Case Number: 2205389/2018
2205433/2018
2205434/2018
2205435/2018
2205436/2018
2205437/2018

EMPLOYMENT TRIBUNALS

Claimants (1) Miss G Cazan
(2) Miss G Cazan
(3) Mrs A Serea
(4) Mr I Serea
(5) Mrs L Tiboc
(6) Mr S Tiboc

Respondents TLC Home Care Services

Heard at: Bristol **On**: 11 January 2019

Chairman: Employment Judge M Ford QC

Representation
For the Claimants: In person
For the Respondent: Mr Heard, Counsel

REASONS FOR JUDGMENT

Written reasons for judgment of 11 January 2019 provided at request of Respondent in an e-mail of 1 February 2019

Issues and background

1. There were six claims in issue in this case. There were two claims brought by Miss Cazan. The claims are cases 2205389/2018 (Miss Cazan), 2205433/2018 (Miss Cazan), 2205434/2018 (Mrs Serea), 2205435/2018 (Mr Serea), 2205436/2018 (Mrs Tiboc) and 2205437/2018 (Mr Tiboc)

2. The facts pleaded in the claim forms were the same. In each case the Claimant claimed, it appeared, unpaid wages, a redundancy payment, notice pay and holiday pay. Each claim was brought against three Respondents: (i) the Secretary of State for Business (meant to refer to

BEIS) as responsible for redundancy payments where employers are insolvent; (ii) TLC Home Services; and (iii) Cleevelink Ltd.

3. The Respondent is in fact a partnership. The correct name of the Respondent should be Mr and Mrs Davidson, trading as TLC Home Care Services.

4. In each claim form, the facts were stated in an identical form. Each Claimant said she or he was employed from 7 March 2016 until 7 March 2017, working as a Health Care Assistant (it later turned out at least one in fact had longer service). Each said they worked for Cleevelink, a company which went into liquidation, and began to work for a new company, TLC Homecare Services, the Respondent to this claim. They contended their claims against the Insolvency Service for unpaid wages were refused on the basis there was a transfer of an undertaking pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006, usually referred to as "TUPE". They referred to an employment tribunal decision, ***Moldovan v Cleevelink*** (case number 1401592/2017), in which I was the Employment Judge, in which a claim was brought against Cleevelink. In that case I held that (i) there was a transfer of an undertaking under TUPE from Cleevelink to the Respondent on about 6 March 2017; (ii) but as a result of regulation 8(7) of TUPE Ms Moldovan's employment did not transfer to the Respondent; and (iii) Ms Moldovan's claim for a redundancy payment from Cleevelink was in time.

5. In these case the claims were received on 27 July 2018, with the exception of claim 2405389/2018 brought by Miss Cazan, which was received on 20 July 2018. In each case ACAS was contacted on 6 October 2017 and the ACAS certificate was dated 17 October 2017.

6. The claims against the Secretary of State and Cleevelink Ltd were rejected because, it was said, there was no conciliation number for a claim against them: see letter from Tribunal of 9 October 2018. Hence the only claim here was against the Respondent, the partnership of Mr and Mrs Davidson.

7. On 9 October 2018, the claims against the Respondent were listed for this preliminary hearing on time limits and, in addition, EJ Livesey ordered the claims to be heard together.

8. On 13 November 2018 the Respondent sent its response to the claims. In summary, it said the claims all related to sums owed to the Claimants by Cleevelink; it did not admit there had been on transfer of those liabilities under TUPE to the Respondent; and it was said that the claims were all out of time.

9. At the hearing I heard evidence from, for the Claimants, Mr Tiboc and Miss

Cazan. The Claimants accepted that the evidence they gave was on behalf of all of them. No evidence was given for the Respondent. I saw a copy of one document – the letter from the Insolvency Service dated 11 April 2017. Both Mr Tiboc, on behalf of the Claimants, and Mr Heard made submissions at the conclusion of the evidence.

Facts

10. In light of the evidence, I find the following facts on the balance of probabilities. I have confined my findings, wherever possible, to facts relevant to the preliminary issue on time limits.

11. It seems most Claimants began working for Cleevelink in around March 2016 (though at least one began earlier). It provided care in homes and in the community for old people under various contracts, including contract with Worcester County Council. All the Claimants worked providing care in the community.

12. On about 3 March 2017 the Claimants and other employees of the Cleevelink were informed by e-mail that it was going into liquidation. Despite this, the Claimants continued providing care to the old people for whom they were responsible.

13. On around 7 March 2017 a company called Griffins, conducting the insolvency of Cleevelink, informed the Claimants by letter that their employment with Cleevelink ended on that day, 7 March. The letter informed the employees that they were entitled to make claims against the Redundancy Payments Service ("RPS") for matters such as wages which were owed.

14. At the time the Claimants were owed their last month's wages, for the period 5 February to 4 March, and unpaid expenses. Wages were paid about two weeks in arrears. In Miss Cazan's case, for example, the sum she was owed was just over £2,261. The Claimants were not given notice or paid notice pay or given a redundancy payment by Cleevelink. It seems some, too, may have had an outstanding claim for unpaid holiday pay due on that date.

15. At around this time, the Claimants and the other care workers and introduced them to Mr and Mrs Davidson, the owners of the Respondent. The employees were told that TLC, the Respondent, would employ them. They were also told that Mr and Mrs Davidson would pay them their wages for 4 March to 6 March, which in fact happened.

16. From about 7 March the Claimant and her colleagues continued working for the people in their care, doing the same work, but now working for the Respondent.

17. As a result of the letter from Griffins, the Claimants made a claim to the RPS for the payments they considered were due to them, including redundancy pay and unpaid wages. In a letter dated 11 April sent to each Claimant, the RPS informed each Claimant that it was not liable for arrears of wages, redundancy pay, holiday pay or notice pay because, among other matters, there had been a TUPE transfer to TLC, the Respondent. The letter added at the end that if the Claimant disagreed with the decision, they could complain to an employment tribunal using a form ET1, which could be obtained from e.g. a Citizen's Advice Bureau. It added that to bring a claim the Claimant must lodge a fee, of £160 on issue, and £230 if a hearing were necessary. It said that the Secretary of State for BIS should be named as respondent and that "There are strict time limits for making a complaint about our decision to an Employment Tribunal so if you do decide to complain you should do so as soon as possible", adding that a claim made within three months of the date of the letter would be in time. It finally referred the reader to the employment tribunal website for details of the time limits.

18. The Claimant and other employees explained to Mr Davidson what the RPS had informed them, who told them he was not liable for the payments because there had not been a TUPE transfer to the Respondent. In subsequent enquiries to RPS, it maintained that there had been a TUPE transfer. Griffins also said it was not responsible for payment of wages or other matters.

19. In about May 2017 the Claimants were paid a sum by Worcestershire CC as gratitude for their support during the period in March 2017 and for their hardship. Though the precise sum varied, it was at least £1,000: Miss Cazan, for example, was paid £1700.43.

20. On about 12 June 2017 the employment of each Claimant with the Respondent terminated: they all resigned (the reasons are not material). They all began a new job, still in the care sector.

21. At some stage - the exact date was not clear – Mr Tiboc (acting with the other Claimants) found out on Google that to bring an employment claim it was necessary to contact ACAS first. As a result, the Claimants informed ACAS of potential claims on 6 October 2017 and it issued a certificate on 17 October 2017.

22. After the matter did not settle through ACAS, the claims were issued much later, in July 2018: on 27 July 2018 save for Miss Cazan's first claim, which was issued on 20 July 2018.

23. The critical issue for this hearing is why the claims were not brought earlier: either within the relevant limitation period or within such further period as statute allows. I deal with that issue, and the relevant facts, in

my conclusions.

The Law - Summary

24. An employee is entitled to a redundancy payment in accordance with Part XI of the Employment Rights Act (ERA) when he is dismissed by reason of redundancy (s.135). The employee must have two years' qualifying service: s.155 (not all Claimants had sufficient service but at least one did). A redundancy includes where an employer ceases to carry on the business for the purpose of which the employee was employed: see s.139 of ERA. A redundancy payment is calculated in accordance with the provisions of s.162.

25. An employee has a right to a minimum period of notice in accordance with s.86 of ERA (two weeks' notice for an employee with two years' service). An employee has a contractual right to be paid her wages and, in addition, a claim may be made for an unlawful deduction from wages under Part II of ERA.

26. The time limits for a claim for a redundancy payment are set out in s.164 of ERA. No Claimant made a claim in writing for a payment, so that s.164(1)(b) does not apply. Hence each should have referred his or her complaint to a tribunal within six months "beginning with the relevant date" under s.164(1)(c). Where a contract is terminated without notice, this means the date on which termination takes effect: s.145(2)(b). If notice is given, the date is the date on which the notice expires: s.145(2)(a).

27. For the purpose of calculating the six-month period, the period between the day after notifying ACAS and receipt of the ACAS certificate is not to be counted: see s.164(5) and s.207B ERA. A one month extension is granted if the time limit would expire in the period between notification and receipt of the certificate: s.207B(4).

28. A tribunal may permit a claim for a redundancy payment to be brought in the subsequent six-month period where it "appears to the tribunal to be just and equitable that the employer should receive a redundancy payment" (s.164(2)). For this purpose, a tribunal shall have regard to the reason shown by the employee for not bringing the claim in time and "all other relevant circumstances" (s.164(3)).

29. The claims for unpaid wages could have been brought as unlawful deduction from wages under Part II of ERA or as a claim for breach of contract under the Employment Tribunals Extension of Jurisdiction Order (England and Wales) 1994 (the "1994 Order"). In either case, the claim should have been brought within three months' from the date of non-payment or termination of employment: see s.23(2) ERA and article 7 of the 1994 Order. Once more, the period between notifying ACAS and receipt of the certificate does not count: s.23(3A) ERA and article 8B of the

1994 Order.

30. In either case, however, a tribunal may allow a claim to be brought later if (i) it is satisfied that it was not reasonably practicable to bring the claim within the three-month limit and (ii) the claim was brought within such further period as the tribunal considers reasonable: see s.23(4) ERA and article 7(c) of the 1994 Order.

31. A claim for unpaid holiday pay due on termination should be brought within three months of the date when the payment should have been made, subject again to extension based on reasonably practicability: see regulations 30(1)(b) and 30(2) of the Working Time Regulations 1998.

32. The phrase "reasonably practicable" is not as wide as reasonable, but nor as narrow as what is physically possible, and means something like what is "reasonably feasible": see ***Palmer v Southend-on-Sea Borough Council*** [1984] ICR 372, CA. The cases emphasise the question is one of practical sense for a tribunal. Ignorance of a right to bring a claim will only make it not reasonably practicable to claim in time if the lack of knowledge is reasonable: see ***Dedman v British Building and Engineering Appliances Ltd*** [1974] ICR 53, CA. In deciding whether the claim was brought within such further reasonable period, a tribunal should consider the factors which caused the delay and what period should reasonably be allowed, bearing in mind the short primary limitation period.

Conclusions

33. My conclusions in light of the facts and law are as follows. Where necessary, these conclusions include supplemental factual issues.

34. The only claims before me are brought against the Respondent, TLC (or strictly the Davidsons' partnership). A first, and fundamental point, is that the Respondent would not be liable for any of the sums claimed unless there was a TUPE transfer to it on about 7 March 2017. This means that the claims must assume the Claimants transferred to it under TUPE; but if there was such a transfer, there could be no claim for a redundancy payment, notice of dismissal or unpaid holiday on termination because there would then be no termination of employment.

35. As no party raised this point and it was not an issue for this hearing, I only highlight it. But it does mean that the only claims, it seems to me, which could ultimately succeed against the Respondent are the claims for unpaid wages. Nonetheless, for completeness, I deal with time limits in relation to all the claims.

36. **Redundancy payments.** On any view these claims are out of time. They should have been brought within six months of the effective date of termination of the Claimant's employment with Cleevelink: that is, within

six months of 7 March 2017: see s.145. There is a discretion to extend the period by a further six months: see s.164(2). In each case the period in in conciliation is ignored: see s.164(5) and s.207B ERA. But there is no discretion to extend time beyond the total one-year period from the relevant date.

37. Even discounting the days in conciliation – 6 October to 17 October – it is clear the claims were brought well beyond the permissible period of 12 months after 7 March 2017. This means they must fail.

38. **Wages**. The wages claim could have been brought under Part II of ERA within three months of the "deduction", which seems to have been (probably) around two weeks after the wages were payable for work done between 5 February and 4 March 2017 were due (which would be about 18 March, or latest 28 March 2017): s.23(2) ERA. The primary limitation period therefore expired on, at latest, 27 June 2017.

39. The claim was not brought within this primary period for three principal reasons. First, the Claimants expected the matter to be sorted out by Mr Davidson. Second, they were not aware of the time limit for the claims. Third, they could not afford the tribunal fees which then applied.

40. I doubt the first and second reasons were sufficient. It must have been pretty clear by at least the end of May 2017 that this matter was not to be resolved by Mr Davidson. In addition, as a result of the letter from RPS of 11 April 2017 the Claimants were, I think, put on inquiry about their rights and the time limits – which led to them raising the matter with ACAS. Even if the letter from RPS was about a challenge to its decision, it nonetheless provided a clear indication that claims to employment tribunals were subject to strict time limits, and referred the Claimants to the tribunal website.

41. I am prepared to accept, however, that because of the fees at the time and their financial circumstances it was not reasonably practicable for the Claimants to bring a claim. The Claimants did not earn a great deal. As Miss Cazan explained, she and other Claimants had to take out loans because of not being paid their wages. I do not consider it was in the circumstances reasonably practicable to pay an initial tribunal fee of £160, with the prospect of more if a hearing were due, to bring the claims in time for what were relatively small amounts of money.

42. But I do not consider that the claims were brought within such further period as was reasonable. As Mr Tiboc accepted, from July 2017 the Claimants knew they no longer had to pay a fee to bring a tribunal claim. They were already on inquiry about the time limits following the letter from RPS of 11 April. The only reason for this additional period of delay, until July 2018, was that the Claimants were awaiting the decision in Mrs

Moldovan's case, which the Claimants thought might be a precedent for theirs. Her judgment was issued in May 2018, and the Claimants knew about it a few days later. In light of the legal principles, I do not consider it can have been reasonable to await the result in her case, nor to delay for a further period of about two months after they learned she had, partly, succeeded.

43. The alternative means of claiming for wages would be to bring a claim for outstanding wages as a claim for breach of contract after their employment with the Respondent terminated, on 12 June 2017. Such a claim should have been brought within three months of that date, subject to an extension under Article 7(c) of the 1994 Order. For the same reasons as set out in paragraph 42 above, I do not consider it was reasonable to delay bringing the claims until July 2018, even if it was not reasonably practicable to bring the claims initially owing to fees.

44. **Notice and holiday pay**. I will only deal briefly with these claims, since they could only have been against Cleevelink: they could only arise if there were a termination by it on 7 March (which would not be the case if the Claimants transferred to the Respondent under TUPE).

45. Assuming there was no transfer of the Claimants to the Respondent under TUPE, the Claimants were entitled to notice of dismissal under ERA on 7 March. The claim for notice pay was therefore outstanding on termination of employment on that date. The claims should have been brought, therefore, against Cleevelink within three months of that date - that is, by 6 June 2017. I do not see logically how such a liability could transfer to the Respondent, but even if it did, the claim was not brought within the relevant time limits after employment with the Respondent ended: see paragraph 42-43 above.

46. The same applies to the unpaid holiday pay claim. It would only arise if there were no TUPE transfer and therefore there was a termination on about 7 March 2017. The claim should have been brought within three months, therefore, of 7 March 2017.

47. **Conclusion**. My conclusion is, therefore, that all the claims here against the Respondent were out of time. It will be no consolation to the Claimants but I should add that, if my judgment in ***Moldovan*** is correct, no liabilities transferred to the Respondent in any event as a result of regulation 8(7) of TUPE. Because Cleevelink was insolvent this means that the only claim worth bringing was against the RPS, and no claim against it was before me. In addition, only those Claimants with at least two years' service with Cleevelink would be entitled to a redundancy payment in any event: see s.155 ERA.

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Employment Judge M Ford QC

Dated: 14 February 2019
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