



EMPLOYMENT TRIBUNALS

Claimant: Mr P Tomaszczuk

Respondent: Norpal Recycling Limited

HELD AT: Manchester **ON:** 14 July 2023

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: Did not attend
(Polish interpreter Ms Alicja Wota attended)

Respondent: Mr S Tomlinson (Health & Safety/HR Consultant)

JUDGMENT

The judgment of the Tribunal is that:

- (1) The claim is struck out in accordance with Rule 37(1)(a) Employment Tribunals Rules of Procedure because the claim has no reasonable prospects of success.
- (2) The claimant has not provided any evidence or other information to demonstrate that a disability discrimination complaint was raised with ACAS in 2020 or 2021 and therefore the claim for disability discrimination arising out of the claimant's employment in 2020 is out of time.
- (3) The respondent may make an application for a costs order to be made against the claimant in accordance with Rules 74 to 84 of the Employment Tribunals Rules of Procedure but must do so in writing to the Tribunal and claimant by no later than **Friday 11 July 2023**.
- (4) The final hearing listed for 26, 27 & 28 September 2023 is cancelled.

REASONS

Introduction

1. This decision was made at a public preliminary hearing listed by Employment Judge (EJ) Ainscough at the preliminary hearing case management (PHCM) on 28 April 2023. She ordered that the Tribunal today should determine:
 - a) Whether the claim for disability discrimination arising out of the claimant's employment in 2020 is out of time; and
 - b) Whether the claims have a reasonable prospect of success.
2. EJ Ainscough noted that the claimant's most recent employment with the respondent was from 29 to 31 August 2022. An early conciliation period was from 29 September to 9 November 2022 and a claim form was issued on 19 December 2022. Complaints of unfair dismissal, disability discrimination and unlawful deductions from wages were made but EJ Ainscough dismissed the claim of unfair dismissal on grounds that the claimant did not have 2 years continuous employment, and this was issued on 15 May 2023.
3. In relation to the remaining complaints of unlawful deduction from wages and disability discrimination, EJ Ainscough explained to the claimant that any claim relating to his earlier employment with the respondent from July to December 2020 would probably be out of time. However, she made case management orders (case management order 1 – Additional Information), seeking information supporting the claims being brought, whether the claimant informed the respondent he was disabled, whether adjustments were sought and details of wages claimed.
4. Case management order 1 required compliance by the claimant by 26 May 2023 and this did not happen. The claimant has provided no explanation for his non compliance.
5. The claimant did not attend the preliminary hearing today and did not provide any explanation as to why he could not attend. Both Mr Tomlinson and Ms Wota the interpreter were able to attend on time and neither had any knowledge of why the claimant could not attend.
6. I was satisfied that it was in the interests of justice to continue with the preliminary hearing in the claimant's absence after I had allowed an additional 15 minutes for the claimant to arrive at the Tribunal.

Discussion

7. Mr Tomlinson provided a number of documents including a payslip for the period of the claimant's most recent employment, an email exchange on 21 and 22 January 2021 between ACAS and Mr Tomlinson and a Polish language copy of the respondent's Induction and Health & Safety Rules which the claimant has signed. Ms Wota was able to translate this document in

order that I was satisfied that all relevant information provided by the claimant was considered.

8. The respondent did not accept that the claimant was disabled and that he had notified them of his mental health issues. There was no evidence provided by the claimant concerning an earlier reference to ACAS about disability discrimination during the period of July 2021 to January 2022. The email from ACAS confirmed that no early conciliation certificate was issued at that time and the notification of a potential claim to ACAS on 20 January 2021 related to wages and holiday pay claims during the 2020 period of employment and nothing relating to disability discrimination.
9. The Polish language Rules was signed in a number of places by the claimant before Mr Tomlinson (with him using his own English language value) on 21 July 2020. This was translated by Ms Wota and while most of the information involved health and safety and environmental matters, there was a health information questionnaire which gave the claimant the opportunity to inform the respondent of any relevant health matters. He failed to identify any.
10. The payslip revealed that the claimant was paid for 11 hours work at £104.50 in September 2022 relating to the August 2022 period of employment. The claimant had not provided any further particulars concerning his loss of earnings in 2022 or indeed, 2020. The latter period was not of course subject to an early conciliation certificate actually being issued.
11. An explanation had been provided within paragraphs (17) to (20) of EJ Ainscough's Note of PH that the question of the reasonable prospects of success of his claims under Rule 37 (strike out for no reasonable prospects of success) and a deposit order under Rule 39 (deposit order for little reasonable prospect of success), would be considered at the PH today. Accordingly, he was on notice of the potential strike out of the claim or deposit order and had a reasonable opportunity to make representations either in writing or by attending the hearing today. The claimant of course had an interpreter present to assist him and was understood to have a good command of everyday English following earlier involvement by the Tribunal with him.
12. There was of course the additional failure to comply with case management order 1 of EJ Ainscough dated 28 April 2023 and a more general failure to actively pursue the claim, both failures were subject to Rule 37 at subsections (1)(c) and (d) respectively. However, they did not form part of the listed PH today but added to my consideration of whether a decision to strike out would be in the interests of justice under Rule 2 and the need to deal with the case efficiently, in a proportionate way, to treat the parties on an equal footing and to avoid unnecessary expense.
13. However, I was satisfied that the claimant in failing to take these steps had place me in a position where insufficient information was available to convince me that either the remaining disability discrimination complaint and the wages complaint had any reasonable prospects of success and that any attempt to rely upon the earlier period of employment 2020 must be out of time as no valid early conciliation certificate was available following that period of

employment and more than 3 months had elapsed between the ending of that employment and the notification of a potential claim to ACAS on 29 September 2022. This was contrary to the provisions of section 123 Equality Act 2010 (EQA relating to disability discrimination) and section 23 Employment Rights Act 1996 (ERA relating to wages claim). In neither case had he provided any information to support an extension of time on the basis of it being just and equitable (s123 EQA) or not reasonably practicable to present a claim in time (s23 ERA). The claimant could only rely upon the most recent 2 or 3 day period of employment in 2022 and which was provided with no meaningful particulars and with the respondent providing documentary evidence which on the face of it, rebutted the complaints being brought.

Conclusion

14. Accordingly, I must conclude that the claim is struck out by reason of the claimant's claim having no reasonable prospects of success (Rule 37) and in any event the claim of disability discrimination for the period of employment from July to December 2020 must be out of time.
15. Finally, I accepted Mr Tomlinson's argument that the claimant had potentially behaved unreasonably by reason of the way he had conducted himself in the proceedings, but without an application having been made in writing previously, I would not make an order for costs. However, I order that any application for costs under Rules 74 to 84 must be made to Tribunal and copied to the claimant in writing by 11 August 2023 and explaining the calculation of the costs and the basis upon which the application was made and why the calculation was appropriate.

Employment Judge Johnson

Date 14 July 2023

JUDGMENT SENT TO THE PARTIES ON
24 July 2023

FOR THE TRIBUNAL OFFICE