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EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr M P Moran

AND

AMEY Services Limited

Heard at: London Central

On: 28 August 2018

Before: Employment Judge Pearl, sitting alone

Representation

For the Claimant: Mr M Moran (Father)

For the Respondent: Mr K Wilson, for Counsel

JUDGMENT OF THE TRIBUNAL AT PRELIMINARY HEARING

The Judgment of the Tribunal is that this claim can proceed on the basis that it was originally presented within time.

REASONS

1. The issue that I have to resolve at this Preliminary Hearing is in my experience unique and poses many evidential problems. The claim has been given a 2018 claim number because the Claimant did not originally pay a fee and, following the decision last year of the Supreme Court, he has applied for the claim to be reinstated. The facts are very sparse and although I have been told a certain amount today, both I and Mr Wilson have agreed that there is no necessity for any of these matters to be verified on oath. Therefore, what I set out below is as best as I can describe the factual situation that emerges from:

- (a) the papers on the file
- (b) the additional information that has been provided almost entirely by the Claimant's father.

2. The Claimant asserts that a claim was initiated by ET1 in 2015. So far as this adjudication is concerned, that appears to be corroborated by the JADU control center documentation that has been provided to the Tribunal in relation to the fee scheme that was then in operation. Those documents show a "receipt date" of 21 January 2015. It is my experience that a receipt date always matches the date of receipt of an ET1 and, indeed, in the next column it is said that the current office is London Central Employment Tribunal. I am therefore satisfied that an ET1 was presented to this office on that date.

3. The next matter to record is that the Claimant was dismissed after something in the order of five years of employment on 22 August 2014. It was a summary dismissal, subsequent to which he appealed, and it was on the basis, I infer, of gross misconduct.

4. There is no documentation other than the fee documents that I have referred to from the original file and there is also no document that speaks definitely about ACAS conciliation. Nevertheless, the JADU documents state the following. "Respondent: AMEY Limited – no certificate returned from ACAS for R053686/14/95." It is evident that that reference number is the reference number for an application for an early conciliation certificate. The problems that arise are, first, that the Tribunal (I am told by the staff) destroys documentation and records relating to conciliation after three months; and (I am also told) ACAS destroy their records after six months. Therefore, it has been impossible for the staff today to ascertain from ACAS whether there was an early conciliation certificate granted and, if so, what date it bears.

5. The next matter is that the Claimant was not acting in person at the time that the ET1 was presented in January 2015. He was represented, I am told, by solicitors. Unusually in this case, he cannot say who those solicitors were and nor can his father. What I have been told is that he contacted solicitors that had advertised in the newspaper on a no win no fee basis and that their offices were in Birmingham. The Claimant did not travel to those offices but corresponded with the solicitor, sent the relevant DVD of the incident of alleged theft and other papers to the solicitor and left matters in the solicitor's hands. As to the identity of the solicitor, there are two problems. First, the file that the Claimant kept was disposed of by his ex-girlfriend when their relationship ended and he has no papers of any sort. Second, he suffered a stroke in May 2016 and as far as I can tell by the discharge document, he was in hospital for fourteen days. He cannot remember who the solicitors were in Birmingham and his father attributes this to a difficulty with his memory after the stroke. It is pointed out by Mr Wilson that there is no specific medical evidence about this and that is correct, although having seen the discharge notification it is not inconsistent with what appears to have been diagnosed at that time, even though it is right to say that the Claimant has no medical evidence concerning memory loss.

6. It seems to me to be inherently improbable that the Claimant would deliberately hold back the name of the Birmingham solicitors if he knew who they were, especially as contacting those solicitors might more easily assist him in establishing his case. He has no reason to think that the solicitors acted negligently and as far as I can tell has never made that allegation against them

and his father confirms that this is the case. However, as the father notes in addressing me, trying to find the solicitor in Birmingham would be akin to a search for the proverbial needle in the haystack. I am inclined to agree.

7. I was much assisted by the discussion that I held with Mr Wilson and both he and I agree that the first question I have to deal with is whether I am satisfied that the claim was presented at a time when there was an early conciliation certificate. I accept that the effect of the various legal provisions that I need not cite is that a claim that is presented here without any such certificate cannot proceed and will be struck out.

8. Resolving this question poses the evidential dilemma I have referred to because there is no positive evidence that there ever was a certificate. On the other hand, if the Claimant was represented by solicitors at a time when I do know that an application for a certificate had been made, I need to ask myself whether it is more likely than not that such a certificate was in existence. In my view I am entitled to draw upon the experience gained as an Employment Judge at this venue since the conciliation scheme was first devised. I have never come across a case where no certificate has issued after an application has been made. So far as the Claimant is concerned, or any Claimant, he or she can sit back and simply wait for the process to be undergone and the certificate to issue. It is my experience that a certificate always issues although there can be no certainty as to when that will occur after an application has been made. I therefore regard it as inherently improbable that an ET1 was presented by solicitors which had no certificate number in it, I obviously cannot check this because the original ET1 is no longer available, but that strikes me as being the correct finding that I should make in circumstances such as these.

9. The second question that I have to deal with is whether or not I am satisfied that such a claim was presented within time. The subsequent chronology in relation to the application for remission of the fee, the refusal of that application, the subsequent appeal and the dismissal of that appeal, resulting, in closure of the case by JADU on 15 April 2015, is not relevant. No fee was paid and the claim was never served as far as I can tell.

10. I am left almost entirely in the dark as to whether the claim was presented within a month of the issue of the certificate. Mr Wilson makes the reasonable point that this claim may have been one that was presented out of time. The dates in the chronology do not really assist one way or the other. I can assume that a certificate ought to have been applied for by a competent solicitor before 21 November 2014. There are eight weeks and five days between that date and the date of presentation of the original ET1. That raises the possibility that the claim was out of time but gives rise to no certainty because the EC certificate can be granted up to six weeks after the application for it and there then follows a further month before the ET1 has to be presented. Looking at matters chronologically I can draw no conclusion one way or the other as to what is likely to have happened in this case.

11. That might be thought to be a point against the Claimant but, doing the best I can on the available facts (or lack of them), I have come to the conclusion

that on the balance of probability it is more likely that the claim was presented within time. The first point is that solicitors acting for the Claimant, provided that they were acting competently, would certainly diarise dates for both application for the EC certificate and also the subsequent presentation of the claim. I cannot assume that these solicitors were negligent in that regard and, of course, if that were the case it would also follow that the Claimant had been ignorant of this negligence for some years. It seems to me that I am entitled in these circumstances again to draw on my own experience which is that the vast majority of claims that are received in the Tribunal are presented within the time that is specified in the rules after the date of an EC certificate. It is an important date for solicitors and in the vast preponderance of cases no negligence arises because the claim is presented within time. This strikes me as being a consideration that I ought to take into account against the possibility that the solicitors slipped up on this occasion and that the negligence has never been drawn to the attention, for example, of the Claimant's father who does have a memory for these matters.

12. Where there is such a paucity of evidence, the decision I come to runs the risk of some injustice to both parties. If I rule against the Claimant he may lose a claim that was presented properly at the time; if I rule against the Respondent they may harbour the suspicion that something went wrong and that the claim was always out of time but that it simply cannot now be demonstrated. In my view the matter is best tested by what is more likely to have occurred than not and for the reasons I have given I have come to the conclusion that I think it more likely that there was a certificate issued and that the solicitors thereafter did present the Claimant's ET1 in the normal fashion, within the time provided for by the rules. Therefore, on this preliminary issue I find that the claim should proceed.

13. I will set out Case Management Orders and also my direction as to the issues in the case separately.

Employment Judge Pearl

Dated: 24 September 2018

Judgment and Reasons sent to the parties on:

24 September 2018

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For the Tribunal Office