



EMPLOYMENT TRIBUNALS

Claimant Mr P Chiriac

Respondent London United Busways Ltd

Heard at: Watford (in public) **On:** 25 April 2023
Before: Employment Judge Cotton (sitting alone)

Appearances

For the Claimant: Mr P Chiriac, represented/supported by Mr M Chiriac

For the Respondent: Mr E Nuttman (solicitor)

Interpreter: Ms Lydia Hogarth

JUDGMENT

1. The claimant's claim that that the respondent made unauthorised deductions from his wages, contrary to section 13 of the Employment Rights Act 1996, by not paying him the correct amount of sick pay on or around 12 November 2021 is dismissed because it was not brought in time.
2. The claimant's claim that the respondent made unauthorised deductions from his wages, contrary to section 13 of the Employment Rights Act 1996, by failing to honour the minimum weekly contractual hours from 23 May 2020 to 28 May 2021 is dismissed because it was not brought in time.
3. The claimant's claim that the respondent made unauthorised deductions from his wages, contrary to section 13 of the Employment Rights Act 1996, by failing to honour the minimum weekly contractual hours from 23-30 April 2022 (payday 6 May 2022) was brought in time and can proceed.
4. The claimant's claim that the respondent made unauthorised deductions from his wages, contrary to section 13 of the Employment Rights Act 1996, by failing to pay him for actual time worked 'on multiple occasions' and on 26 January 2022 was dismissed because it was not brought in time.
However, this decision has been reconsidered at the Tribunal's own initiative. A separate letter has been sent to the parties about this.

5. The claimant's claim that the respondent refused his reasonable request to be accompanied at a disciplinary hearing contrary to section 10 of the Employment relations Act 1999 is because it was not brought in time.
6. The claimant's claim of direct sex discrimination contrary to section 13 of the Equality Act 2010 is dismissed because it was not brought in time.
7. The claimant's claim that he was subjected to harassment related to sex contrary to section 26 of the Equality Act 2010 is dismissed because it was not brought in time.

REASONS

Introduction

1. This was an open preliminary hearing lasting for one day. A Romanian interpreter attended on behalf of the claimant.
2. The claimant was employed by the respondent as a bus driver from 12 October 2019 until his resignation with effect from 10 July 2022.
3. Early conciliation started on 8 April 2022 and ended on 19 May 2022. The claim form was presented on 23 June 2022.

Final hearing and further management of the case

4. A Case Management Order concerning those parts of the claim which can proceed will be sent out separately from this Judgment. The dates set for the final hearing – 28 and 29 February and 1 March 2024 – have been vacated. The final hearing will now take place **on 23 October 2023**, for 3 hours from 10am.
5. A letter concerning my reconsideration of one aspect of the claimant's unauthorised deduction from wages claim has been sent out separately from this Judgment and the Case Management Order.

Claims

6. This claim is for:-
 - a. Unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 2022.
 - b. Unreasonable failure to permit the claimant to be accompanied at a disciplinary hearing contrary to section 10 of the Employment Relations Act 1999.
 - c. Direct sex discrimination contrary to section 13 of the Equality Act 2010.

- d. Harassment related to sex contrary to section 26 of the Equality Act 2010.
7. The claim is set out in the claimant's ET1, which has an appended Claim Statement. Additional information was provided following a case management hearing on 6 February 2023 ('the CM hearing') in a 47 page document headed 'Particulars of Claim' ('the Further Particulars.'). The claimant also provided a Schedule of Loss following the CM hearing.
8. In his Further Particulars, the claimant refers to incidents alleged to be indirectly discriminatory. Also, references are made to a retrospective pay award made by the respondent after the claimant had resigned (and after he had submitted his ET1). Neither of these was referenced in the original claim, either explicitly or implicitly, and there was no application to amend relating to them. Therefore I did not consider these.

Evidence

9. I was provided with a bundle of some 563 pages, the claimant's written application to amend his claim to include a claim of unfair constructive dismissal and a short witness statement from the claimant. I heard evidence from the claimant about his reasons for the delay in making his claim. I heard submissions from both parties.

Purpose of the preliminary hearing

10. The purpose of this open preliminary hearing was set out in the Case Management Order prepared following the CM hearing. The matters to be considered were:-
 - a. Whether the respondent's application for the claims to be struck out on the basis that they are out of time should be considered prior to the claimant's application to amend his claim to include a claim of unfair constructive dismissal or vice versa.
 - b. Should the claims be struck out under rule 37(1)(a) of the Rules of Procedure 2013, because they have no reasonable prospect of success, taking into account the respondent's arguments that the claims were not presented within the time limits specified in section 23 Employment Rights Act 1996, section 11 Employment Relations Act 1999 and/or section 123 Equality Act 2010, as the case may be.
 - c. Should the claimant have permission to amend his claim to include a complain of unfair constructive dismissal.
 - d. Should the claims or any allegations within them be made the subject of a deposit order under rule 39 of the Rules of Procedure 2013.

Order in which to consider applications

11. Having taken representations from the parties, I decided to first consider the respondent's application that the claims should be struck out because

they were presented outside of the relevant time limits. *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR is authority for the proposition that there must be a claim that is capable of being amended; and if the original claim is out of time then there is nothing to amend.

12. Based on my findings, this was not a case where the substance of the proposed amendment may be material to whether the case is out of time because it might then constitute conduct extending over a period. (*Sakyi-Opare v The Albert Kennedy Trust* UKEAT/0086/20 (24 March 2021, unreported.)

Strike out application (Rule 37(1)(a))

What are the time limits?

13. Pursuant to sections 23 of the Employment Rights Act 1996 (unlawful deduction from wages claims), section 11 of the Employment Relations Act 1999 (right to be accompanied) and section 123 of the Equality Act 2010 (sex discrimination claims) the time limit for bringing claims is 3 months from the date upon which the deduction was made, the date upon which the right to be accompanied was refused and the date of the act to which the complaint relates.

Were any or all of the claims out of time?

14. The claimant's claim was presented on 23 June 2022. The respondent argued that the last day upon which the acts complained of took place was 26 January 2022. Taking into account the conciliation period, the claims should therefore have been presented by 19 June 2022 at the latest. In making this argument, the respondent said I should consider only the original claim form, and not the Further Particulars.
15. The claimant's position was that – in summary – the original claim form was specific about timings in relation to only some of the claims, and that more specific dates had been provided in the Further Particulars following the CM hearing (on 20 February 2023), and at the invitation of the Employment Judge at that hearing.
16. I decided that, in considering whether the claims were out of time, I was not confined to the claimant's original claim form but could also take into account the further information, including certain specific dates which were provided in his Further Particulars. I took account of the principle that the claim form should be given a generous interpretation; and of the fact that the claimant is a litigant in person, and that English is not his first language. I rejected the respondent's argument that the specific dates given in the Further Particulars must be disregarded because they are, in effect, proposed amendments to the original claim. They are not.

17. The claimant's position was as follows:-

- a. The refusal of the right to be accompanied took place on 26 January 2022 but was not out of time.
- b. The unlawful deduction from wages claims were not out of time. The original claim form and the Further Particulars gave three categories of claim in this context:-
 - i. A failure to pay him for the minimum contractual hours. The original claim form says this happened 'often', and that it was raised at the disciplinary hearing on 26 January 2022 – but does not say that all these deductions happened on or before that date. The Further Particulars gave the following specific time periods:-
 1. 23-28 May 2020, payday 5 June 2020.
 2. 27 June – 3 July 2020, payday 10 June 2020.
 3. 12-28 December, payday 24 December 2020.
 4. 17-23 April 2021 pay day 28 May 2021.
 5. 23-30 April 2022, payday 6 May 2022.
 - ii. A failure to pay for actual time worked. The original claim form says this happened 'on multiple occasions', and that it was raised at the disciplinary hearing on 26 January 2022 – but does not say that all these deductions happened on or before that date. The Further Particulars say that 'The Claimant is unable to particularise' these deductions because they are not apparent in the pay slips and respondent has possession of relevant information. (However, the claimant's Schedule of Loss, which I did not look at during the hearing, gives some specific dates from 29 September 2019 to 10 July 2022 for this head of loss.)
 - iii. A failure to pay the correct contractual sick pay on or around 12 November 2021.
- c. The sex discrimination claims (direct discrimination and harassment) were not out of time because although the original claim refers to a single incident of sex discrimination which took place on 26 January 2022, the Further Particulars add a number of complaints about incidents which happened later, and the dates upon which these incidents occurred should also be taken into account.

Findings with reasons

18. As regards the claim about the right to be accompanied, I find that this was out of time. The date of the alleged refusal was 26 January 2022. The claim should have been served on or before 19 June 2022.
19. As regards the unauthorised deduction from wages claims, I find as follows:-
 - a. The claims concerning the respondent's failure to pay the minimum contractual amount are out of time except for the claim relating to the period from 23 – 30 April 2022 (pay day 6 May 2022). The claimant did not argue that this alleged deduction was part of a

series of deductions, but I note that the previous deduction in this category was said to have been made on 28 May 2021 – almost a year earlier. Therefore, applying the case of Bear Scotland Ltd and ors v Fulton and ors 2015 ICR 221 EAT, the alleged deduction in May 2022 cannot be said to have been the last in a series of deductions because there has been a gap of more than three months since the last deduction.

- b. The claim for sick pay is alleged to have taken place in November 2021 and is therefore out of time.
- c. In relation to the claims for failure to pay for actual hours worked – since neither the claim form nor the Further Particulars gives specific dates for these deductions, at the hearing I took the only date mentioned in the claim form - 26 January 2022 - as the relevant date, and, on this basis, found the claim to be out of time. However, it subsequently came to my attention that the Schedule of Loss, provided after the Further Particulars and included in the bundle, does in fact include some specific dates, which render this aspect of the claim ostensibly in time. On this basis, I **reconsidered** this part of my decision (see further below).

20. As regards the sex discrimination claim, I also take 26 January 2022 as being the date to which the complaint relates, and therefore find that this claim is out of time. The alleged incident on 26 January 2022 was a discrete incident, not part of conduct extending over a period which stretched beyond 26 January 2022.

21. The Further Particulars refer to a number of incidents which took place after 26 January 2022 and describe them as examples of harassment, bullying and intimidation:-

- a. Between October 2019 and January 2022, the respondent failed to respond to complaints he made.
- b. On 30 March 2022 the respondent did not respect the claimant's 45 minute meal break.
- c. On 6 April 2022, the respondent called the claimant on his mobile phone when he was driving.
- d. On 6 May 2022 the claimant was harassed with the placement of a 'parking permit notice' on the windshield of his vehicle although he had the parkin permit visibly displayed.

22. However, these were not presented as allegations of sex discrimination. That is to say, they are complaints about the behaviour of the respondent but it is not alleged that, in carrying out this behaviour, the respondent treated the claimant less favorably because he was a man, or that any alleged harassment was related to his sex. It is not clear on what legal basis the claimant wishes to complain about these incidents. I have not taken these dates into account.

Should time be extended?

23. Where a claim is not presented within the prescribed time limit, the Tribunal has discretion to grant a time extension.

Unlawful deduction from wages and right to be accompanied

24. The test for extending time for claims of unauthorised deduction from wages and failure to permit a worker to be accompanied at a disciplinary hearing is a two stage test:-
- a. Was it reasonably practicable for the complaint to be presented in time?
 - b. If not, was the claim nevertheless presented within such further period as the tribunal considers reasonable?
25. Having heard evidence from the claimant, I find that the reasons for not presenting his claim in time are as follows:-
- a. He miscalculated the time period.
 - b. He was working hard.
 - c. He was stressed, because of tensions at work and because he was concerned about losing his job.
 - d. He preferred to use the respondent's internal procedures rather than escalate matters to the tribunal.
26. I am not satisfied that the claimant has demonstrated that it was not reasonably practicable for him to bring his claim in time. This is a strict test. The claimant agreed that he was aware of the time limits, and this is confirmed in an email dated 10 May 2022, in which he wrote 'I have only 30 days to file the papers to the court.' The fact that an employee is pursuing internal process does not, of itself, mean that it is not reasonably practicable to submit the claim in time, even if this means submitting the claim before an appeal has been concluded. (Bodhu v Hampshire Area Health Authority [1982] ICR 2000.) The claimant referred to being overworked, but also said he was not attending work during the weeks prior to the deadline. He said he was stressed, and this is noted in his email of 10 May 2022; but no medical evidence was provided.

Sex discrimination/harassment claim

27. The Tribunal has discretion to extend the time limit by such further period as it considers just and equitable. However, extension should still be the exception rather than the rule.
28. I am not persuaded that it is just and equitable in all the circumstances to extend time in this case.
29. Although the delay is relatively short – 4 days – the reasons for the delay (set out above) are not compelling.
30. In terms of the prejudice to the parties – were I to allow the extension, the respondent would have to defend a case it would not otherwise have to defend, and the claimant would lose the opportunity of arguing his case.

However, I have take into account that this appears to be a very weak claim. It relates to a particular comment made at the claimants' disciplinary meeting on 26 January 2022. At the hearing, I was referred to the transcript of the meeting which the claimant himself had made. The offending statement made by the female manager was not exactly what was set out in the claim form. The manager's remark was 'I'm on my own in locked office with two guys, and I feel very uncomfortable so....' As regards the wider context - the female manager was present at the meeting with the claimant and the claimant's son, who was also an employee of the respondent at that time. The meeting became heated. The manager said she felt threatened. Then she uttered the offending words. Taking account of what was said and the context in which it was said, this seems to me a poor foundation for a claim of direct discrimination and/or harassment related to sex.

Amendment application

31. Having decided that one aspect of the claim remains – namely, his claim for unauthorised deduction from wages relating to the period 23-30 April 2022 – I went on to consider his application to amend.
32. The claimant wished to amend his claim to add a claim of unfair constructive dismissal. He resigned from his employment on 10 July 2022 – after he had brought his claim.
33. Having heard submissions from both parties, I decided that this amendment application should not be permitted. In reaching this decision I took into account the following factors:-
 - a. That, if permitted, the claim would take effect from 25 April 2022 and would be significantly out of time.
 - b. As regards the balance of hardship – refusing the amendment means that the claimant loses his ability to argue for compensation, and to address the alleged unfairness he has suffered at the hands of the respondent. From the respondent's perspective, this is a wholly new claim involving significant areas of factual and legal enquiry. Different witnesses would need to be called, and one key witness is no longer employed by the respondent.
 - c. As regards the manner in which the amendment was made:-
 - i. It was first raised in January 2023 when the claimant saw, in the agenda for the preliminary hearing, that he could add something to his claim.
 - ii. It was set out in writing in the claimant's Further Particulars dated 20 February 2023, but insufficient particulars were provided to enable the respondent to respond in a meaningful way to the claim.
 - iii. The claimant was ordered at the preliminary hearing to produce a witness statement saying, in date order, what happened, when it happened, who was responsible. He provided a witness statement but it did not set out these

details.

34. As regards the reasons for the delay – it was submitted that the claimant had misunderstood the law and had believed that events post-dating his claim could be treated as part of the initial claim. This reason would not be sufficient to persuade me that time should be extended (the relevant test being the ‘reasonable practicability’ test.). I find that the claimant might reasonably have been expected to check this assumption, for example by speaking to ACAS.
35. Taking all these circumstances into account, I find that the balance of prejudice favours the respondent and the amendment should not be permitted.

Reconsideration – unauthorised deduction from wages claim concerning alleged failure to pay for actual time worked

36. Pursuant to rule 71 of the Rules of Procedure, I have reconsidered my decision insofar as it relates to the claim for ‘failure to pay for actual time worked’. The reason for this is that I inadvertently failed to take into account the specific dates given in the claimant’s Schedule of Loss. I relied only on the information in the original claim and the Further Particulars. The dates in question were 29 September 2019-10 July 2022. Had I taken these dates into account, I may have found that this aspect of the claim, or part of it, was in time and could proceed. Based on these dates, my provisional view is that part of this claim is ostensibly in time. (Although I note that there is a two year ‘backstop’ in this context.)
37. During the hearing, the claimant’s representative did make reference to the Schedule of Loss, but did not make it clear that the relevant dates were to be found there, or take me to the relevant page of the bundle.
38. I have sent a letter to the parties concerning this reconsideration. If appropriate, this matter can be dealt with at the final hearing on 23 October 2023.

Conclusion

39. The claimant’s claim for unauthorised deduction from wages relating to the period 23-30 April 2022 (failure to honour minimum weekly contractual hours) is in time and can proceed. This will be considered at the final hearing on 23 October 2023.
40. Pursuant to rule 71 of the procedural rules, I have reconsidered my decision that the claim for unauthorised deduction from wages (failure to pay for actual time worked) is out of time and should be dismissed. A separate letter has been sent to the parties about this. My provisional view, based on the dates given on page 132 of the bundle (in the Schedule of Loss) is that this claim, or parts of it, are in time. If appropriate, this matter can be considered at the final hearing on 23

October 2023.

41. Subject to the above, the claim is dismissed.

Employment Judge Cotton

Date: 9 May 2023

Sent to the parties on: 11.5.2023

GDJ
For the Tribunal Office

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.