EMPLOYMENT TRIBUNALS

Claimant: **Mr N Stubbs**

Respondent: **Gable Essex Limited (in administration)**

Heard at: **East London Hearing Centre (in public)**

On: **11 October 2023**

Before: **Employment Judge Gordon Walker**
Members: **Miss M Daniels**
Mrs A Smith

Appearances
For the claimant: did not attend
For the respondent: did not attend

JUDGMENT

1. The claim of disability discrimination is dismissed. The claim was not presented within the time limit at section 123 Equality Act 2010.

2. The claim of unauthorised deductions from wages is dismissed. The claim was not presented within the time limit at section 23 Employment Rights Act 1996.

3. The claim of breaches of health and safety is dismissed. The claim was not presented within the time limit at section 48 or section 111 Employment Rights Act 1996

REASONS

Introduction

1. The parties did not attend the hearing.

2. We decided to proceed with the hearing pursuant to rule 47 of the Employment Tribunal Rules of Procedure 2013, because:

   a. The Tribunal made practicable enquiries of the claimant by telephone and email. The claimant emailed the Tribunal at 10:59 in the following terms: *"I sent you an email fucking months ago asking to be fucking*

notified is (sic) the fucking respondents are actually going to fucking attend the fucking hearing or fucking not". We took this to mean that the claimant chose not to attend the hearing today as the Tribunal had not informed him whether the respondent was going to attend the hearing.

b. The Tribunal checked its email inbox. The notice of hearing dated 5 July 2023 was emailed to the claimant. The last correspondence received from the claimant was dated 27 February 2023. There was no email from the claimant asking whether the respondent was going to attend today's hearing.

c. Even if the claimant had sent such an email, we still would have proceeded in the claimant's absence. The claimant is not absolved of the requirement to attend the hearing, or make written representations in advance, by the absence of the other party. It is for the claimant to prove his claims. The claimant has some understanding of the Tribunal process as he attended a hearing in this matter on 31 October 2022.

d. It was in accordance with the overriding objective to proceed with the hearing. The Tribunal had regard to the duty to deal with cases proportionality and to reduce delay and save expense. The claimant was allocated a hearing today, which he chose not to attend. As set out below, there were fundamental flaws in the claimant's claims in relation to jurisdiction and the substantive merits of the claims.

3. We proceeded to make findings of facts and conclusions on the information available to us on the Tribunal file. This consisted of the pleadings, Tribunal orders, contract of employment, and correspondence.

Findings of fact

4. The claimant was employed by the respondent recruitment agency from 17 or 25 March 2021. The first date is the date when the contract of employment was signed. The second date is the date in the claim form. The claimant's employment terminated on 17 December 2021.

5. The respondent is a recruitment agency that supplied the claimant's services to Wiltshire Farm Foods / Apetito Limited as a driver to undertake activities relating to the delivery of frozen food to customers.

6. There was a written contract of employment between the parties. This included a clause at 2.6(k) which states:

The Temporary Worker shall be responsible for all fines, enforcement notices, judgment and liabilities howsoever arising from him use of the Client's vehicle. Any fines / PCN Notices will be deducted immediately direct form the temporary workers wages.

7. Apetito Limited had more control over the claimant's working conditions day to day than the respondent. The respondent was simply a recruitment agency that provided the claimant's driver services to its clients.

8. The claimant has physical impairments affecting his knee and ankle. We do not have any information about how long he had had those impairments.

The only information we had about how they impacted on his day-to-day activities was how the affected his ability to crouch and kneel.

9. The claimant alleges that there was a requirement for him to be on his knees, crouched down, and in the back of the van. We find that if this requirement was enforced, it was a requirement made by Apetito Ltd rather than the respondent, given respondent was simply the recruitment agency and not responsible for the claimant's day-to-day work.

10. The claimant says in his claim form that he did not inform the respondent of his impairments. He does not say he brought anything to their attention to alert them of the fact that he had, or might have, such impairments.

11. The claimant was issued with a parking fine in relation to work on 7 September 2021 (that is the date given in the claim form). A deduction was made from his pay on 17 December 2021 in respect of that fine.

12. The claimant alleges breaches of health and safety. He alleges that he made complaints about the conditions of his walk to work along the public highway. He also complains about the conditions in the freezer vans, although he does not say he complained about that.

13. We find that if the claimant did complain about his walk to work, that complaint was made to Apetito Ltd as they had day to day oversight of his work, whereas the respondent was the recruitment agency.

14. We do not find that the claimant made any complaint about the health and safety conditions in the vans, as that is not stated in his claim form. We find that the conditions in the vans were the responsibility of Apetito Ltd.

15. The claimant contacted ACAS the day after his employment ended (18 December 2021). The ACAS conciliation process concluded on 22 December 2021. The claimant says in his claim form that this was his ninth claim through ACAS.

16. The claimant presented his claim to the Employment Tribunal on 6 April 2022.

17. On 31 October 2022 there was a preliminary hearing before Regional Employment Judge Burgher. The outcome of that hearing, and as set out in the judgment of 21 November 2022, was that the claims against Apetito Ltd came to an end. The claim of health and safety breaches against Apetito Ltd was struck out.

18. The respondent is in administration. The administration started on 21 July 2022. On 14 February 2022 the administrator wrote to the claimant, copying the claimant to state *"Gable Essex Limited is insolvent and we consider it a matter for the Tribunal to make judgment"*.

19. On 24 February 2023 the Tribunal wrote to the parties, stating that they considered this email to amount to consent from the administrator for the claim to proceed.

20. On 5 July 2023 the parties were sent the notice of today's hearing.

Legal principles

Disability discrimination claim

21. To bring a claim of disability discrimination, the claimant must be a disabled person at the time of the events that the claim is about. Disability is defined at section 6(1) Equality Act 2010:

> ***6 Disability***
>
> *(1) A person (P) has a disability if—*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

22. "Long term" is defined at schedule 1(2) of the Equality Act 2010, which states so far as is relevant to this claim:

> ***Long-term effects***
>
> *2(1) The effect of an impairment is long-term if—*
>
> *(a) it has lasted for at least 12 months,*
>
> *(b) it is likely to last for at least 12 months, or*
>
> *(c) it is likely to last for the rest of the life of the person affected.*
>
> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.*

23. A disabled claimant can bring a claim of discrimination arising from disability, pursuant to section 15 Equality Act 2010, which states:

> ***15 Discrimination arising from disability***
>
> *(1) A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

24. They can also make a complaint of failure to make reasonable adjustments, pursuant to sections 20 and 21 (and schedule 8) Equality Act 2010, which

says so far as is relevant to this claim:

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

…..

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Schedule 8** PART 3 **LIMITATIONS ON THE DUTY

Lack of knowledge of disability, etc.

20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(b) that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

25. A claim of disability discrimination must be presented in accordance with the time limits at section 123 Equality Act 2010, which states so far as is relevant to this claim:

123 Time limits

*(1)**….** proceedings on a complaint within section 120 may not be brought after the end of—*

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

26. Whilst extension of just and equitable grounds is a broad discretionary power for the Tribunal, the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time and *'the exercise of discretion is the exception rather than the rule*' (***Robertson v Bexley Community Centre*** [2003] IRLR 434, at paragraph 25, per Auld LJ). Per Langstaff J in ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** UKEAT/0305/13 (18 February 2014, unreported), a litigant can hardly hope to satisfy that burden unless he provides an answer to two questions (para 52): *"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time*

limit the claim was not brought sooner than it was."

Health and safety claims

27. Section 44 Employment Rights Act 1996 states so far as is relevant to this claim:

44 Health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(1A) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that—

(a) in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work, or

(b)in circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.

28. Section 100 Employment Rights Act 1996 states so far as is relevant to this claim:

100 Health and safety cases.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(c)being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

29. The time limits are set out at sections 48 and 111 Employment Rights Act 1996 which state so far as is relevant to this claim:

111 Complaints to employment tribunals

(1)A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

*(2) **. . .** an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—*

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

48 Complaints to employment tribunals

(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 44(1)

…

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

Unauthorised deductions from wages

30. Section 13 Employment Rights Act 1996 states so far as is relevant to this claim:

13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

31. The time limit is set out at section 23 Employment Rights Act 1996 which states so far as is relevant to this claim:

23Complaints to employment tribunals

(1) A worker may present a complaint to an employment tribunal

(a) that his employer has made a deduction from his wages in contravention of section 13…

…

*(2)… an employment tribunal**]**shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made

…

Conclusions

Date for the claimant to present his claims

32. Given the date of the termination of the claimant's employment and that dates of the ACAS conciliation process, the claimant was required to present his claims to the Tribunal by 20 March 2022. The claimant presented his claim on 6 April 2022.

Disability discrimination claim

33. The claim of disability discrimination is dismissed because the claimant failed to present his claim of disability discrimination within the time limit. He

has provided no explanation for this. He has not proven that it is just and equitable for the Tribunal to extend time. There is no explanation for the failure to comply with the time limit. We note that the claimant was able to contact ACAS the day after his employment terminated, and that he was familiar with the ACAS process. Further the merits of the claim are weak, as explained below. These matters point to the fact that it is not just and equitable to extend time.

34. Even if the claim had been presented in time, it still would have been dismissed, because:

    a. The claimant has not proven that he was a disabled person within the meaning of section 6 Equality Act 2010. There is no evidence that the impairments (even if they did have a substantial adverse effect on day-to-day activities) were long term.

    b. It is not clear which type of claim the claimant intends to make. He may be making a claim pursuant to section 15 of sections 20-21 Equality Act 2010:

        i. The respondent did not know and ought not reasonably to have known of the claimant's alleged disability. Therefore, these duties were not engaged.

        ii. A further potential difficulty for the claimant is that, even if there was a PCP (requirement) for the claimant to work on his knees, crouched down, and in the back of the van, that was not a PCP applied by the respondent, but by Apetito Limited.

Health and safety breaches

35. The claim of health and safety breaches is dismissed because the claimant failed to present his claim within the time limit. He has provided no explanation for this. He has not proven that it was not reasonably practicable for him to present his claim in time, or that he presented it within a further reasonable period. There is no explanation for the failure to comply with the time limit. We note that the claimant was able to contact ACAS the day after his employment terminated, and that he was familiar with the ACAS process. These matters point to the fact that it was reasonably practicable for him to present his claims in time.

36. Even if the claim had been presented in time, it still would have been dismissed, because:

    a. A claim for breach of health and safety is not a standalone claim in the jurisdiction of the Employment Tribunal.

    b. There are claims relating to health and safety within the Tribunal's jurisdiction (section 44 and 100 Employment Rights Act 1996). Those claims would have been dismissed because:

        i. The claims relate to the alleged actions or inactions Apetito Ltd

and the claim of breach of health and safety against them has been struck out.

ii. Even if C was making a such a claim against the respondent, it would fail because:

1. He did not make complaints to the respondent about health and safety as required;
2. He does not appear to have been in serious or imminent danger or to have taken actions to avert such danger; and
3. He does not allege, and there is no evidence that, he was dismissed or subject to a detriment as a result.

Unauthorised deductions from wages

37. The claim of unauthorised deductions from wages is dismissed because the claimant failed to present his claim within the time limit. He has provided no explanation for this. He has not proven that it was not reasonably practicable for him to present his claim in time, or that he presented it within a further reasonable period. There is no explanation for the failure to comply with the time limit. We note that the claimant was able to contact ACAS the day after his employment terminated, and that he was familiar with the ACAS process. These matters point to the fact that it was reasonably practicable for him to present his claims in time.

38. Even if the claim had been presented in time, it still would have been dismissed, because the deduction was authorised by a written term of the contract of employment (clause 2.6(k)) which was signed by the claimant.

Employment Judge Gordon Walker
Dated: 11 October 2023