



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr Jose Fonseca

**Respondent:** Pilgrim's Pride Ltd

**Heard at:** Bristol (via CVP video hearing) On: 9<sup>th</sup> September 2021

**Before:** Employment Judge P Cadney

**Representation:**

Claimant: In Person

Respondent: Ms K Hurst (Solicitor)

## PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant's claim number 1400968/2021 is dismissed as having been presented out of time.
- ii) The claimant's claim number 1400950 /2020 will proceed to hearing.
- iii) Case Management Orders are set out below.

### Reasons

1. The claimant was dismissed on 12<sup>th</sup> November 2020. Accordingly the primary time limit for presenting any claim was 11<sup>th</sup> February 2021. The ACAS EC certificate gives the commencement date (date A) as 25<sup>th</sup> December 2020 and the conclusion (date B) as 11<sup>th</sup> January 2021. This had the effect of extending the limitation period by 17 days until 28<sup>th</sup> February 2021.
2. At various points the claimant has been represented by his trade union and a solicitor although he is now a litigant in person.

3. 1400950/2021 – This claim was presented in time on 24<sup>th</sup> February 2021 and was accepted by the tribunal. It was submitted on the claimant's behalf by his trade union representative and appears to bring claims of ordinary unfair dismissal and/or automatically unfair dismissal (health and safety related although not particularised – potentially a s100 Employment Rights Act 1996 claim) and a claim for wrongful dismissal/notice pay (see below).
4. 1400986/2021 – On 28<sup>th</sup> February a separate claim was submitted on the claimant's behalf by his solicitor. This also related in part to his dismissal and made claims for public interest disclosure (whistleblowing) detriment and automatically unfair dismissal (s103A ERA 1996) (see below). On the face of it this claim was also in time. However in error the claimant's details had been entered twice, both as the details of the claimant and respondent. The claim form was rejected, as necessarily the respondent's details did not correspond with those on the ACAS EC certificate. That error was rectified and the claim accepted. However given that error, the deemed date of the submission of the claim form was the day of the rectification and not the date of original presentation; 23<sup>rd</sup> March 2021. In consequence the claim was lodged out of time.
5. Accordingly today's hearing was listed to determine whether the claims in claim 1400986/2021 should be dismissed as having been presented out of time.
6. The question is whether it was reasonably practicable to have presented the claims in time and if not whether they were presented in such further time thereafter as was reasonable. The claimant relies simply on the fact that the error was his solicitor's and not his and that it would be unfair if he were not permitted pursue these claims for that reason.
7. Unfortunately there are a number of authorities concerning errors by skilled advisors. The basic proposition is that "*If a claimant engages solicitors to act for him or her in presenting a claim, it will normally be presumed that it was reasonably practicable to present the claim in time and no extension will be granted. As Lord Denning MR put it in Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA: 'If a man engages skilled advisers to act for him — and they mistake the time limit and present [the claim] too late — he is out. His remedy is against them.' This rule is commonly referred to as the 'Dedman principle'.*" (IDS Handbook volume 5 para 5.64) Whilst there are exceptions in this case it was clearly reasonably practicable to have presented the case in time, given that the claimant's solicitor did so, but the error caused it to have been rejected, and when it was correctly completed it was out of time. In those circumstances I can see no way that I can or could hold that it was not reasonably practicable to have presented the claim in time (i.e. presented in time correctly and properly completed) with the consequence that I am bound to dismiss it.

8. However for the reasons given below this does not necessarily prevent the claimant from being permitted from presenting those claims.

Amendment / Public Interest Disclosure Claims - Further and Better Particulars

9. The respondent has sought further and better particulars of both claims; and as discussed in the hearing whilst the claims in 1400986/201 have been dismissed that is on a jurisdictional basis not because the merits of the claims have been considered. Accordingly it is open to the claimant to apply to amend the existing claim (although this does not necessarily mean that any application will succeed).
10. As is set out in the directions below the claimant has been given permission to apply to amend the claim to include the public interest disclosure claims originally set out in claim 140986/2021. If he does seek to do so he will have to supply the further and better particulars of his claim as set out below.
11. A qualifying protected disclosure is a disclosure of information which in the reasonable belief of the individual is in the public interest and is information tending to show one of the matters set out below. As is set out in the directions above the claimant should identify into which category he contends any disclosure fell:
  - i) a criminal offence had been, was being or was likely to be committed;
  - ii) a person had failed, was failing or was likely to fail to comply with any legal obligation;
  - iii) a miscarriage of justice had occurred, was occurring or was likely to occur;
  - iv) the health or safety of any individual had been, was being or was likely to be endangered;
  - v) the environment had been, was being or was likely to be damaged;
  - vi) information tending to show any of these things had been, was being or was likely to be deliberately concealed.
12. If he seeks permission to amend the claimant must set out in writing:
  - i) The disclosures relied on; stating individually and in respect of each of them :-
  - ii) Whether they were oral or in writing;
  - iii) When they were made;
  - iv) To whom they were made;

- v) The subject matter of the disclosure /the information disclosed;
  - vi) The category or categories of disclosure (as set out above) into which they fall.
  - vii) The basis for contending that in the reasonable belief of the claimant the disclosure was in the public interest.
13. For the assistance of the claimant in the Grounds of Resistance already submitted in respect of 140986/2020 the respondent has helpfully set out the disclosures it understands the claimant may be relying on (although it does not accept that any are protected disclosures ).These are:-
- i) 26<sup>th</sup> October 2020 email (ET3 Grounds of Resistance para 27)
  - ii) 7<sup>th</sup> November 2020 email (GoR paras 44/45)
  - iii) 12<sup>th</sup> November 2020 – oral disclosures at the disciplinary hearing (GoR paras 48/52)
14. If the respondent has correctly identified the alleged disclosures the claimant may address the questions set out above by reference to those alleged disclosures.
- 15.
16. If the claimant does apply to amend the respondent will notify the tribunal if it objects; and if so further directions will be given (see directions below).

Ordinary Unfair Dismissal / Automatically Unfair Dismissal s100 ERA 1996 – Further and Better Particulars .

17. As set out above in claim 14009650/21 the claimant brought claims of unfair dismissal and wrongful dismissal. Those claims are reasonably clear. The unfair dismissal arises from a dispute that occurred whilst the claimant was carrying out overtime on 7<sup>th</sup> November 2020. The respondents case is that it reasonably took the view that his conduct amounted to gross misconduct; the claimant that it was not misconduct at all or at least not misconduct sufficient to justify dismissal.
18. In the Grounds of Claim, the claimant refers to being an appointed Trade Union Health and Safety Rep (para 2) and at para 14 (e) that the claimant genuinely considered that he was raising as a TU Health and Safety Rep a legal health and safety requirement in the rotation of tasks. However in the second claim form the only claims are of whistleblowing.
19. The claimant is directed to confirm:-

- i) Whether he is bringing a claim that his dismissal was automatically unfair (s100 ERA 1996);
- ii) If so within which subsection his claim falls (from the particulars summarised above he appears to be seeking to bring a claim within s100(1) (b). If this is not correct the claimant should set out any alternative basis of the claim. The section is set out below )

*100 Health and safety cases*

*(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—*

*(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,*

*(b) being a representative of workers on matters of health and safety at work or member of a safety committee—*

*(i) in accordance with arrangements established under or by virtue of any enactment, or*

*(ii) by reason of being acknowledged as such by the employer,*

*the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,*

*(c) being an employee at a place where—*

*(i) there was no such representative or safety committee, or*

*(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,*

*he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,*

*(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*

*(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.*

Employment Judge P Cadney  
Dated: 13 September 2021

Judgment sent to the parties: 22 September 2021

FOR THE TRIBUNAL OFFICE