# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr S Berry**

**Respondent:** **Simon Field t/a Vehicle Logistics**

**Heard at:** **Nottingham (via CVP)**

**On:** **23 July 2021**

**Before:** **Employment Judge Smith (sitting alone)**

**Representation**
**For the Claimant:** In person
**For the Respondent:** No attendance

# JUDGMENT

1. The Claimant's claim is dismissed because the Tribunal has no jurisdiction to consider it.

# REASONS

**Procedural history**

1. By way of an ET1 claim form received by the Tribunal on 21 April 2020 the Claimant presented a claim for "other payments" against the Respondent. No ET3 response has ever been presented to the claim, but the nature of the claim itself was unclear.

2. In particular, it was unclear as to the basis upon which the Claimant had been engaged by the Respondent. On 16 July 2020 Employment Judge Heap wrote to the Claimant inviting him to clarify these matters before a decision could be made to issue a default judgment under **rule 21** of the **Employment Tribunals Rules**

**of Procedure 2013**. The Claimant provided some information on 3 August 2020 via email, in which he said that *"I am claiming for tax and National Insurance for the following years"* and provided a breakdown of figures for the tax years 2018-19 and 2019-20. He also mentioned a sum of £1,000 which had been paid in respect of an insurance policy, plus £235 he said he had been charged for damage apparently caused to a windscreen.

3. This information was insufficient to clarify the basis of the claim and Employment Judge Broughton wrote to the Claimant on 12 September 2020 inviting him to provide further information before a default judgment could be issued. Regrettably, the information provided by the Claimant remained insufficient and Employment Judge Adkinson wrote to the Claimant on 22 January 2021 making a further request for information. The request made of the Claimant was for him to clarify whether he had paid the sums cited in tax and National Insurance to HM Revenue and Customs (HMRC) directly, or whether he was contending he had paid more tax and National Insurance as an ostensibly self-employed person as opposed to an employee who would have paid through PAYE.

4. The Claimant provided further information on 3 February 2021, in response to Employment Judge Adkinson's request. The Claimant's email opened with the words *"The figures which were provided have not been paid by myself as they should have been paid over to HMRC by Mr. Simon Field but, he hasn't despite making deductions from my wages."* It continued, *"He is now saying I was self-employed, which from previous correspondence you can clearly see I wasn't, and I need to pay these amounts over myself."* At the email's conclusion the Claimant stated that he was asking for the Tribunal to find that he was an employee of the Respondent and order the Respondent to pay to HMRC. In the alternative, if the Tribunal found him to be self-employed the Claimant stated he was asking the Tribunal to order the Respondent to repay monies deducted from him so he could pay them to HMRC himself.

## The hearing

5. This hearing was listed as a remedy hearing, although – for reasons that were unclear – no judgment (default or otherwise) had been issued in the Claimant's favour. However, without being able to fully understand the Claimant's claim I was not in a position to issue a **rule 21** default judgment or go on to determine any remedy issues. I therefore proceeded to hear evidence from the Claimant and his accountant, Ms Jayne Wheeler, and sought to clarify the basis of the claim.

6. The Claimant commenced his engagement with the Respondent on 12 May 2017. This engagement continued until 31 December 2019. The Claimant recalled this date with clarity: it was memorable for him because it was the day before his dog unfortunately died. I accepted this part of his evidence.

7. During the course of the Claimant's evidence he referred to a schedule of deductions he had compiled, in the form of a spreadsheet. I considered that it could be of assistance to me in deciding his claim if I had sight of that spreadsheet. At my request he emailed it through to the Tribunal office and I

looked at it. The Claimant said that it showed what he earned on a weekly basis, and what was actually paid. The deficit between the figures owed and the figures paid amounted to £4,121.22. That figure did not correspond to any of the figures said to have been the subject of the claim as evident from the Claimant's responses to Employment Judges Heap and Adkinson.

8. Ultimately, the Claimant's evidence was that he did not know what the explanation for the discrepancy was at all. It was merely his assumption that that amount related to his liability for income tax and National Insurance. I found this evidence to be unconvincing because hitherto the one piece of clarity the Claimant had provided was his claim concerned sums deducted for tax and National Insurance purposes, which *"should have been paid over to HMRC"* in the words of his email of 3 February 2021.

9. For her part, Ms Wheeler confirmed that whilst the discrepancy in what the Claimant was saying he was owed and what he was actually paid was readily identifiable, she too did not know whether any "deduction" had been made for tax and National Insurance purposes. She did not know the reason for the discrepancy, which in her position (as the Claimant's accountant) was understandable because the Claimant had not been provided with payslips or any P60s during the time of his engagement by the Respondent from which she could make an assessment. The impression I obtained was that Ms Wheeler had done her best to assist the Claimant with what information he had provided her, and that she was doing her best to assist me in determining this claim.

10. Ms Wheeler confirmed that it had not been her but the Claimant who had prepared the spreadsheet. For this reason the Claimant was recalled to give further evidence about it. The Claimant confirmed that the final entry on the spreadsheet was the week of 19 December 2019, and that he would have been paid on the Friday of that week for any work performed in that week. That date would have been Friday 20 December 2019. Putting aside the employment status issue, it was clear that it was this date upon which the final deduction in any series of deductions from wages had been made.

**Jurisdiction**

11. At this stage in the hearing it became clear that a jurisdictional issue arose even if the Claimant could prove he was an employee or a worker of the Respondent:

    11.1. If I found the Claimant to be an employee, his employment had come to an end on 31 December 2019. Under **art.7 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** ("the **1994 Order**") the primary limitation period for a breach of contract claim outstanding or arising on the termination of employment would have expired on 30 March 2020.

    11.2. If I found the Claimant to be a worker, the last alleged deduction from wages would have taken place on 20 December 2019. Under **s.23(2) Employment Rights Act 1996** ("the **1996 Act**") the primary limitation period

for an unauthorised deductions from wages claim would have expired on 19 March 2020.

11.3. The Claimant contacted Acas for early conciliation on 1 March 2020 and a certificate was issued on 2 March 2020. For the purpose of the early conciliation provisions, 1 March 2020 is Day A and 2 March 2020 is Day B.

11.4. Under the first of the two provisions extending time for compliance with early conciliation (**art.8B(3)** and **s.207B(3)** respectively, which are materially identical) the Claimant would benefit from an extension of time of zero days because the day after Day A and Day B are the same date (2 March 2020). The primary limitation period would therefore be unaffected by the Claimant's compliance with the Acas procedure.

11.5. Under the second of the two provisions extending time for compliance with early conciliation (**art.8B(4)** and **s.207B(4)** respectively; again, materially identical) the Tribunal must look at whether the primary time limit would have expired between Day A but no later than one month after Day B, which in this case would have been 2 April 2020. It was clear that this would have applied to the Claimant's claims of breach of contract and unauthorised deductions from wages. However, under these provisions time is extended to the end of that period, i.e. to 2 April 2020. The Claimant's claim was presented on 21 April 2020 and was therefore presented 19 days out of time, even with the benefit of the **art.8B** and **s.207B(4)** extensions.

12. The time limit for presenting breach of contract claims to Employment Tribunals is jurisdictional, not merely procedural. **Article 7** of the **1994 Order** makes it clear that a Tribunal *"shall not entertain a complaint"* unless the time limit is complied with or extended. That wording is common between this type of claim and unfair dismissal claims (see **s.111(2)** of the **1996 Act**) and the Court of Appeal has affirmed that the position is a jurisdictional one in relation to the latter (**Radakovits v Abbey National plc [2010] IRLR 307**). The position is materially identical in relation to unauthorised deductions claims (see **s.23(2)** of the **1996 Act**).

13. The case of **Radakovits** made it clear that if a question of jurisdiction arises and *"is properly a live one"*, the Tribunal must take it (per Elias LJ at [17]). On the basis of the evidence as it emerged I considered that the matter of jurisdiction had indeed arisen and was properly a live issue. I therefore had no option but to determine it.

14. Having been recalled, in his evidence the Claimant agreed that his claim – whether expressed as one an unauthorised deductions or breach of contract – was presented late. He nevertheless invited me to extend time, and I heard evidence from him on the reasonable practicability of presenting the claim in time, which is first stage in the applicable test for extending time in both types of claim (**art.7(c)** and **s.23(4)** respectively). This question is a matter of fact for the Tribunal (**London International College v Sen [1992] IRLR 292**, EAT) and reasonable practicability means what was *"reasonably feasible"* at the time

(**Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119**, Court of Appeal).

15. The Claimant's explanation, in evidence, for why he could not have presented his claim by 2 April 2020 was multifaceted. He contended that:

    15.1. At that time, it was what he described as *"the early days of Covid"* and that he was trying to keep himself and his family financially afloat at that time. He did, however, say that he was working at that time;

    15.2. He suffered from anxiety, and that *"got the better of him at times"*;

    15.3. He was concerned about the possible repercussions from the Respondent if he presented a claim. Those, he said, included verbal abuse and the threat of actual bodily harm; and,

    15.4. He said that Acas had told him that the time limit was three months from the time Acas issued his early conciliation certificate.

16. Ultimately I did not accept the Claimant's evidence on these points, save in respect of his anxiety. In that regard I did accept that he was suffering from anxiety around the time of 2 April 2020 and that the prospect of presenting a claim to an Employment Tribunal was something which would likely have caused him to become more anxious. I also note that a mental impairment can be an important – even conclusive – factor in determining whether it was reasonably practicable to have presented a claim in time (**Walls' Meat Co Ltd v Khan [1978] IRLR 499**, Court of Appeal). However, even in the basis of the above finding I did not consider that heightened anxiety rendered it not reasonably practicable – in the sense that it was not reasonably feasible – for the Claimant to lodge his ET1 in time. I was provided with no evidence about what the Claimant could or could not do in the run-up to 2 April 2020, because of his anxiety. He was on his own case able to work during that time, and he was able to submit his claim without difficulty less than three weeks later. It was not suggested that his anxiety was any worse at the time he did in fact lodge his claim.

17. As to the Claimant's other contentions, my findings and determinations were as follows:

    17.1. I did not accept that the Claimant's work commitments in *"the early days of Covid"* were particularly onerous. He did not suggest that they were, even if there was a degree of financial uncertainty for him at that time (as there was for large numbers of people across the country). He did not suggest that they were more onerous then than when he actually did come to submit his claim on 21 April 2020, less than three weeks later, and it clearly had been reasonably practicable for him to do so on that date. In my judgment, the Claimant's work commitments in the run-up to 2 April 2020 did not negatively affect the reasonable feasibility of him presenting a claim by that date.

17.2. On the balance of probabilities I did not accept the Claimant's evidence that there was a realistic possibility he might face verbal or physical threats from the Respondent. On 1 March 2020 the Claimant had engaged in the Acas early conciliation process and he would have known that it was at least possible that the Respondent would be contacted by Acas informing him that there was a dispute between them. That was around seven weeks before the Claimant presented his ET1 to the Tribunal, and it did not result in such threats being made. Nor did the lodging of his claim on 21 April 2020. There was no evidence that in the more than 16 months that have elapsed since the Claimant lodged his claim, the Respondent had ever engaged in threatening behaviour towards him. In my judgment, the Claimant's suggestion was not realistic and it did not make it not reasonably practicable for him to present his claim by 2 April 2020.

17.3. I did not accept the Claimant's evidence that Acas had told him he had three months from the date of the early conciliation certificate to present his claim. Whilst erroneous advice from an Acas representative does not in principle rule out a Claimant benefitting from an extension of time on the "not reasonably practicable" basis (**DHL Supply Chain Ltd v Fazackerley UKEAT/0019/18**, 10 April 2018, unreported) it was in my judgment highly unlikely that even an inexperienced Acas representative would have given such advice to the Claimant. On the balance of probabilities, Acas did not give him that advice. The early conciliation system has been in place for several years now and its mechanics are well familiar. The system is supplemented by an abundance of information available to prospective Claimants both on the Acas website and from other official sources. Furthermore, if the Claimant's evidence was correct he would, in his mind, have had until 1 June 2020 to present his claim, yet he did so some six weeks prior to that putative deadline and at a time when (on his evidence) he was grappling with Covid-related financial uncertainty, anxiety and the possibility of threats from the Respondent. In my judgment, this seemed inherently unlikely. It was for these reasons that I rejected the Claimant's evidence as to what he was told by Acas and it follows that this had no impact upon whether it had been reasonably practicable for him to submit his claim by the 2 April 2020 deadline.

18. The result of my findings and the above analysis is that it was reasonably practicable for the Claimant to have presented his claim to the Tribunal by 2 April 2020. As such, he cannot benefit from an extension of time under **art.7(c)** or **s.23(4)**, and it is not necessary for me to go on to determine the second element of the test (whether the claim was presented within such further period as was reasonable).

19. It follows that the Tribunal has no jurisdiction to consider the Claimant's claims, and they are dismissed.

20. For completeness, owing to a lack of jurisdiction I cannot and do not make any findings as to the employment status of the Claimant, or indeed any of the merits of his claim.

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Employment Judge Smith

Date: 26 August 2021