Case Number: 1600400/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr Robert Cole**

Respondent: **Solas Cymru**

Heard at: **Cardiff** **On: 23 August 2017**

Before: **Employment Judge P Cadney**

Representation:
Claimant: In Person
Respondent: Mr P Morris (Counsel)

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that the claimants claims for:-

a) Unfair Dismissal
b) Redundancy Pay

Are dismissed.

Reasons

1. By a claim form submitted on 23 February 2017 the Claimant brings two claims, a claim for unfair dismissal and a claim in the alternative for a redundancy payment. The case comes before me this morning on the Respondents application that the redundancy payment claim, which on any analysis is in time, should be struck out as having no reasonable prospect of success; and that the unfair dismissal claim should be struck out on the basis it was submitted out of time and the Tribunal has no jurisdiction to hear it.

2. Dealing with the redundancy pay claim first, the background is not essentially in dispute. The project for which the Respondent employed the

Claimant was funded by the Local Authority and there was a reduction in that funding. Accordingly the Respondent had to make up the shortfall and it concluded that the means by which it would do so was to seek the agreement of its employees for a reduction in salary. In the Claimant's case that would have meant a reduction of something of the order of £3,100. Some of the Claimant's colleagues accepted but the Claimant did not accept that proposed variation and accordingly in October 2016 he was given notice expiring on 12 January 2017.

3. The Respondents case is that that dismissal was at least potentially fair, the potentially fair reason being some other substantial reason. The Claimant's case is essentially, as at least put in the pleadings, that other means could have been found to have made up the shortfall and the reduction in employees' salaries was not a necessary or reasonable method of dong so. Whatever the merits of the dispute the Respondent submits that on any analysis no-one is suggesting that this is a case which falls within the definition of redundancy set out in section 139 ERA 1996 in as much as there is no cessation or reduction of the amount of work being done, and no cessation or reduction in the number of workers being employed to do that work. The dispute is about the reasonableness or otherwise of the Respondents conclusion that the means of achieving the shortfall was to reduce salaries. Therefore this is not a case in which the Claimant could possibly be entitled to a redundancy payment irrespective of the outcome of the unfair dismissal claim.

4. It seems to me that that must be right and in fairness to the Claimant his evidence to me is that he simply ticked the box of the likely payments he believed he might be entitled to, but it seems to me as a matter of law that that is misconceived and accordingly I propose to strike out the redundancy payment claim as having no reasonable prospect of success.

5. That leaves the unfair dismissal claim which the Respondent submits was submitted out of time. The relevant dates are that the employment terminated on 12 January 2017 and the ET1 was submitted on 23 May 2017. But for the ACAS Early Conciliation Provisions the ordinary time limit would have expired on 11 April 2017 and the claim would therefore be out of time. There was conciliation between 24 January and 24 February which has the effect of extending time until 12 May 2017 under the clock stopping provisions (the other mechanism by which Early Conciliation can extend time does not apply in this case as the ordinary limitation date fell more than one month after 24th February 2017).

6. It follows, the respondent submits that the claim was submitted out of time and it appears to me that the Respondent must be right. Therefore the issue for me is whether I should extend time on the basis it was not reasonably practicable for the claim to have been submitted within time. In

brief the Claimant's evidence is that during the consultation period he consulted the Citizens' Advice Bureau who advised him to consult a solicitor. That advice cost him £385 and thereafter he simply did not have the funds to seek any further legal advice. After dismissal he contacted ACAS and at the conclusion of the ACAS conciliation period he consulted ACAS who informed him, as he understood it at the time, that he had three months from the date of the end of conciliation period to bring his claim. That would have expired on 24 May 2017which is why he submitted his claim on 23 May2017 understanding that he was submitting it in time at that point. He had delayed to the latter part of the limitation period as he understood it because he could not afford the £250 fee and it was not until the latter part that his circumstances reduced sufficiently that he was eligible for remission.

7. A large part of the discussion between the parties and the Tribunal turned on the advice that the Claimant had been given by ACAS. It was the Claimant's recollection that the conciliation period having come to an end he contacted ACAS by telephone and was informed that the limitation period effectively began from the conclusion of the Early Conciliation and that he had 3 months to bring a claim from that point. That was questioned by Mr Morris on behalf of the Respondent. Part of his submission was that it was unlikely in the extreme that anyone at ACAS would have given such clearly incorrect advice and the reality must be that the claimant had misunderstood the advice he had been given.

8. It is entirely to the Claimant's credit, although perhaps not to his advantage, that after I had risen to consider my decision he discovered an email from ACAS which he drew to the Respondents attention and then to me dated 28 February 2017 which in part reads "*I can still conciliate should they wish to, despite the Early Conciliation Certificate being issued, but the clock has resumed for you to raise a claim to an Employment Tribunal. You have 3 months less 1 day to make a claim to an Employment Tribunal, but the time spent in Early Conciliation does not count towards that time.*" This is in fact an entirely accurate statement of the law, but which the Claimant interpreted as meaning that he had three months from the conclusion of the Early Conciliation period to bring his claim. The error the claimant made was to fail to understand that the early conciliation period had stopped the clock for one month, but had not as he thought, reset it to begin again on 23rd February 2017. The Claimant now accepts that in fact the position is as the Respondent submitted it was likely to be, that he was given the correct advice by ACAS but that he misinterpreted it. It appears to me firstly that that must be correct, and as I say it must be to his eternal credit firstly that he drew that to my and the Respondents attention and has accepted the consequences of it.

9. It may seem unfair that the claimant should suffer for his honesty, but it seems to be inevitable that I am bound to conclude that the claimant was given the correct advice but misunderstood it. It follows that this is a case in which the claimant was aware of the time limit, had been given correct information about how to calculate it, and in which there was no impediment to him presenting the claim in time. As a result of that it is impossible for me to say it was not reasonably practicable for the claim to have been brought within time and therefore I am bound to dismiss the claim as having been brought out of time.

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Employment Judge P Cadney
Dated:30 August 2017

ORDER SENT TO THE PARTIES ON

…….15 September 2017……..

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS

NOTES

(1) Any person who without reasonable excuse fails to comply with this Order shall be liable on summary conviction to a fine of £1,000.00.

(2) Further, if this Order is not complied with, the Tribunal, under Rules 37(1)(c) and 76(2), may (a) make an Order for costs or preparation time against the defaulting party, or (b) strike out the whole or part of the claim, or, as the case may be, the response, and, where appropriate, direct that the respondent be debarred from responding to the claim altogether.

(3) You may make an application under Rule 29 for this Order to be varied or revoked.