



EMPLOYMENT TRIBUNALS

Claimant: Mr Peter Vallee
Respondent: A & J Sectional Buildings Ltd

RECORD OF A PUBLIC PRELIMINARY HEARING

Heard at: Watford **On:** 5 October 2023
Before: Employment Judge Alliott (sitting alone)

Appearances

For the claimant: In person
For the respondent: Mr Michael Nadin (solicitor)

JUDGMENT

The judgment of the tribunal is that:

1. Upon reconsideration, the judgment of Employment Judge Tynan striking out the claimant's claim of unfair dismissal is revoked.
2. For the avoidance of doubt, any other claims of unfairness, discrimination and/or victimisation are struck out as they stand no reasonable prospect of success.
3. The claimant is granted permission to amend his claim to include a claim of automatically unfair dismissal for the assertion of a statutory right (namely the right not to suffer an unlawful deduction of wages) pursuant to s.104 Employment Rights Act and a claim for unpaid overtime pay.

REASONS

1. This reconsideration hearing was ordered by Employment Judge Moore on 15 August 2023 to determine:
 - 1.1 Whether the claimant pleaded in his claim form that he had been dismissed for asserting a statutory right pursuant to s.104 Employment Rights Act 1996 and/or whether it is in the interests of justice that the judgment striking out his claim of unfair dismissal on the basis he did not have two years' service with the respondent should be revoked.

- 1.2 Identify the issues in the claim for unlawful deduction of wages, and, if necessary the unfair dismissal claim;
- 1.3 Consider whether the claimant's claims of unfairness, discrimination and victimisation should be struck out on the grounds they stand no reasonable prospect of success (pursuant to s.37 of the Employment Tribunal's Rules of Procedure 2013) and
- 1.4 Make any case management orders necessary or the final hearing.

Authorisation to hear this reconsideration hearing.

2. I have been authorised by acting Regional Employment Judge Lewis to hear this reconsideration hearing in accordance with Rule 72(3) of the Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013.

Reconsideration

3. Pursuant to Rule 72 Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013:-

“A tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision (“the original decision”) may be confirmed, varied or revoked. If it is revoked it may be taken again.”

4. In the case management summary of Employment Judge Moore the following is set out:-

“...it became apparent that the Claimant believed the reason he had been dismissed was because he had challenged Mr John Souster of the Respondent about the wages he had been paid for installing lined and insulated buildings on 14 and 21 November 2022 and, in particular, complained that he had been paid £120 per day rather than £150 per day which it had been agreed the Claimant would be paid for that kind of work. Moreover, it is at least arguable the Claimant had alleged this was the reason for his dismissal in his Claim Form and that he had therefore pleaded that the reason (or principal reason) for his dismissal was the assertion of a statutory right (namely the right not to suffer an unlawful deduction of wages) pursuant to section 104 Employment Rights Act with the consequence that he should not have been required by the Tribunal in its letter of 12 January 2023 to justify why his claim should not be struck out.”

5. In his claim form at section 8.2 the claimant references a document attached. The document attached is a grievance submitted by the claimant to the respondent dated 29 November 2022. It is common ground that that letter was incorporated within the claimant's claim as his, in effect, particulars of claim.
6. In that letter the claimant complains about being paid less than the amount he says was the agreed day rate. The following is set out:-

“Upon challenging John Souster about his, and receiving my wage slip, I was then told he will only pay me £120 per day no matter what job I would be doing. I would like to suggest that this is the only reason A & J wanted to end my employment.”

7. In my judgment, the claimant has pleaded facts upon which it is arguable that he was asserting a statutory right, namely the right not to suffer an unlawful deduction of wages, and that he had been automatically unfairly dismissed.
8. I accept that there is no specific reference to automatically unfair dismissal. Further, I accept that when the claimant was given an opportunity to explain why his unfair dismissal claim should not be struck out he did not respond. The claimant is a litigant in person and did not know of the potential for bringing a claim of automatically unfair dismissal in circumstances where he had less than two years continuous service. It is clear to me that, frankly, the possibility of such a claim did not arise until the preliminary hearing heard on 15 August 2023. Nevertheless, in my judgment the claim form did complain about unfair dismissal and did plead the factual basis of such a claim.
9. The claim form does not expressly refer to s.104 Employment Rights Act 1996 automatically unfair dismissal. In the circumstances, in so far as the claimant needs permission to amend, I grant it. In so doing I have taken into account the Selkent factors and the balance of hardship. The nature of the amendment is to introduce a new claim but is no more than a relabeling exercise given that the factual basis of the claim has already been pleaded. I have taken into account the applicable time limits and the fact that this claim only specifically arose at the preliminary hearing on 15 August 2023. The claimant was dismissed with effect on 5 December 2022 and, accordingly, the primary limitation period would have expired on 4 March 2023. It is therefore approximately four and a half months late. In my judgment it was not reasonably practicable for the claim to have been brought sooner and has been brought in a reasonable time thereafter. The timing and manner of the application are that the claim has arisen as a result of a preliminary hearing in circumstances where Employment Judge Moore was under a duty to ensure that a litigant in person's claim is properly presented. Lastly, I consider the balance of hardship. I have taken into account that the allegations appear to involve Mr John Souster who is aged 71 and has retired. However, in my judgment, I do not consider that there will be any real prejudice to him recalling events in late 2022. On the other hand, the claimant will be deprived of bringing a claim of unfair dismissal. In my judgment, the balance comes down on the side of the claimant.
10. Consequently, in my judgment it would be in the interests of justice to revoke the judgment of Employment Judge Tynan and allow the claimant's claim of unfair dismissal to proceed to a hearing. Further, in so far as I need to grant permission for the claimant to amend to expressly set out that his claim was one of automatically unfair dismissal for asserting a statutory right I do so.
11. In his claim form the claimant does not refer to a claim for alleged unpaid overtime pay. However, the claimant has ticked the "other payments" box and is clearly making a claim for unauthorised deduction of wages/breach of contract. In discussion with the parties today it seems to me that whether or not the claimant was entitled to any payments for overtime should be a matter of arithmetic. The claimant did not place before me any document setting out his calculations as to why he says he was entitled to be paid these amounts. The respondent has indicated that as far as overtime payments are concerned the claimant is owed nothing and that this can be demonstrated on the documents.

12. I accept that the claimant needs permission to amend in order to include this claim. The claimant told me that at the time he presented his grievance dated 29 November 2022 any such claim had not yet crystallised. Nevertheless, it would have crystallised on his dismissal on 5 December 2022. The nature of the amendment is to include a new claim for overtime. It is out of time and once again only appears to have been made at the hearing in front of Employment Judge Moore on 15 August 2023. In my judgment, in balancing hardship, it would be proportionate and in the interests of justice to allow the claimant to advance this claim. I take into account that if this claim is not litigated in this jurisdiction then it would be open to the claimant to present a claim for breach of contract in the small claims court which cannot be in anyone's interest. The claim is not going to add a great deal in that it should be possible arithmetically to calculate whether or not the claimant is due any monies. In my judgment, it was not reasonably practicable for the claimant to include this claim sooner and he has brought it within a reasonable time thereafter.
13. For the avoidance of doubt I have struck out the claimant's residual claims of unfairness, discrimination and victimisation on the basis that they stand no reasonable prospect of success as no protected characteristic has been relied upon and consequently they do not fall within the jurisdiction of this tribunal.

CASE MANAGEMENT SUMMARY

Final hearing

1. All issues in the case, including remedy, will be determined at a final hearing before an Employment Judge sitting alone at **the Employment Tribunals Watford, 2nd Floor, Radius House, 51 Clarendon Road, Watford, WD17 1HP**, on **16 and 17 January 2024**, starting at 10 am or as soon as possible afterwards on the first day. The parties and their representatives, but not necessarily any other witnesses, must attend by **9.30 am** on the first day. The time estimate for the hearing is 2 days.

The claim

2. The claimant was employed by the respondent as a Driver Installer from 9 August 2022 until dismissal with effect on 5 December 2022. By a claim form presented on 6 December 2022, following a period of early conciliation from 30 November to 2 December 2022, the claimant brings complaints of automatically unfair dismissal for asserting a statutory right and claims for unauthorised deductions of wages/breach of contract. The respondent defends the claims.

The issues

3. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Unfair dismissal

- 3.1 What was the principal reason for dismissal. The respondent asserts that it was redundancy.
- 3.2 Was the principal reason for dismissal that the claimant had asserted a statutory right (namely the right not to suffer an unlawful deduction of wages) pursuant to s.104 Employment Rights Act 1996.

Unauthorised deduction of wages/breach of contract

- 3.3 Was the claimant entitled to be paid £150 per day on two occasions in November 2022 rather than the £120 he says he was paid? (total claim value £60).
- 3.4 Is the claimant entitled to any overtime payments?
- 3.5 The position appears to be as follows:-
 - 3.5.1 The claimant was contracted to work an average of 8 hours per day. In addition his “clocked” time would include an unpaid half an hour lunch break. The respondent had a system whereby if a worker worked more than 9.6 hours per day (plus half an hour unpaid lunch break) or 10.1 hours then the employee would accrue a right to overtime. However, if less than this was worked then the overtime would be reduced. The claimant will produce a spreadsheet setting out how much he says he was owed.

Remedy

- 3.6 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

Other matters

4. The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’, which can be found at:
www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/
5. The parties are reminded of rule 92: “*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of “cc” or otherwise)...*”. **If, when writing to the tribunal, the parties don’t comply with this rule, the tribunal may decide not to consider what they have written.**
6. The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
7. If the Tribunal determines that the respondent has breached any of the claimant’s rights to which the claim relates, it may decide whether there were any

aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

8. The following case management orders were made.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Complaints and issues

- 1.1 The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

2. Further information

- 2.1 By **4pm, 19 October 2023**, the claimant must provide to the respondent the following:-

- 2.1.1 A document setting out all details of his assertion of a statutory right (the right not to suffer unauthorised deduction of wages) claim to include:

- How any assertion was made (whether orally or in writing)
- To whom
- When
- Where
- Whether anyone else was present
- The gist of what was said.

- 2.1.2 A spreadsheet setting out all details of his overtime claim including the dates the claimant worked, how many hours he worked and how he says he accrued an entitlement to overtime pay.

3. Statement of remedy / schedule of loss

- 3.1 The claimant must provide to the respondent by **4pm, 19 October 2023**, a document – a “Schedule of Loss” – setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant’s complaints and how the amount(s) have been calculated.

- 3.2 If any part of the claimant’s claim relates to dismissal and includes a claim for earnings lost because of dismissal, the Schedule of Loss must include the following information: whether the claimant has obtained alternative employment and if so when and what; how much money the claimant has earned since dismissal and how it was earned; full details of social security benefits received as a result of dismissal.

4. **Amended response.**

4.1 The respondent has permission to serve and file an amended response to deal with the unfair dismissal and overtime claims. Any such amended response is to be sent to the claimant and the tribunal by **4pm, 16 November 2023.**

5. **Documents**

5.1 On or before **4pm, 30 November 2023**, the claimant and the respondent shall send each other copies of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy..

6. **Final hearing bundle**

6.1 The parties are to agree the contents of the final hearing bundle and the respondent is to prepare it and send a hard and an electronic copy of it to the claimant by **4pm, 7 December 2023.**

7. **Witness statements**

7.1 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **4pm, 21 December 2023.** No additional witness evidence will be allowed at the final hearing without the Tribunal's permission. The written statements must: have numbered paragraphs; be cross-referenced to the bundle(s); contain only evidence relevant to issues in the case. The claimant's witness statement must include a statement of the amount of compensation or damages he is claiming, together with an explanation of how it has been calculated.

8. **Final hearing preparation**

8.1 **On the first day of the hearing** the following parties must lodge the following with the Tribunal:

8.1.1 Two copies of the bundle(s), by the respondent;

8.1.2 two copies of the witness statements by whichever party is relying on the witness statement in question;

9. **Other matters**

9.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.

- 9.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 9.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.
- 9.4 **Public access to employment tribunal decisions**
All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.
- 9.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
- 9.6 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

Employment Judge Alliott

Date: 24 October 2023

Sent to the parties on:

15 November 2023

For the Tribunal: