



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P O'Brien

**Respondent:** Mersey Eco Grants Ltd

**Heard at:** Manchester (by CVP Video)      **On:** 8 March 2023

**Before:** Employment Judge Parkin

## **Representation**

**Claimant:** No attendance or representation

**Respondent:** Mr J Tidy, solicitor

## JUDGMENT AT A PRELIMINARY HEARING

**The Judgment of the Tribunal is that** the claimant's unfair dismissal, breach of contract/notice pay, unlawful deduction from wages and disability discrimination claims are all dismissed for want of jurisdiction. All his claims in these proceedings are thereby dismissed.

## REASONS

1. By his ET1 claim form presented on 29 March 2022 the claimant claimed unfair dismissal, disability discrimination, holiday pay and arrears of pay arising from the termination of his employment with the respondent as a surveyor on 3 December 2021. The respondent resisted all claims in its ET3 response with full grounds of resistance presented on 6 July 2022.
2. There was a case management hearing on 7 September 2022 before Employment Judge Feeney. In her case summary, she identified that the claimant's claims needed further particularisation since he lacked the two years' service for an ordinary unfair dismissal claim but may have an unfair dismissal claim for asserting a statutory right or even for having made a protected disclosure ("whistleblowing"). She identified claims for unlawful deduction from wages in respect of pay and holiday pay and general but not specific disability discrimination claims relating to the claimant's back condition and also a breach of contract/notice pay claim.
3. At paragraph 1 of the case management orders the claimant was expressly

ordered to advise the Tribunal by 31 December 2022 whether or not he sought an amendment in respect of a disability discrimination claim in relation to his difficulties in accessing attics via ladders and, if so, to set out the amendment in full including when he said he raised this with the respondent and what type of disability discrimination it was; it was suggested it might be a reasonable adjustment claim. He was also ordered to confirm whether or not he was claiming unfair dismissal for asserting a statutory right claim by 31 December 2022, and, if so, to establish the basis of any such claim and the facts and the statutory right he relied upon and he was to confirm whether or not he brought a whistleblowing claim in respect of any of the matters he said led to his dismissal. He was ordered to provide to the respondent by 20 January 2023 relevant medical records and an impact statement supporting his claim that he was disabled by virtue of his back problems.

4. None of these case management orders was ever complied with by the claimant; there was no further contact by the claimant with either the Tribunal or the respondent. Accordingly, his unfair dismissal claim relying upon an inadmissible reason for dismissal (an "automatic" unfair dismissal claim) and disability discrimination claims remain unclear. The claimant was not contactable on the day of this hearing; two telephone calls from the Tribunal administration at the start of the preliminary hearing went straight to the claimant's voicemail. After adjourning to allow those telephone calls to be made, the Tribunal decided to continue with the hearing.

#### 5. The Preliminary Hearing

In accordance with Employment Judge Feeney's case management order the preliminary issues to be determined were:

- i) are the claimant's claims of unfair dismissal, unlawful deduction of wages, (breach of contract) and disability discrimination out of time?;
  - ii) if so, whether it was reasonably practicable for the claimant to file his (claim for) unfair dismissal for asserting a statutory right, (breach of contract) and unlawful deductions of wages claims in time and, if not, whether they were filed within a reasonable time thereafter?; and
  - iii) (if so), whether it would be just and equitable to allow the claimant to proceed with his disability discrimination claims?
6. Accordingly, this was a substantive determination of the time limit issues and Judge Feeney ordered the claimant to provide a supporting witness statement by 31 December 2022 setting out the reasons why his application was late or (if he disputed this) why he did so, as well as the other case management orders. Again, there was no compliance by the claimant. Although the Tribunal was satisfied that the claimant had not actively pursued his claim following the case management hearing in September and the case management orders being sent to the parties on 29 November 2022, it dealt with the issues at this hearing in accordance with those listed before it.
  7. At this hearing, the Tribunal accepted the respondent's witness evidence from its Chief Executive Officer, Mr Craig Stewart, as true and accurate. It confirmed with him the circumstances of the claimant's dismissal by telephone on Friday 3 December 2021, which were broadly consistent with the claimant's version summarised at paragraph 12 of Judge Feeney's

order. The claimant's probationary period would have expired on 6 December 2021. The respondent had not yet put a monthly pay process into operation at the time of the dismissal and its final payment was made to him on 3 December 2021.

8. The applicable law

The Tribunal applied the statutory time limits in respect of all the claims which were the "not reasonably practicable" strict test for unfair dismissal (Section 111(2) Employment Rights Act 1996), breach of contract/notice pay (Article 7 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and unlawful deduction from wages claims (Section 23(4) ERA 1996) and the more liberal "just and equitable" extension provision in relation to the disability discrimination claims under section 123 of the Equality Act 2010. Each provision is also supplemented by similar Early Conciliation time provisions such as those at section 207B(2) ERA 1996 which stay and/or extend the operation of the time limits in certain circumstances. However, in all cases, the claimant bore the burden of satisfying the Tribunal that it had jurisdiction to consider his claims fully at a final hearing.

9. As to the "not reasonably practicable" test, the Tribunal followed the guidance of the recent EAT authority Cygnnet v Britton [2022] EAT 108 which itself summarised longstanding principles set out in earlier Court of Appeal and EAT authorities. The Tribunal has a broad discretion under the just and equitable extension provision and there is no presumption that it will be exercised in favour of the claimant, see Robertson v Bexley Community Centre [2003] IRLR 434, CA where it was held that "the exercise of discretion is the exception rather than the rule".

10. Conclusion

Applying these provisions, the Tribunal concluded that each statutory time limit in respect of all the claimant's claims ran from 3 December 2021. The ordinary 3-month limitation period for claims would have expired on 2 March 2022 but the claimant commenced Early Conciliation on 19 January 2022 and his certificate was issued on 9 February 2022. Day A is 20 January 2022 and Day B is 9 February 2022 meaning that 21 days' Early Conciliation should be discounted or counted as time not running, which makes the relevant time limit 23 March 2022, still six days before the ET1 claim form was presented. The claimant gains no benefit from the other provision at section 207B(2)(b) because his claim was not presented within a further month of the Early Conciliation certificate being issued.

11. In these circumstances the claimant's claims were all presented out of time. He himself has given no evidence and put no case to the Tribunal as to why it was not reasonably practicable for him to present the claims in time or, in respect of the still unparticularised disability discrimination claims, why it would be just and equitable for the Tribunal to determine them in any event at a final hearing. It is always for the claimant in Employment Tribunal proceedings to pursue the claim vigorously and actively and the claimant has simply failed to do so and has wholly failed to satisfy the Tribunal that it has jurisdiction to determine any of these claims.

Employment Judge Parkin  
Date: 8 March 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

17 March 2023

FOR THE TRIBUNAL OFFICE