



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Withey  
**Respondent:** Nu-Tech Services Ltd t/a Nu-Tech Electrical  
**Heard at:** Cardiff **On:** 31<sup>st</sup> May 2019  
**Before:** Employment Judge P Cadney

**Representation:**

Claimant: In Person  
Respondent: Ms J Nevins

## PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant's claims are dismissed as they were presented out of time and the tribunal does not have jurisdiction to hear them.

### Reasons

1. This is the decision of the tribunal in the case of Mr A Withey v Nu-Tech Services Ltd t/a Nu Tech Electrical.
2. The case comes before me today following an earlier preliminary hearing heard by EJ Havard at which he directed that a Preliminary Hearing determine the question of whether all or any of the claimant's claims are out of time, and if so whether time should be extended.
3. The claimant submitted a claim on 19<sup>th</sup> December 2018. In the claim form at Box 8 he has ticked claims for holiday pay, arrears of pay and other payments. In addition he asserts that he was not given a contract of employment, never received payslips and repeats the claims for unpaid holiday pay and unlawful deduction from wages. Claims he has not made in Box 8.1 are claims for unfair dismissal or discrimination. However in Box 8.2 he alleges that he has suffered harassment bullying and discrimination in the workplace and refers explicitly to the definition of harassment contained in s26 Equality Act 2010. In addition in

Box 9 he has ticked that he is seeking a recommendation having made a discrimination claim, and in Box 10.1 he has ticked the box stating he was making a whistleblowing claim.

4. When the case came before EJ Havard he identified the claims "The claimant is claiming unpaid holiday pay, arrears of pay and other payments. He is also claiming harassment bullying and discrimination although his claims lack detail". At that stage he did not identify the claimant as bringing an unfair dismissal claim on the basis the dismissal was automatically unfair (S103A ERA 1996).
5. EJ Havard directed that all of the claims should be the subject of a Preliminary Hearing to determine whether they were in time before any further case management orders would be made, on the basis that if the claimant was unsuccessful his claims would be struck out in their entirety. He gave directions including that by 17<sup>th</sup> May the claimant should serve a statement explaining the delay in presenting the claims, and any medical evidence relied on. In fact the claimant did not comply with those directions but did on 28<sup>th</sup> May 2019 supply a medical report. Although a copy was sent to the respondent it has not apparently been received by them. In addition on an earlier date the claimant had supplied some medical records which I will refer to later.
6. The claimant was dismissed on 22<sup>nd</sup> June 2018 and accordingly any claims should have been submitted at the latest by 21<sup>st</sup> September 2018. That time can be extended if there has been compliance with the ACAS early conciliation process. That process was complied with on 21<sup>st</sup> September itself, which was the last day for compliance leading to an automatic extension of time. As a consequence any claim should have been submitted by 21<sup>st</sup> October 2018 to be in time, but the claim form was served on 19<sup>th</sup> December 2018. Therefore all of the claimant's claims however identified are out of time.
7. As indicated above the claims identified by EJ Havard included all of those for which boxes were ticked in the claim form and in addition a discrimination claim, although it was not further particularised. This morning the claimant has said that he is intending to bring an unfair dismissal claim on the basis of whistleblowing. He had at the time he submitted his claim form understood that he was able to do so as he did not have two years' service. For today's purposes I will assume that in addition to the claims specifically advanced there also claims for automatic unfair dismissal and discrimination.
8. Other than the discrimination claim all of the claims are subject to the reasonable practicability test. I can only extend time if it was not reasonably practicable for the claims to be submitted in time, and that they were submitted in a reasonable time thereafter.
9. The claimant this morning tells me that he has no real recollection of why the claim was submitted on 18<sup>th</sup> December 2018 and not earlier, or of any specific reason that he was unable to submit it by 21<sup>st</sup> October 2018. Equally he has no recollection of why or how he was able to discover the need for, and then to participate in ACAS early conciliation within time, or how he discovered the general requirement for two years' service for an unfair dismissal claim but he suggests he probably found the information online. He stated that he has

suffered from mental health problems during this period. He has supplied a medical report from his GP Dr Abdul Waheed which states: "He has ongoing moderate to severe anxiety/depression episodes affecting his mental health and has not been able to work for the last twelve months. No alcohol/illicit drug use, has chosen not to take anti depressants." In addition he has supplied medical records which includes for an entry dated 15<sup>th</sup> August 2018 "...patient admits taking o-d of medication on 22/7/18 when distressed..."

10. It is clear both from the report and from the medical records that the claimant is telling the truth when he says he has been suffering from mental health issues for the past year. The question for me is whether it was reasonably practicable for the claims to have been presented in time. It is not inevitable that someone suffering from mental health issues will be prevented from doing so. As is apparent in this case the claimant was able to discover the need to enter into early conciliation and to do so within time, and to have found out enough about the general requirements of an unfair dismissal for him to choose not to bring such a claim originally. Whilst it is difficult not to have sympathy with the claimant there is no evidence before me as to why the claimant did not bring the claim within time, and no evidence as to how it came to be submitted approximately two months out of time. I have to determine the case on the basis of the evidence and in those circumstances here is simply not the evidence before me to find that it was not reasonably practicable for the claim to have been presented within time.
11. That leaves the discrimination claim to which a different test, whether it is just and equitable to extend time applies. Even with that more generous test there is no presumption that it should be applied in favour of the claimant, and the claimant has the same difficulties in relation to this test as with the reasonable practicability test on the evidence as set out above. In addition there is another difficulty. Although the claimant wishes to make a discrimination claim he has not in the claim form identified the protected characteristic relied on. It is not possible to bring a discrimination claim based upon a general perception of unfairness, it must relate to and be based one or more of the protected characteristics. However when asked at this hearing which protected characteristic he was intending to rely on as the basis of his claim he has not been able to identify any that he would be relying on if the case were to go forward. On that basis the claimant's claim for discrimination is doomed to fail and in terms of exercising my discretion, to allow a claim to go forward where the claimant cannot himself identify a central component of the claim would benefit nobody, not least the claimant himself. It follows that I am equally unpersuaded to exercise my discretion in relation to the discrimination claim and that all of the claimant's claims must be dismissed as being out of time.

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**Employment Judge P Cadney**  
**Dated: 6<sup>th</sup> June 2019**

ORDER SENT TO THE PARTIES ON

.....9 June 2019.....

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS