RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr H Singh**

Respondent: **Restore Plc**

Heard at: **East London Hearing Centre**

On: **Wednesday 25 July 2018**

Before: **Employment Judge Prichard**

Representation

Claimant: Ms M Kaur, Claimant's sister, legal adviser

Respondent: Mr A Johnston, Counsel instructed by Irwin Mitchell LLP, Birmingham,

Also attending: Ms R Whitear, HR Business Partner with Restore Plc

JUDGMENT

It is the judgment of the Tribunal that this respondent be dismissed from these proceedings to the claimant will take advice as to whether to apply to name an alternative respondent Wincanton Holdings Limited Group to these proceedings and will do so, if doing so at all, the claimant should write to the tribunal within 2 weeks of the date this judgment is sent to the parties.

REASONS

1 This case is a late claim, one of a few that the tribunal has received, where it is being alleged that the reason for the lateness of the claim was the unlawful tribunal fees regime which came to an end immediately after the Supreme Court decision in the Unison case in July 2017.

2 This is not a claimant who made an original approach to Acas and then to the tribunal service asking for remission fees. This is a case where the claimant never even started the process until later. There was a reference to Acas on 15 May 2018, certificate on 16 May the claim form presented to Leicester central office on 19 May 2018.

3 The claimant, it appears, worked for Wincanton Holdings and was dismissed for alleged gross misconduct on 27 August 2015 following a meeting which he did not attend. The decision was conducted by Mr Jason Rowles then sales director of Wincanton Holdings.

4 The business was called Wincanton Records Management, that is the name of the business. The corporate employer is thought to be Wincanton Holdings or possibly Wincanton Group Limited. If the name is to be amended both might be nominated as potential respondents. Wincanton Records Management is just a trading name.

5 Things became very complex after that, leading to the nomination of Resource Plc as the respondent to this late claim. I have seen a letter offering the claimant an appeal dated 20 October 2015 inviting him to an appeal hearing on 5 November. At that hearing Ms Kaur attended. The claimant was not well and did not attend as he had acute mental health problems at that time. He had a diagnosis of bipolar affective disorder. He has been treated for many years with anti psychotic medication to control and regulate this mental disorder. Eventually the appeal was put off until 9 February where both Ms Kaur and her brother attended.

6 The appeal could not be heard by the original nominated decision maker, Mr Gary Keith UK Head of Operations because he too had left the company. The appeal decision maker was Andrew Satchwell in the end. He was the head of national accounts. Jodi Crooks HR was also involved. She left shortly afterwards. She was made redundant in April 2016. According to Ms Kaur, the appeal meeting was a non event. The appeal process was finished under the management of Resource (Spur) Limited. Mr Johnston explained they had to cast around to find people who had originally been with Wincanton Holdings/Group and had transferred to Resource (Spur).

7 It was a 3 stage process. Employees first TUPE'D to Resource (Spur) in the first instance and then they were TUPE'D to the present respondent, Restore Plc on 1 March 2016 so the employees with the original records management employees were TUPED into a company created for the purpose Wincanton (4) Limited whose shares were then acquired by Restore Plc and the name of that Wincanton (4) Limited was changed to Restore (Spur) Limited prior to the TUPE to the present respondent on 1 March 2016.

8 It is a complicated transition and an employee could be forgiven for misnaming the respondent. The legal analysis however is quite simply that when an employee is dismissed by a company they immediately become an ex-employee. In this case the dismissal was without notice so that happened immediately on 27 August. The legal position is that if an appeal is allowed then the employee has not been dismissed and the dismissal disappears. But if the appeal is not allowed the situation remains the same the dismissal is effective as of 27 August. That was months before the employees TUPE'D into the new entities.

9 That is why the present respondent has to be dismissed from these proceedings. I am not dismissing the entire case because the claimant wants to take advice and consider his position as to whether to name Wincanton Holdings/Group as a respondent.

10 The claimant other difficulties as well as his mental health. Apparently he was sectioned under section 2 of the Mental Health Act 1986 in November 2015 because of

concern at his behaviour and concern for his personal safety. While all this was happening, his wife had their first son in June 2016. Since that time she had many problems with her second pregnancy. Their second son was born after 27 weeks extremely premature. Mother and son had to spend 3 months in St Georges Specialist Neonatal Unit. The birth weight was less than one kilo (2 pounds). All is well now.

11 The claimant found work again in May 2016 and he is still there. He is working in a different records management company for roughly the same salary as he earned before. In principle, there would be no continuing claim for loss of earnings, if the claimant is ever awarded anything arising from these proceedings. His basic earning with the respondent was £22,400, but with bonuses and sales commission his on target earnings in a good year might be £40,000 per annum.

12 Ms Kaur representing Mr Singh responsibly informed the tribunal that they only focused on the question of bringing these proceedings now that the fees had been scrapped and after the claimant's wife came out of hospital, and the family situation calmed down. The problem was that somebody had to care for their first son while his wife was in hospital. The claimant became the primary carer.

13 I gave the claimant leave to consider their position about adding what has to be the correct respondent in these proceedings, but it is not without some comment.

14 The claimant did not have two years continuous service at the date of his summary dismissal on 27 August he therefore had no unfair dismissal rights. This is a claim for race discrimination, disability discrimination, and wrongful dismissal i.e. notice pay and accrued holiday pay claimable as arrears of pay. There are two "just and equitable" time extensions under section 123 of the Equality Act 2010 regarding the two discrimination claims, and then there are two "not reasonably practicable" time extensions under part 2 of the Employment Rights Act 1996 (section 23), and also the Extension of Jurisdiction Order 1994.

15 Commenting on the "not reasonably practicable" time extensions for the money claims a problem is that it has now been 10 months since the fees were abolished. The timing of the eventual application seems to have been driven by personal reasons rather than having anything to do with the date of knowledge that the fees had actually been scrapped. The claimant at this time was holding down a job and also the whole pregnancy difficulty had not reached the proportions it later reached in February 2018. This will be a problem if the claimant has to show that the cause of late presentation was the fees regime. They would also have to show the claim was presented in "a reasonable period thereafter". That is the second part of the "not reasonably practicable" test, which the claimant would also struggle to satisfy.

16 As far as the question of whether it is just and equitable under section 123 of the Equality Act 2010 the respondent will have major problems. Everybody who witnessed the claimant's behaviour prior to his termination and who worked within that team has moved on. All the main responsible decision makers are probably untraceable.

17 The question of whether it is just and equitable to extend time is going to depend on both the interests sides. The respondent would have to face such a claim effectively without witnesses. Even the claimant's line manager who was a witness, and was in

included in the disciplinary investigation, Dan Sinclair appears to have moved on. He is no longer with Restore Plc.

18 There is one person mentioned in the claim who is still working for Restore Plc and that is Arthur Pelling who allegedly made the comment that "all Indians should be thrown off the boat". It seems to be the only reference to anything to do with race discrimination.

19 The disability discrimination claim is based upon the claimant's bipolar affective disorder which on closer reading might have accounted for some of the behaviour which brought about his dismissal and lack of trust and confidence felt by the company. The company was very concerned about him. They alleged that he refused to go and see occupational health. At one time the concern was such that they reported him to the police who paid a welfare visit to him at home, an event which his whole family found traumatising.

20 The reason why the claimant says that the fees had a prohibitive effect on him was that he would never have succeeded in getting remission from fees because his wife worked full-time as an administrator with A-plant. But then she left work after the birth of two children. He is now the main provider in the family.

21 I indicated to Mr Singh and his sister that, at another tribunal hearing, this same preliminary hearing on jurisdictional time points against the correct respondent, the tribunal is "unlikely" to find in their favour because of the problems under section 123 of the Equality Act 2010 and section 23 of the Employment Rights Act 1996. But it will be a decision for the claimant to take.

22 Finally, if the claimant wishes to proceed with this claim, this judgment will be served together with the service papers on Wincanton. It was mentioned that if this case is pursued as against Wincanton in view of the difficulties with the jurisdictional time limit is the specific difficulty the claimant will face. It is not inconceivable that they would apply for their costs of attending a preliminary hearing on these time points. That will depend on the judge hearing the case.

23 <u>The claimant wrote to the tribunal on 10 August chasing this judgment. I advise him to consider the judgment carefully and read the legislation carefully before electing to name Wincanton as a respondent. He has 2 weeks from the date this is sent to him to consider whether to do so. The tribunal will do nothing more until it hears from the claimant.</u>

Employment Judge Prichard

21 August 2018