# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Dellal

**Respondent:** ABM Aviation UK Limited

**Heard at:** Manchester (by CVP) **On:** 29 April 2021

**Before:** Regional Employment Judge Franey
(sitting alone)

**REPRESENTATION:**

**Claimant:** In person
**Respondent:** Mr A O'Neill, Solicitor

# JUDGMENT AT PRELIMINARY HEARING

1. The complaint of detriment contrary to regulation 2 of the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 is struck out under rule 37(1)(a) because it has no reasonable prospect of success.

2. The complaint of unlawful deductions from pay contrary to Part II Employment Rights Act 1996 is dismissed. It was presented after the end of the period of three months beginning with the date of the deduction when it was reasonably practicable for it to have been presented within that period.

# REASONS

## Introduction

1. Following a case management hearing in private before Employment Judge Benson on 20 January 2021, this public preliminary hearing was listed to determine two matters.

2. The first was whether the complaint of detriment under regulation 2 of the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 ("the Zero Hours Regulations") should be struck out on the grounds that it had no reasonable prospects of success. I will call this the "**zero hours issue**".

3. The second was whether the complaint of unlawful deductions from pay could proceed given that the claim form was presented outside the period of three months from the date of the alleged unauthorised deduction. I will call this the "**time limit issue**".

## Summary of the Proceedings

4. Having undergone early conciliation between 17 August and 17 September 2020, the claimant presented his claim form on 15 October 2020. He had been employed as a Customer Care Agent by the respondent since 2007. His claim form said that he was on a zero hours contract with a clause which prevented him working for other employers, and that this had prevented him from obtaining other employment whilst furloughed under the Coronavirus Job Retention Scheme from the spring of 2020. He alleged that his furlough pay on 10 May 2020 was too low, the shortfall being £229.86. He had pursued a grievance but the respondent had not allowed him to do so.

5. The respondent initially filed a holding response because the internal proceedings were ongoing, but subsequently amended grounds of resistance were provided on 19 January 2021. They asserted that the unlawful deductions complaint was out of time, but that in any event the furlough payment had been correctly calculated. It was also denied that there was any exclusivity clause in the contract, but the response suggested in any event that the zero hours detriment complaint had no reasonable prospect of success.

6. The complaints and issues were clarified by Employment Judge Benson at the preliminary hearing on 20 January 2021. The substantive complaints were of unlawful deductions from pay in relation to the payment on 10 May 2020, and of detriment contrary to regulation 2 of the Zero Hours Regulations. If either claim succeeded the claimant would also seek an award of four weeks' pay for failure to provide a written statement of the main terms of his employment, and he sought an uplift to any compensation awarded on the basis of an unreasonable failure to follow the ACAS Code of Practice in relation to grievance procedures.

7. The claimant was required to supply some further information after the preliminary hearing. The acts or deliberate failures to act giving rise to the detriment were said to be a failure to clarify the exclusivity clause, and failing to allow the

claimant a grievance hearing. These meant that he was unable to pursue alternative employment that would have supplemented his limited furlough payments. He said that this caused him loss of earnings and stress.

## The Hearing

8. The Code V in the heading indicates that this hearing was conducted by video conference call using the HMCTS Cloud Video Platform. That was proportionate and fair given the issues to be determined, and there were no significant difficulties with the technology.

9. I had a bundle of documents running to 217 pages, and any references to page numbers in these reasons are a reference to that bundle. Mr O'Neill had supplied a written submission.

10. On the zero hours issue I heard no evidence but the claimant made an oral submission. Mr O'Neill's submissions were in writing.

11. On the time limit issue I heard evidence on affirmation from the claimant, pursuant to a two page witness statement which he had supplied during the hearing. We had a break in the hearing to allow Mr O'Neill and I to read it. After the evidence I heard an oral submission from both sides before making my decision.

12. These reasons will deal with the zero hours issue then the time limit issue.

## Zero Hours Issue – Legal Framework

13. The position of zero hours workers is addressed by sections 27A and 27B of the Employment Rights Act 1996. Section 27A defines a "zero hours contract", and identifies in subsection (3) provisions which are unenforceable. It is convenient to call such a provision an "exclusivity clause".

14. The definition of an exclusivity clause is as follows:

> **"Any provision of a zero hours contract which –**
>
> **(a) prohibits the worker from doing work or performing services under another contract or under any other arrangement, or**
>
> **(b) prohibits the worker from doing so without the employer's consent..."**

15. A clause of that kind is by section 27A(3) unenforceable against the worker.

16. Section 27B empowers the Secretary of State to make further provision by means of regulations. The Zero Hours Regulations from 2015 make provisions for unfair dismissal and the right not to be subjected to a detriment.

17. The detriment provision is section 2(2), which is as follows:

> **"(2) A worker who works under a zero hours contract has the right not to be subjected to any detriment by, or as a result of, any act, or any deliberate failure to act, of an employer done for the reason specified in paragraph (3).**
>
> **(3) The reason is that the worker breached a provision or purported provision of the zero hours contract to which section 27A(3) of the 1996 Act applies."**

**Zero Hours Strike Out Decision**

18. Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides that a Tribunal may strike out all or part of a claim or response on the ground that it has no reasonable prospect of success.

19. This power should not be too readily exercised. Cases should not be struck out when the central facts are in dispute, as striking out the case will deprive the claimant of an opportunity to prove those facts at the final hearing. The correct approach, therefore, is to take the claimant's factual case at its highest, unless it is contradicted by plainly inconsistent documents. Complaints of detriment are analogous to complaints of discrimination under the Equality Act 2010, where the approach to striking out was summarised by the Employment Appeal Tribunal in **Mechkarov v Citibank NA [2016] ICR 1121** as follows in paragraph 14:

> **"On the basis of those authorities, the approach that should be taken in a strike out application in a discrimination case is as follows: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."**

20. I applied this approach to the zero hours issue.

21. In addition I assumed in favour of the claimant that his contract did contain an exclusivity clause which fell within section 27A(3). That is something which is not accepted by the respondent and which would have to be determined at a final hearing if the matter proceeded.

22. I also took account of the claimant's confirmation, provided previously in writing and given again at this hearing, that he did not do any work for an alternative employer. His case is that he was deterred from seeking such work by the exclusivity clause, not realising at the time that it was legally unenforceable.

23. Having considered Mr O'Neill's written submission, I identified the main point for the claimant and invited him to respond to it. He raised two arguments. The first was that his expressed intention to work elsewhere was sufficient to amount to a breach of the clause in his contract, and therefore the detrimental treatment that flowed was a consequence of that breach. He said that the respondent had "deemed" it to be a breach. The second argument was that the clause prevented him not just from performing other work but also from even looking for it, and therefore that even though he did not actually work he had been in breach of the clause in question.

24. I considered both of these arguments but I was satisfied that this claim had no reasonable prospect of success.

25. The core problem faced on the first argument was that regulation 2(3) identifies very precisely the conduct on the part of the employee which must be the reason for the detriment if the protection is to be activated. It is that the worker breached the provision to which section 27A(3) applies. It is not engaged if the

worker is thinking about possibly breaching it, or was deterred from breaching it. There must be an actual breach by "doing work or performing services under another contract".

26. On this point I considered whether the claimant might have an argument that there was an anticipatory breach, which would occur if he conducted himself in such a way as to make clear that he would definitely be breaching the contract in the future. In my judgment this would only be tenable as an argument if the claimant had accepted an offer of other employment and notified the respondent of the date he would be starting. Even taking his factual case at its highest, this had not happened.

27. It followed that as the claimant had not done work or performed services under another contract, he was not in breach of the exclusivity provision in his contract (assuming that it existed as he maintained) and therefore his actions did not attract any protection under regulation 2. The claim had no reasonable prospect of success.

28. I also considered his alternative argument that the clause operated so as to prevent him even seeking work. The difficulty with this argument is that a clause which prohibits an employee from seeking other work, as opposed to actually doing it, would be outside the scope of section 27A(3). It is only clauses which prevent employees actually doing work which are rendered unenforceable and which then trigger protection if the employee breaches the clause and is treated detrimentally as a result.

29. For those reasons I concluded that the complaint under the Zero Hours Regulations had no reasonable prospect of success, and I struck it out.

**Time Limit Issue – the Law**

30. The time limit for a complaint of unauthorised deductions from pay appears in section 23 of the Employment Rights Act 1996:

> **(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –**
>
> > **(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made….**
>
> **(4) Where the employment tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."**

31. Two issues may therefore arise if the complaint is outside the primary time limit in subsection (2): firstly, whether it was not reasonably practicable for the claimant to present the complaint within time, and, secondly, if so, whether it was presented within such further period as is reasonable.

32. Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372,** Court of Appeal). The court approved the statement in **Bodha v Hampshire Area Health Authority**

**[1982] ICR 200** that the existence of a pending internal appeal does not of itself justify a finding that it was not reasonably practicable to bring a claim.

33. Ignorance of one's rights can make it not reasonably practicable to present a claim within time as long as that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488** Employment Appeal Tribunal.

34. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

**Time Limit Issue – Findings of Fact**

35. Having heard the evidence I made the following findings of fact.

36. The claimant was aware prior to 10 May 2020 the basis upon which his furlough pay would be deducted. There had been an exchange of emails on 5 and 6 May (pages 74 and 75) in which he was told that the method of calculation would follow Government guidelines and the issue was not negotiable.

37. He was aware in broad terms of his right to go to an Employment Tribunal, although he did not have specific understanding of the time limit position at this stage. The claimant was a member of the GMB trade union, and did take advice from them during May about the rules of the furlough scheme. The union told him, however, that he would have to exhaust the internal procedures before he could access legal advice.

38. In the claimant's previous experience during his years of employment for the respondent any errors in payslips had been corrected the following month. Despite being told that the method of calculation was not negotiable, he hoped that it might be corrected in the payslip on 10 June 2020.

39. When he saw this had not been done he brought his grievance on 11 June 2020. The claimant believed that he ought to exhaust his internal grievance before taking legal proceedings. He formed the view that the grievance ought to take a total of 42 days, since according to the relevant procedures an initial response was due within 28 days and any appeal might take a further 14 days. He anticipated that the grievance ought to be resolved by 23 July 2020.

40. That remained his view even despite email correspondence of 18 June 2020 (page 84) telling him that he could not bring a grievance about a company process issue. His response the following day (page 84) sought to appeal that decision or in the alternative to lodge a second grievance.

41. By late July the claimant had carried out some research and had seen the page on the ACAS website (page 52) which says that the time limit for making a claim to an Employment Tribunal is "three months less one day". It gives an

example of an unfair dismissal complaint where time runs from the date of the dismissal.

42. Crucially, I found as a fact that the claimant thought that his three month less one day period ran from the failure to correct the error in the payslip on 10 June 2020. However, he had not seen anything on the ACAS website which said that, and in truth it was a misunderstanding of the law. That misunderstanding was the real reason that his claim was lodged out of time. He thought that the three month time limit for commencing early conciliation in order to "stop the clock" expired on 9 September 2020. It actually expired on 9 August 2020.

43. In mid-August the claimant was informed that he would be coming back to work in the last week of August. He knew he would be very busy then and decided to start the ACAS conciliation process before then rather than wait until what he thought was the last date on 9 September. He commenced ACAS early conciliation on 17 August. He knew he could not bring a claim until the certificate was issued. ACAS issued their certificate on 17 September 2020. He believed that he had a calendar month to lodge his claim and therefore that 16 October 2020 would be the last day. In truth this was a misapprehension, because the one month extension under the legislation from the date of the certificate only applies if the conciliation period starts within the primary time limit.

44. Rather than leave his online submission of the claim form until what he thought was the very last day, he did it the day before. That is why his claim form was lodged on 15 October 2020, over two months after the primary limitation period expired. Part of the reason he left it until the end of what he thought was the limitation period was because he was very busy supporting his family and friends at this time due to a number of issues arising out of the pandemic.

**Time Limit issue - Submissions**

45. Mr O'Neill had prepared a written submission and he relied on that and the questions he put in cross examination as a summary of his case as to why time should not be extended. He submitted that it was reasonably feasible for the claimant to have ascertained, by means of internet research or otherwise, that the time limit ran from the date of the deduction, not from the date of the failure to correct it. It was therefore reasonably practicable for the claimant to have presented his claim within time. He was well equipped to undertake such research, as was evident from the terms of his submissions and emails which frequently referred to particular pieces of legislation. Further, once the ACAS conciliation period ended he could reasonably have lodged his claim more quickly as he still had time to do that despite the family issues. He was still furloughed at that stage and therefore had the hours which otherwise would have been working hours available to him.

46. In his submission Mr Dellal emphasised that the deductions were continuing even to the present time, although he had chosen to limit his claim form only to the deduction made on 10 May 2020. He had believed that the payment on 10 May 2020 could not be considered as a deduction until the respondent had had a chance to put it right the following month. He thought that if he were to bring a Tribunal claim before the next payment it would be regarded as premature. His position was that he had behaved reasonably throughout and the claim should be allowed to proceed.

**Time Limit Issue – Decision**

47. As a matter of law, it is plain from section 23(2)(a) that the three month time limit started to run on the date of the alleged underpayment, not the date on which the respondent could have corrected it. The claimant was wrong in his belief that it could not be regarded as a deduction until the following payday had passed.

48. Further, it is clear that the claimant operated under a mistaken belief that his three month limitation period was running from 10 June 2020 rather than 10 May 2020. His actions after that period were entirely consistent with this view and showed a good understanding of the interaction between Tribunal time limits and early conciliation, save for the misapprehension about when time started to run. He knew that the three months from 10 June would allow sufficient time for the grievance to be completed, which is always to be encouraged before a Tribunal claim is brought, and he knew that by going to ACAS the clock would stop and he would not be able to lodge his claim until the ACAS conciliation certificate had been issued. He also understood that once that was issued he had a calendar month in which to bring his claim. In the light of that misapprehension his actions that followed were entirely reasonable.

49. This case therefore turned upon the question whether his mistaken belief that time was running from 10 June 2020 was one which it was not reasonably practicable for him to have corrected. Could he reasonably have found out that time started to run on 10 May?

50. In my judgment it was reasonably practicable for him to have ascertained the correct position. For example, the ACAS website itself in the advice section contains a page on deductions from pay which makes clear that where there is a single deduction the three month period runs from the date of the deduction. That same information is easily ascertainable by means of internet research using Google or another search engine. The claimant could also have made a specific enquiry about time limits of his trade union, just as he sought advice about the furlough rules. I accepted Mr O'Neill's submission that the claimant was well able to research and ascertain the relevant law, having done so on more complex matters such as the Zero Hours Regulations, or the applicability of an uplift where an employer unreasonably fails to comply with the ACAS Code of Practice on Discipline and Grievance Procedures.

51. It follows that in my view it was reasonably practicable for the claimant to have brought his claim within time by carrying out research which would have identified the correct position, and which could then have informed his approach to time limits in the weeks that followed. The first condition for extending time under section 23(4) is not met, and the complaint of unlawful deductions from pay is dismissed.

**Conclusion**

52. The complaint in relation to detriment under the Zero Hours Regulations is struck out because it has no reasonable prospect of success.

53. The complaint of unauthorised deductions from pay in relation to the deduction on 10 May 2020 is dismissed because it was brought out of time and the claimant has not established that time should be extended.

54. That means that the Tribunal no longer has any power to make an award for any failure to supply a written statement of the main terms of employment, and therefore these proceedings are at an end.

55. Mr O'Neill indicated at the end of the hearing that his client would consider whether to make an application for costs. Any such application should be made within 28 days of the date that this Judgment is sent to the parties. It must be copied to the claimant and set out details of the amount claimed, how it has been calculated, and why it is considered that the claimant has acted unreasonably. The claimant will have an opportunity to respond within 14 days of receiving any such application, and I will then determine the costs application on the papers unless either side requests a further hearing.

56. If an application is pursued the claimant can find more information about costs in Guidance Note 7 attached to the Presidential Guidance on General Case Management found at this website:

https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/

______________________________

Regional Employment Judge Franey
30 April 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
6 May 2021

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.