EMPLOYMENT TRIBUNALS

Claimant: Mr L Robson

Respondent: First Subsea Limited

JUDGMENT

1. The claim is rejected under Rule 12(2) of the Employment Tribunal Rules of Procedure 2013 and cannot proceed.

2. This judgment should be taken as notice of rejection under rule 12(3). The claimant has the right under Rule 13(1) to seek reconsideration of this decision as explained in the Reconsideration section of the Reasons below.

REASONS

Introduction

1. The issue which has given rise to this Judgment is whether the Tribunal has any jurisdiction over this claim. It was presented with no early conciliation certificate but with the box ticked to indicate that the claim was exempt from that requirement because it was an unfair dismissal complaint containing an application for interim relief. It had become apparent that the exemption in question might not apply.

2. The case had not been rejected under Rule 12 when first presented, but the point was raised by the respondent in its agenda form for the preliminary hearing on 7 September 2022. The Employment Appeal Tribunal ("EAT") confirmed in **E.ON Control Solutions Limited v Caspall [2020] ICR 552** that a point of this kind must be addressed even if it arises after the claim has been served and the proceedings have progressed some way.

3. The issue was discussed at the preliminary hearing on 7 September 2022. No-one attended the hearing for the claimant, but the trainee solicitor Mr Ashmore represented the respondent. The written record of that hearing contained an explanation of the point and was sent out in writing to the parties on 14 September 2022. It made provision for both sides to make written representations, and for the claimant to request an oral hearing if he so wished.

4. The claimant made written representations dated 14 November 2022, and did not request a hearing. The respondent made submissions in reply on 25 November 2022.

5. I have considered those written submissions from both sides, and I am satisfied that no oral hearing is required.

The proceedings so far

6. The claimant was employed as a Service Technician by the respondent between 2019 and 28 April 2022, when he was dismissed.

7. He presented his claim form on 29 April 2022. The claim form identified in box 8.1 that he was pursuing the following complaints:

- Unfair dismissal
- Discrimination because of religion or belief
- Arrears of pay
- "Harassment/failure to protect my health and safety/failure of employee's duty of care regarding health and safety"

8. Box 8.2 invites the claimant to set out the background and details of the claim. The claimant made a very brief entry:

> **"Failure to protect my health and safety by forcing me to get trial vaccine; harassing me on a weekly basis to get the vaccine or I will lose my job. I have now been dismissed unfairly and loss of earnings."**

9. Box 9 asks the claimant to say what remedy he wanted if his claim was successful. He ticked all the boxes including reinstatement, re-engagement, compensation and a recommendation if there had been unlawful discrimination.

10. Nowhere in Section 9 or anywhere else on the form did the claimant say that he was applying for interim relief.

11. The claim was not rejected. It was served on the respondent and listed for a case management hearing. The respondent filed a response form defending the claim and asserting that it should be rejected for want of an early conciliation number.

The Law on Interim Relief

12. Interim relief is the subject of Section 128 Employment Rights Act 1996. If an employee presents a claim form complaining of unfair dismissal within seven days of the effective date of termination, and alleges that the reason or principal reason for dismissal was one of a number of specified reasons (which include health and safety reasons under Section 100 or protected disclosures under Section 103A), the Tribunal can consider granting interim relief, which is an order for the continuation of his contract until the final hearing of the claim. Interim relief can only be granted if the Tribunal concludes that it is likely that the claim will succeed.

13. Section 128 provides that an employee who presents a complaint of the specified kind "may apply to the tribunal for interim relief". It is up to the claimant to make that application. A complaint of unfair dismissal on one of the prohibited grounds does not automatically give rise to an application for interim relief.

The Law on Early Conciliation

14. The requirement to contact ACAS before instituting proceedings is found within Section 18A of the Employment Tribunals Act 1996. It applies to almost all of the complaints which can be presented to an employment tribunal, including the complaints in this case of unfair dismissal, discrimination because of a philosophical belief, unauthorised deductions from pay, and harassment contrary to the Equality Act 2010.

15. Certain types of claim are exempt from early conciliation proceedings. The detail is set out in the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014.

16. Regulation 3 provides that there is no requirement to undergo early conciliation where:

> **"The proceedings are proceedings under Part X of the Employment Rights Act 1996 and the application to institute those proceedings is accompanied by an application under Section 128 of that Act."**

Submissions

17. The claimant's written submission accepts that he had not complied with Section 18A of the Employment Tribunals Act 1996, but relies on the decision of the Court of Appeal in **Denton v TH White [2014] 1WLR 3926** as the correct approach to assessing whether the claimant should be granted relief from the sanction of having his case struck out. The written submission goes on to suggest that at all three stages the claimant has established that there should be no strike-out.

18. The respondent's position is that the exemption relied upon by the claimant does not apply, and that the Tribunal therefore has no jurisdiction over the claim. It is asserted that **Denton** had no relevance here. That was a case concerned with failure to comply with case management orders requiring service of witness evidence, court fees, costs budgets and other orders. Further, it was a case about the proper approach under the Civil Procedure Rules, not the Employment Tribunal Rules of Procedure. The provision in issue here was a jurisdictional matter and if the claimant had not met the requirements for the Tribunal to have jurisdiction, there is no discretion to ignore that. The respondent relied on the decision of the EAT in **Pryce v Baxterstory Ltd [2022] EAT 61**.

Conclusion

19. In my judgment the submissions made on behalf of the claimant are not well-founded because the **Denton** case is indeed concerned with a different situation: breach of case management orders. The Tribunal has a discretion over what sanction, if any, to impose if there is such a breach (Rule 6).

20. This case is concerned with a mandatory requirement contained in primary legislation which must be satisfied before the Tribunal has jurisdiction over the claim. The Tribunal does not have any discretion if that requirement is not met.

21. In my judgment the Tribunal has no jurisdiction over the unfair dismissal complaint because the claim form does not contain and is not accompanied by any application for interim relief. The exemption in Regulation 3 therefore does not apply to that complaint.

22. Further, the Tribunal has no jurisdiction over any of the other complaints raised because the exemption in Regulation 3 can apply only to an unfair dismissal complaint. Even if the claimant had applied for interim relief, only the unfair dismissal complaint could have proceeded in any event.

23. As a consequence the claim form is now rejected under Rule 12(2) because it falls within Rule 12(1)(d): it instituted relevant proceedings, was made on a claim form which contained confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply.

Reconsideration

24. Under rule 13 the claimant can apply for reconsideration of this decision on the basis that either the decision to reject was wrong, or that the defect can be rectified.

25. Any such application must be in writing and presented to the Tribunal within 14 days of the date that this judgment is sent out. The application must explain why the decision is said to have been wrong, or must rectify the defect, and any request for a hearing must be contained in the application.

26. The claimant may wish to note that pursuant to **Pryce v Baxterstory Ltd [2022] EAT 61** provision now of an early conciliation certificate will not rectify the defect if no certificate existed on 29 April 2022 when the claim was presented.

Regional Employment Judge Franey
16 December 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
22 December 2023

FOR THE TRIBUNAL OFFICE