treatment he has received for it has been a significant cognitive detriment. No medical evidence was produced to me, but has been provided to the respondent and I accept that this is so. The claimant's driving licence was withdrawn by the DVLA by reason of his medical condition no later than 02 September 2007.

6. The claimant is most unlikely ever to be able to return to work with the respondent. The pension trustees have not accepted that he will never be able to work for anyone ever again, and so he has not been permitted to take ill health early retirement.

7. The claimant remains employed by the respondent. This is because his employment contained a permanent health policy entitlement. After the car crash in 2005 the respondent made a decision to self insure, for all its several hundred employees. That is, it ceased the insurance policy it took out for its employees, but did not alter their contracts of employment, so that it is contractually bound to pay to employees that which the insurance company would have paid had the policy continued. Again, this is what the claimant says, but it is clear from the claim form and the correspondence that this is what is said and it is not denied. I find it to be so.

8. The Acas notification was on 11 April 2017, the Acas early conciliation certificate was issued on 26 April 2017 and this claim was issued on 31 May 2017.

9. There is no evidence before me that could lead to a finding of fact that the respondent had deliberately conducted itself in an improper way in its dealings with the claimant.

10. The claimant started work for the respondent on 08 September 2003. The holiday year started on each anniversary of the commencement of the employment.

<u>The claims made by the claimant, and reasons put forward on the out of time point</u>

11. The claims of the claimant are clearly set out in the order of EJ Reed and I do not repeat them here.

12. The claimant asserts that the reason he has not brought a claim before is for the following reasons:

    12.1. His cognitive deficits have precluded him from doing so: he simply has not had the ability to bring the claim.

    12.2. The respondent has lied and failed to respond to correspondence from him and intentionally strung things out.

13. The claimant deals with the following challenges from the respondent to that stance in the following ways:

13.1. He had advice from a lawyer about his personal injury claim, but that lawyer was a specialist in personal injury and could not advise him about employment matters, and he did not ask the lawyer to do so.

13.2. While he has lived with his (then) supportive wife and with other family, his condition would not permit him to seek their help: he had remained convinced that he could deal with matters unaided.

13.3. Only when he ran out of money, which was about the same time he was convinced the respondent was not truthful with him, did he bring the claim, but he was not really in able to do so even then.

13.4. He was not eligible for legal aid, and so could get no legal help.

13.5. He had not realised the extent of the insurance claim until 2017.

13.6. Counsel submitted that the claims were not inherently strong and that was relevant to the just and equitable proportionality assessment: the claimant asserted that there was a sustained campaign of deception by the respondent that should be considered highly relevant.

Relevant law

14. The issue of time for these disability claims is set out in the Equality Act 2010, S123:

"123
Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—
(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

15. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in British Coal v Keeble [1997] IRLR 336.

    a. The length of and the reasons for the delay.

    b. The extent to which the cogency of the evidence is likely to be affected by the delay.

    c. The extent to which the parties co-operated with any request for information.

    d. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action.

    e. The steps taken by the claimant to obtain appropriate professional advice.

16. I have also considered the comments of Auld LJ in Robertson v Bexley Community Service [2003] IRLR 434 CA *"It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule"*.

17. Kingston-upon-Hull v Matuszowicz [2009] EWCA Civ 22 set out that omissions cannot form a series for S20 of the Equality Act 2010: it is the decision to omit that is the relevant date.

18. The law about holiday pay is set out in *Blakely* and in *King* in the CJEU decision. Holiday pay is a right to time with pay, and not a right to pay. Compensation is due if the right to paid holiday is not given by an employer. For someone absent long term a member state is not precluded from stopping accrual of holiday entitlement into successive years. That is because the reason for paid holiday is as a health and safety measure to protect those in work, and self evidently a person absent through long term illness is not at work. Therefore regulation 13(9)(a) *"Leave to which a worker is entitled under this regulation may be taken in instalments, but … may only be taken in the leave year in respect of which it is due"* is not contrary to EU law.

19. The time period for holiday pay claims is in the Working Time Regulations 1998 ("WTR") at regulation 30:

> *"(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented—*
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> *(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;*
>
> *(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 or, as the case may be, six months."*

<u>The issue of whether it is just and equitable to extend time, claim by claim</u>

20. The first claim relates to the company car which was removed in 2007. This is part not a series of actions. It is over 9 years out of time. The claimant lost his driving licence by September 2007 by reason of his medical condition. The claim is over 9 years out of time. While there might be documents still available, this is such a long time that there has to be great prejudice to the respondent. The condition of the claimant has been (on the limited evidence given to me) substantially the same for the whole period, though worsening after the issue of the claim so that a further operation was required in November 2017. He was able, with the assistance of a solicitor, to fight and to win a personal injury claim of some magnitude during 2005-2007. While this predates his brain tumour being discovered, plainly the tumour did not arrive at the moment of diagnosis: that he was able to deal with this other claim is of some relevance, if not

determinative, given the caution required in the absence of when the effect of the tumour began substantially to affect the claimant.

21. The claim is not intrinsically a strong one, as it is by no means apparent that an employer is required to provide a company car to an employee who cannot work and drive because his wife could drive it, and him, for personal reasons. The claim also does not have any clear connection with disability - the disability (not conceded, but this decision is prepared on the assumption that the claimant was and is disabled from 2005 by reason of the brain tumour (and before that by the back injury that lasted 2 years) - was the reason the claimant was not working. However it was not a reasonable adjustment to provide a car as it would not assist him working. On the loss of the licence it becomes hard to see the claimant showing that this was disability related, other than that the cause of the removal of the licence was by reason of disability. This is a matter that is also open to the defence that the action was justified.

22. For the issue of just and equitable extension there is the very long delay, the prejudice to the respondent, the possibility of bringing a claim earlier by family help which the claimant declined to accept, the difficulty in the claim succeeding, and the absence of any proven impropriety in the actions of the respondent (however passionately asserted by the claimant). It would not be just and equitable to extend time for this claim.

23. Private medical insurance was cancelled in 2006, and the claimant knew this. It was before his brain tumour was diagnosed, but I take into account the possibility that it was affecting him then. The 2016 request to reinstate it was refused in January 2017. Time runs from 2006. If it ran from 2016, or January 2017, the time could be renewed indefinitely by making requests every 3 months. This was an action taken in 2006. As it was more than 10 years out of time it cannot be just and equitable to permit this claim to proceed.

24. Holiday pay: this was partly dealt with after the out of time matters were considered as the skeleton argument of Counsel for the respondent did not assert that it was out of time. There are a variety of points to be made about this claim.

25. I drew the attention of the parties to *King* in the CJEU before the hearing started. The holiday year started on 08 September each year. By reason of regulation 13(9)(a) and *King*, the entitlement of the claimant to compensation under regulation 30 of the Working Time Regulations 1998 for each holiday year ended at its end. Therefore the claims for holiday pay under the WTR are all incapable of success, save the claim commencing 08 September 2016, for 9 months. They would not be claims for a series of deductions, for *King* makes it clear that they are not

deductions. Rather, the remedy is for such compensation as is just and equitable by reason of regulation 30(3)(b).

26. The claims are misconceived. The money the claimant receives from the respondent he considers inadequate, but the starting point is, he says, that it was to be 75% of his net earnings. While he contests the amount is correct, he has received from the employer money which must exceed the 12.07% of his previous pay that holiday pay would represent. (As he was being paid nothing by reason of sickness absence, his holiday pay would be calculated on the pay in the last 12 weeks he did work).

27. Therefore he will have no loss for the 9 months that is not affected by the 13(9)(a) and *King* problem. Even if the *King* case had not been so decided, there is still the fact that there is no loss throughout the period. The insurance policy was to pay for his loss of earnings, and that loss of earnings would include holiday pay. Even at its most generous the holiday pay claim could only be for the percentage of holiday pay that was not covered by the insurance type payment. (If the pay was of 75% of net pay the most the claim could be for is 25% of the holiday pay, more if the claimant has been paid less than 75% of previous net pay.) Since the payment is by the respondent and not by an insurance company, this must be an irrefutable argument.

28. It was for these reasons that I decided that a deposit should be ordered in respect of the claim for holiday pay from 08 September 2016 to 31 May 2017 which is the only claim that I do not strike out.

29. The Permanent Health Policy claims: omissions cannot form part of as series of acts as set out in *Matuszowicz*. This is a claim dating from 2007, and for the same reasons as the other claims I do not consider it just and equitable to extend time.

30. The change to Permanent Health Insurance terms was made in 2012. While this is a shorter period than the other claims, less long is a better description. There is no real explanation of the absence of a claim, save the brain tumour and its effect on the claimant. The claimant knew of the change at the time. It would not be a reasonable adjustment claim as it would not affect ability to work positively. It was a company wide change, and so claimant related disability causation is difficult to see. As with the other claims it would not be just and equitable to extend time.

31. Disciplinary action in 2007 - this is so far back, that it is impossible to see that it could be just and equitable to extend time.

32. 2005 - alleged delay in replacing the company car. This was 2 years before the diagnosis of the brain tumour, and the appellant gives no

reason why such a claim could not have been made. He asserted that he was disabled by reason of the car accident before he was disabled by the tumour: when this happened he was not disabled by the tumour. It is the tumour that he gives as a reason why he could not bring a claim earlier, but on his own account that does not apply to this claim. It would not be just and equitable to extend time for this claim, which is over 10 years out of time.

33. Reduction in pension contributions - this was not explained to me any more than it was to EJ Reed. It cannot be a reasonable adjustment case as it would not help the claimant return to work. It is not in time, whenever it was asserted to be. It is not just and equitable to extend time for this claim.

34. Email of 08 August 2007: at 10 years out of time it would need very exceptional circumstances to allow such a claim to proceed. There are none. It is not said that the claimant was not aware of it when it was written.

35. Failure to process an expenses claim in 2009 - the same applies. The claimant thinks that he was told lies about it, but he has always known that there was an expenses claim that had not been paid, and 8 years is far too long to wait to bring a claim.

36. Failure to amend bonus scheme in 2007. The claimant says that during his last three months much of his work was reallocated, so that he did not receive renewal commissions all bonus payments. At the very least he would have known about this when the payments started to be made by reason of his long-term absence. He said these payments would be made at 75% of his net earnings, and so it would have been apparent to him many years ago when these payments started. Again, and for similar reasons, it is not just and equitable to extend time.

37. Having decided upon a deposit order for the reasons set out above I investigated with the claimant his extent of his means. The claimant said that he had now separated from his wife by reason of the strain of these proceedings and was sleeping at the home of friend. While he received money from the respondent he said that this was not 75% of his previous net earnings because they deducted tax and national insurance from it, even though it was supposed to be 75% of his previous net pay, and because they had been increasing it at 3% per annum not 5% per annum. He said that it was only enough to pay his mortgage, and that he had no savings left. I considered that a deposit was appropriate for the reasons set out. It should not be de minimis, and it should be at such a figure that it was realistic for the claimant to be able to pay it. The maximum

permitted is £1000. I decided that a figure of £250 met these various considerations and so ordered.

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Employment Judge PSL Housego
Dated 09 February 2018

Judgment sent to Parties on

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