



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Owen Craig

**Respondent:** Red Van Services

## JUDGMENT

The claimant's application dated 16 May 2023 for variation of my earlier case management decision, refusing permission to amend the claim to include claims under sections 4 and 8 Employment Rights Act 1996 and a breach of contract claim, sent to the parties on 2 May 2023 is refused in part.

The application to amend the claim to include a claim for breach of contract in the alternative to unauthorised deduction from wages is allowed. The amended list of issues are attached to this decision.

## REASONS

1. I have undertaken consideration of the claimant's application for reconsideration of the judgment refusing permission to amend the claims to add a section 4 and section 8 claim under the Employment Rights Act 1996 and a breach of contract claim.
2. Although a case management order is not a judgment within the meaning of rule 70 and so cannot be reconsidered under the general reconsideration power conferred by rule 70, I have nonetheless considered this application under rule 29 which provides that the tribunal may 'at any stage of the proceedings...very, suspend or set aside an earlier case management order where that is necessary in the interests of justice'. Given similar considerations arise I have applied the law relevant to rule 70.

### The Law

3. In **Selkent Bus CO Ltd v Moore 1996 ICR 836** Mummery P (as he then was) explained the relevant factors in deciding whether to grant permission to amend a claim included (a) the nature of the amendment (is it relabelling or is it a new cause of action) (b) applicability of time limits (c) timing and manner of the application. The core test is the balance of injustice and hardship in allowing or refusing the application.

4. The Law section **8 Employment Rights Act 1996** provides that a worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement. Section 2 sets out what the particulars should contain including (b) the amounts of any variable, and fixed deductions from that gross amount and the purposes for which they are made.
5. **Section 11 ERA** provides that a worker may require a reference to be made to an employment tribunal to determine what particulars ought to have been included or referred to in a statement to comply with the requirements of section 8, but that the tribunal does not have the power to consider a question as to the accuracy of an amount stated (section 1(3)). Section 11 (4) provides that a claim must be brought within the period of 3 months beginning with the date on which employment ceased or within such further period as the tribunal considers reasonable where it is satisfied that it was not **reasonably practicable** for the application to be made before the end of that period of three months (emphasis added).
6. Pursuant to **section 12 ERA** any financial remedy is only recoverable where the tribunal, having found there was a failure to properly particularise, further finds that any unnotified deductions have been made during the period of thirteen weeks immediately preceding the date of the application for the reference, the tribunal may order the employer to pay a sum not exceeding the aggregate of the unnotified deductions so made.
7. Claims under **section 4 ERA** also need to be brought within 3 months as set out in section 11(4).

### **The Application**

8. Many of the points made by the representative for the claimant were considered at the case management hearing. However, having reviewed the order it does not set out clearly the tribunal's reasoning and so that has been set out fully below.

### **Section 8**

9. The claim was issued on 15/12/22, with an ACAS certificate dated the same date. The claimant's employment terminated on 13/10/22.
10. The claimant's originating ET1 does not make reference to his pay slips other than "the tax amounts deducted are questionable too. Showed different amounts for the same gross pay".
11. The claim therefore was not already factually claimed. The claimant appears to be claiming about the discrepancy or accuracy of amounts, which is specifically excluded as something the tribunal can consider under section 8 (see section 11(3)). For any sums the claimant claims he is owed he has a remedy under section 13 unauthorised deduction from wages, which is a claim he currently has before the tribunal.
12. As it is a new cause of action time limits are relevant. This application was made on 26/4/23, so is over 3 months out of time (early conciliation is not

required for section 8 claims). The application for reconsideration references the lack of knowledge a lay person would have of such claims. However, at the hearing the claimants' father said that he was aware of the facts relied upon at the time the claim form was written, and gave no reason why they were not included in the original ET1. He explained that they went to solicitors in January, but there was an issue with insurance, so the matter was delayed because of that, but that did not explain why the claim could not have included these facts or claims in the ET1. He therefore did not provide a sufficient reason as to why it was not reasonably practicable to bring the claim in time and I find that it was reasonably practicable to have done so.

13. Turning to the balance of hardship the tribunal can only award any deductions found to have been made during the thirteen weeks preceding the date of the application for the reference, even allowing for the time to be backdated to issue of 15/12/22 the preceding 13 weeks is the 13/9/22 to 15/12/22 only 4 of those weeks were worked by the claimant. As already indicated the claimant has an extant deduction from wages claim to recover the amounts he claims he is owed, so there is no real prejudice to the claimant in not being able to pursue this claim.
14. Given the claimant's unauthorised deduction from wages claim is live, he is not prejudiced by the section 8 claim not being allowed to continue. It is not the role of the tribunal to calculate the accuracy of the amount stated in a pay slip. It would be a burden on the respondent who would have to give evidence on the content of information on a pay slip as well as defend the money claim. I therefore find the respondent would be more prejudiced than the claimant in having to respond to this claim.

#### **Section 4**

15. The claimant accepts this is a new cause of action and is not a relabelling exercise. The claim form does not include reference to facts that would indicate this claim was being pursued. As with the section 8 claim the claimant was aware of the facts at the time he presented his claim, and provided no explanation as to why they weren't included in the ET1 and so this claim is out of time. I have not been presented with a reason for it not being reasonably practicable to present the claim in time, other than ignorance of rights. However, there has been no explanation offered as to whether that ignorance is in itself reasonable and so I find it was reasonably practicable to bring this claim in time. The balance of hardship did not fall in favour of allowing this amendment given the claimant's other claims, which are more significant, are extant.

#### **Breach of Contract**

16. On reflection this was not adequately addressed. This is not a totally new cause of action as the factual basis for it has been pleaded. The respondent will have to defend the claims in so far as the unauthorised deduction of wages claim has been brought.
17. There is greater prejudice against the claimant who may find there has been a break in the series of deductions if it is only allowed to be pursued as an unauthorised deduction claim. Therefore the claim will be amended to include a breach of contract in the alternative to the unauthorised deduction from wages claim.

**Conclusion**

18. Having considered all the points made by the claimant I am satisfied that there is no reasonable prospect of the original decision being varied or revoked in respect of the section 8 and section 4 claims.
19. The unauthorised deduction from wages claim shall be amended to include in the alternative a breach of contract claim.
20. That claim shall be added to the issues to be determined at the final hearing on the 19 and 20 July 2023.

Employment Judge Mellor.  
DATE 19 June 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
26 June 2023

FOR THE TRIBUNAL OFFICE

## Complaints and Issues

1. The following sets out the claimants complaints and the issues the tribunal will have to decide on the next occasion:

### 2. Unfair Dismissal

2.1 Was the claimant dismissed by the respondent? The respondent says there was an oral variation to the contract waiving the notice period and so there was no dismissal.

2.1.1 If the claimant was dismissed what was the reason or principal reason for dismissal? The respondent the reason was a substantial reason capable of justifying the dismissal namely that the claimant wanted to leave the respondent's employment.

2.1.2 Was that a potentially fair reason?

2.1.3 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant.

#### **Constructive unfair dismissal:**

2.2 Did the respondent do the following things?

2.2.1 Fail to pay the claimant on time and/or underpay as per his updated schedule of loss?

2.2.2 Unduly criticise the claimant for the work that he did?

2.2.3 Leave the claimant to run a business with an apprentice whilst Mr Ryan was on holiday when the claimant himself had only just become qualified?

2.2.4 Leave the claimant with no building materials?

2.2.5 Deny the claimant holiday requests.

2.3 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

2.3.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.3.2 whether it had reasonable and proper cause for doing so?

2.4 Did the claimant resign in response to the breach? The tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.5 Did the claimant affirm the contract before resigning?

### 3. Remedy for unfair dismissal

3.1 Does the claimant wish to be reinstated to their previous employment?

- 3.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
- 3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 3.5 What should the terms of the re-engagement order be?
- 3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
- 3.7 What financial losses has the dismissal caused the claimant?
- 3.8 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- 3.9 If not, for what period of loss should the claimant be compensated?
- 3.10 What basic award is payable to the claimant, if any?

#### **4. Holiday pay**

- 4.1 What was the claimant's leave year? The respondent says the leave year commenced on the claimant's start date 16 October.
- 4.2 How much of the leave year had passed when the claimant's employment ended?
- 4.3 How much leave had accrued for the year by that date?
- 4.4 How much paid leave had the claimant taken in the year?
- 4.5 Were any days carried over from previous holiday years?
- 4.6 How many days remain unpaid?
- 4.7 What is the relevant daily rate of pay?
- 4.8 The claimant's claim for holiday pay includes holiday from 2019/2020, are the holiday pay claims in time?

#### **5. Unauthorised deduction from wages/Breach of Contract**

- 5.1 Were the wages paid to the claimant on the dates set out in the claimants schedule of loss less than the wages he should have been paid?
- 5.2 Are the claims in time? The tribunal will consider whether there has been a series of deductions and whether that series has been broken by the gap between March 2021 and April 2022.
- 5.3 Was any deduction required or authorised by statute?
- 5.4 Was any deduction required or authorised by a written term of the contract?

- 5.5 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
- 5.6 Did the claimant agree in writing to the deduction before it was made?
- 5.7 How much is the claimant owed?