



# THE EMPLOYMENT TRIBUNAL

---

**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE MORTON

**BETWEEN:**

**Mr G Kempster**

**Claimant**

AND

**The REC Horsham Limited (1)**

**Mr N Mc Dowell (2)**

**Respondents**

**ON:** 18 November 2022

**Appearances:**

**For the Claimant:** Mr S Rahman, Counsel

**For the Respondent:** Mr M Grant, Legal Executive

## **Judgment**

1. All of the Claimant's claims under the Equality Act 2010 in respect of direct sex discrimination, equal pay and victimisation are dismissed on withdrawal by the Claimant.
2. The Claimant's claims of breach of contract in respect of failure to enrol him in a pension scheme, failure to give payslips and failure to deduct income tax and national insurance from his salary have no reasonable prospect of success and are struck out.

3. The Claimant's claims of breach of contract in respect of unpaid pension contributions and company sick pay arising prior to 20 December 2020 are res judicata and are struck out.

## Reasons

1. The Claimant has brought two claims against the Respondent, the first (2301896/2021) presented on 25 May 2021 and the second (2300896/2022) on 8 March 2022.
2. The first claim was a claim for unlawful deduction from wages presented while the Claimant was still employed. That claim was the subject of a judgment of EJ Krepski on 21 March 2022. The judgment was as follows:
  1. **The Claimant's claim in respect of unauthorised deductions from wages prior to 25th May 2019 is time-barred and is struck out as it has no reasonable prospect of success.**
  2. **The Claimant's claim in respect of company sick pay was withdrawn and is dismissed.**
  3. **The Claimant's claim in respect of pension contributions and/or pension payments was withdrawn and is dismissed.**
  4. **The Claimant's claim in respect of expenses and National Insurance contributions was withdrawn and is dismissed.**
3. The second claim followed the termination of the Claimant's employment on 24 January 2022. He brought a number of claims including the following money claims:

**'a separate breach of contract claim in relation to incorrect and/or non-payment of wages, non-provision of payslips, failure to enrol me in a pension scheme, failure to make correct pension contributions, tax and National Insurance contributions (or even at all to the relevant HMRC and pension authorities), non-payment of company sick pay, non-payment of holiday, expenses, in relation to the loss of wages I suffered between December 2019 and my resignation, and as a consequence of the other breaches relied on in relation to my other claims'.**
4. Claims of breach of contract may be brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 Article 3 of which provides:

**Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum**

**(other than a claim for damages, or for a sum due, in respect of personal injuries) if-**

**(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;**

**(b) the claim is not one to which article 5 applies; and**

**(c) the claim arises or is outstanding on the termination of the employee's employment.**

5. I do not think there is any abuse of process in the Claimant putting forward claims for breaches of contract in respect of sums he says became due to him after the period to which the first claim relates. It seems to me that those claims cannot fall within the scope of EJ Krepski's judgment because they arose after the period in respect of which that judgment was given. Furthermore, they could not have been brought as breach of contract claims before the termination of the Claimant's employment as the Tribunal would not have had jurisdiction to hear them.
6. However, I do not consider that the Tribunal has jurisdiction to give a remedy by way of compensation for breach of contract for failure to enrol someone in a pension scheme, failure to give payslips, or failure to pay tax or national contributions to HMRC. These do not seem to me to be matters that give rise to contractual rights that could be compensated by damages (although a failure to pay contractual pension contributions might – see the next paragraph). I consider that those particular claims have no reasonable prospect of success and should be struck out.
7. The claims that can be brought by way of a claim for breach of contract are claims that arose after 20 December 2020 in respect of any unpaid contractual pension contributions, any unpaid contractual sick pay, holiday pay or expenses that arise under the contract of employment. I consider that claims in respect of unpaid pension contributions and unpaid company sick pay arising prior to that date were dismissed on withdrawal by EJ Krepski's judgment of 21 March 2022 and given the terms of the judgment, cannot be revived as either deductions claims or breach of contract claims. Those claims are therefore struck out as they are res judicata.
8. I did not consider that the Claimant was assisted by the case of *Srivatsa v Secretary of State for Health and another* [2018] EWCA Civ 936, referred to by Mr Rahman, as this concerned a claim brought under the 2004 Tribunal Rules. Under the 2013 Rules there is provision under Rule 52 for a claim not to be dismissed on withdrawal if the Claimant has expressed at the time of withdrawal a wish to reserve the right to bring a further claim and the Tribunal is satisfied that there would be a legitimate reason for doing so or the Tribunal considers that dismissing the claim would not be in the interests of justice. The

Claimant has been legally represented throughout his claim and it seems to me that the appropriate course of action for the Claimant would have been to ask that his claims in respect of pension contributions and company sick pay should not be dismissed after withdrawal on the basis that he may wish to revive them as breach of contract claims in the second proceedings. His employment had been terminated by the time of the hearing before EJ Krepski, so he knew that course of action was open to him. However, that is not what the Claimant did. Consequently, the claims in respect of sick pay and pension payments arising before December 2020 were dismissed by the judgment of 21 March 2022 and cannot be revived by the second claim.

Employment Judge Morton  
Date: 25 November 2022

**Public access to employment tribunal decisions**

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