



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Drayson

**Respondent:** ABM Catering Limited

**Heard at:** Manchester (in public; by CVP)      **On:** 15 May 2023

**Before:** Employment Judge Holmes (sitting alone)

## Representatives

For the claimant: In Person

For the respondent: Ms M Bouffé , Counsel

## JUDGMENT ON FINAL HEARING

It is the judgment of the Tribunal that :

1. The claimant has made no claim for breach of contract that the Tribunal has jurisdiction to consider, and does not seek to amend her claims to do so;
2. The claimant has , on her acceptance of the respondent's calculation of her entitlement upon termination of her employment, no claim for holiday pay, and this claim is dismissed.
3. The claimant's application for permission to amend her claims to include a claim for unlawful deductions from wages for the period from 21 February 2023 to 1 March 2023 is refused.
4. The claimant's claim for a redundancy payment is dismissed.

## ORDERS

1.It is the Order of the Tribunal that:

a)The Tribunal's judgment on the respondent's application for costs will be considered in Chambers;

b) The respondent shall, by **12 June 2024**, serve upon the claimant and the Tribunal a statement of the costs claimed, if inviting the Tribunal to make a summary determination thereof;

- c) The claimant shall by **12 June 2024** , if she wishes the Tribunal to take into account her ability to pay in determining whether to make a costs order, and , if so , in what amount, send to the Tribunal and the respondent full details of her means, including all income and expenditure, savings and assets;
- d) The claimant shall by **12 June 2024** , if she wishes the Tribunal to take into account any health conditions which may have affected her ability to comply with the Tribunal's orders, send to the Tribunal and the respondent copies of any medical records, reports or other evidence of her condition and its effects upon her;
- e) The claimant shall also, by **12 June 2024** provide to the Tribunal and the respondent copies of any email or other communications to the respondent in or about April 2023 in which she raised any queries about her final pay, and how it was calculated, or any similar issues relating to her pay or holiday pay.

## REASONS

### 1.The background and procedural history.

1.By a claim form presented on 18 April 2023 the claimant , who is unrepresented, brought claims of unfair dismissal, for a redundancy payment , and for holiday pay and "other payments". She was employed by the respondent between 11 May 2021 and 10 March 2023.

2. The respondent defended the claims, contending that as the claimant lacked two years' qualifying service, she could not claim unfair dismissal or a redundancy payment. She had, however, pleaded that her dismissal was for the automatically unfair reason that she had made a protected disclosure.

3.A preliminary hearing was held on 3 November 2023 by Employment Judge Tobin. He identified (para. 3 of his Case Summary) the claimant's claims as being automatically unfair dismissal, protected disclosure detriments, a shortfall in her annual leave, breach of contract in respect of her notice period, and for a redundancy payment. It seems likely that he took these from the claimant's handwritten Agenda document that she had submitted for that hearing.

4. As the respondent disputed that the claimant had made any protected disclosure, the Employment Judge ordered that a further preliminary hearing be held to determine whether any of the claims that the claimant had made should be struck out as having no reasonable prospects of success, or whether any deposit orders should be made.

5. That preliminary hearing was held by Employment Judge Eeley on 9 February 2024. She determined that the claimant's claim of automatically unfair dismissal should

be struck out as the claimant had no reasonable prospects of establishing that she had made any protected disclosure. Her judgment was sent to the parties that day.

6. In dealing with the claimant's other claims, Employment Judge Eeley in her Record of a Preliminary Hearing held on 9 February 2024, at para. (2), recorded this:

*It is unclear whether the claimant asserts that she still has Tribunal claims which have not yet been determined by the Tribunal. Rather than require the claimant to answer definitively at this hearing, I have made case management orders (as set out below) in order to ensure that any outstanding matters are dealt with appropriately.*

She went on to make these orders:

*By no later than 23 February 2024, the claimant shall write to the Tribunal and the respondent to confirm whether:*

*1.1.1 She still pursues a claim for unpaid holiday pay. If she does, she must set out what sums of pay she is claiming, how she has calculated this and how many days of holiday pay she says are still owing.*

*1.1.2 She still pursues a claim for notice pay (wrongful dismissal). Does she accept that she has received her compensation for wrongful dismissal (i.e. her notice pay)? If not, how much notice pay does she say is still owed?*

*1.1.3 She still pursues any other claim of breach of contract. If she does, what term of the contract does she say was breached and to what compensation does she say she was entitled as a result? How has she calculated such compensation.*

*1.1.4 Some or all of her remaining claims are to be withdrawn (she should specify which). Does she consent to any withdrawn claims being dismissed by the Tribunal?*

7. There followed further orders for exchange of documents, preparation of a hearing bundle and exchange of witness statements for this hearing. The dates for compliance with these orders were in March and April 2024, the last of them, exchange of witness statements, being required by 26 April 2024.

8. The claimant did not comply with these orders. She wrote an email to the Tribunal on 9 May 2024 explaining why she had been unable to do so, citing her health issues as the reason for her non-compliance.

9. The respondent, by email of 10 May 2024 sought an order striking out the claims, for non-compliance with the Tribunal's orders. The Tribunal declined to determine that application, leaving it for this hearing.

10. By email of 12 May 2024 the claimant provided more details of her remaining claims, which are of breach of contract , for holiday pay, and now it seems , also for arrears of wages.

**2. This hearing.**

11. The respondent had , in anticipation of this hearing, and in accordance with the Tribunal's orders, prepared two bundles for this hearing, one containing witness statements, and the other containing other documents.

12. This led to some confusion, as there had also been two bundles prepared for the preliminary hearing on 9 February 2024. Further, whilst the bundles for this hearing were smaller, they nonetheless contained (save for the orders and judgments made on 9 February 2024) the same documentation as was contained in the previous bundles, although not as comprehensively. The witness statements adduced for this hearing by each side were the same ones that they had relied upon in the February hearing.

13. The respondent's position was that the claimant was in breach of the Tribunal's orders, and the application to strike out had been made on that basis. The claimant accepted that she was in breach of the Tribunal's orders, but attributed this to her anxiety, which she contends amounts to a major health issue for her.

14. The claimant had, in the view of the Employment Judge, in her email of 12 May 2024, at least attempted to provide details of the remaining claims that she wished to advance. From that document it appeared to the Employment Judge that they fell into three categories. The first was her breach of contract claim, the second a claim for unpaid wages between the end of February and beginning of March 2023, and the third a claim for underpaid holiday pay. He accordingly took the claimant through these claims, and discussed with the claimant the position as he saw it.

**i) The breach of contract claim.**

15. The claimant was dismissed, with no notice, but with, the respondent contended, payment in lieu of notice of one week's pay. The claimant, after some debate, and separation of the issue of whether she had been underpaid for February 2023, accepted that she had been paid notice pay.

16. The Employment Judge noted that in her claim form the claimant had not ticked the box for notice pay, which is the usual (and , currently, probably the only) way in which a claimant can bring a breach of contract claim, without specifying this in writing in another part of the claim form. Whilst in the claimant's Agenda for the first preliminary hearing , and indeed, Employment Judge Tobin's Record, there was reference to a "breach of contract claim", in the view of this Employment Judge no such claim had been made by the claimant in her claim form.

17. That meant that if the claimant was now to pursue such a claim, she would need the permission of the Tribunal to amend her claims to include such a claim.

18. That, however, raised a further issue. In her email of 12 May 2024, and elsewhere the claimant had raised issues about how the terms of her contract required the respondent to give her one month's notice of changes to her contract. That, the Employment Judge takes to be a reference to a clause on the first page of the Contract (page 70 of the bundle prepared for the 9 February 2024 hearing) which reads:

*“Any changes or amendments to these terms will be confirmed in writing within one month of them occurring.”*

That is not, however, a one month notice period, it is what it says, notice of confirmation of any changes to the contract. That cannot override the express provisions as to notice of termination. The claimant also made reference to other ways in which she considered that the decision to make her redundant was unfair, or indeed, not genuine. In conclusion, she was seeking, as damages for breach of contract, loss of earnings from the date of her dismissal to date, and indeed future loss of earnings, much like a compensatory award for the unfair dismissal claim that she cannot bring.

19. The Employment Judge explained how the Tribunal's breach of contract jurisdiction was very limited, and how it would not extend to cover claims for general damages for breach of contract. The usual measure of damages is, and the usual claim that is made is of failure to pay, notice pay. Whilst the respondent may have (it has not pleaded to this claim, as it was not clearly made) dismissed the claimant without notice, in circumstances where notice should have been given, the claimant's loss is the notice pay that should have been paid. The respondent, however, has paid that, so the claimant has suffered no loss, and the Tribunal could make no further award.

20. In these circumstances the Employment Judge invited the claimant to take some time to consider whether she did wish to seek to amend her claims in this manner, and how she proposed to get around the limitations that he had explained upon any award of damages, which in the circumstances would be nil.

**ii) An arrears of pay claim?**

21. In the email of 12 May 2024 the claimant at para. 5, stated that she believed that she had not been paid for a period of several days between the payroll cut off date in February 2023 and 1 March 2023.

22. This appeared to the Employment Judge to be a new claim. In the claim form the claimant did not tick the box for “arrears of pay”, which is the type of claim that this appears to be. The claimant explained that she was not aware of this shortfall until she

read that the respondent had stated that she had been paid “From 1 March 2023 to 10 March 2023”. This had led her to question whether there were missing days.

23. This would certainly be a new claim, for which the Tribunal’s permission to amend would be required. It was still rather unclear. The claimant explained, however, as she did in her email of 12 May 2024 that she had raised with the respondent (by email) queries on her final pay, in April 2023 , but no response had been forthcoming.

**iii) The holiday pay claim.**

24. Turning finally, to the holiday pay claim, this had clearly been included in the original claim form, so no amendment was required. The claimant had been ordered, however, to provide further details of this claim, but had not done so, save to mention in her email that her line manager had “used her days off as holiday taken”. The Employment Judge explained how holiday pay operates, and how pay in lieu of untaken holiday claims arise. What the Tribunal needed to know is where was the dispute? Was it the number of days holiday that the claimant had taken? If not, what was the issue? The claimant again said that she had raised this before her employment ended, but did not get an explanation.

**The adjournment.**

25. The Employment Judge accordingly offered the claimant an adjournment to consider these points and then make any applications that she wished to. She accepted this, and the hearing was adjourned for 20 minutes or so, the claimant saying that she had been able to consider these issues and was ready to proceed.

26. In the meantime the Employment Judge had seen page 55 of the document bundle produced for this hearing. This is a table showing how the claimant’s terminal holiday pay was calculated at 13.23 days. Upon resumption of the hearing he went through this with the claimant to ascertain if it assisted to identify what the issues were. She accepted that the days worked column was correct, and that she had taken 4 days holiday in February 2023, as the Table showed. The Employment Judge accordingly asked her to identify where the issue was, and where she disagreed with the calculation. She was unable to do so, and accepted that the calculation was correct. The respondent contended that this had also been discussed in the previous preliminary hearing, where the claimant accepted the calculation.

**3.Resolution.**

27. The claimant declined to make any application to amend her claims to add any claim for breach of contract. As no such claim is before the Tribunal, no further determination is required.

28. In relation to the holiday pay claim, the claimant has accepted that she does not have one, and this claim is dismissed.

29. In relation to the potential amendment to claim arrears of pay from February 2023, the claimant still has failed to provide any details of this claim. She was provided on 3 April 2024 with the further documents, including page 55, which shows the number of days that the respondent says she worked, and she has all her payslips from December 2022 to the end of March 2023. She has had plenty of time to formulate what sums she considers she has been underpaid. It is, the Employment Judge considers, of some significance that this was not a claim that she originally made, but seems to have arisen from terminology that the respondent has used, probably in the preparation and lead up to the preliminary hearing on 9 February 2024. Up until then the claimant had not suggested that she was underpaid in this way.

30. In considering whether to allow an amendment the Tribunal applies the principles set out in ***Selkent Bus Company v Moore [1996] IRLR 661*** which remains the leading case in terms of how the Tribunal should approach applications of this nature. In that case Mummery, J. as he then was, identified, firstly, how there were three different types of amendment. Distinctions may be drawn between:

- (i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint;
- (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim; and
- (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

31. In relation to all amendments Mummery, J., set out a number of relevant circumstances in a non exhaustive list of considerations that the Tribunal should be taken into account when deciding whether to allow or not to allow an amendment, and the first of those is the nature of the amendment, second is the applicability of time limits and the third is the timing and the manner of the application. Those are the primary considerations, but they are not the only ones, it being clear that this was not an exhaustive list and ultimately what Mummery, J. said in that case, as has been approved in many cases thereafter, is that the paramount considerations are the relevant injustice and hardship involved in refusing or granting an amendment. Questions of delay as a result of adjournments and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision, as has been said before, ultimately this is a matter for the Tribunal's discretion, and ultimately it may have to apply a balance of prejudice test.

32. It is only in respect of amendments falling into category (iii) – entirely new claims unconnected with the original claim as pleaded – that the time limits will require to be considered. Two main questions arise. First, when is the new claim deemed to take effect? Second, if the new claim is, or may be, time-barred, is a tribunal obliged to

consider the factors relating to both the application to amend and to a possible extension of the time limit at one and the same time? As to the first question, the time limit is to be considered as if the proposed claim had been presented on the date of the application to amend and not the date of the presentation of the claim. Mummery J stated in Selkent that it is 'essential for the tribunal to consider whether [the new claim] is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions'.

33. Here the Tribunal considers that the proposed amendment falls into the second category. It is linked to, or arises out of, the same facts as the original claims. To that extent, therefore, time limits are not a significant factor, although, of course, the manner and timing of the application are.

34. The Tribunal's view is that the proposed amendment should not be permitted. The proposed amended claim is still not clear, and the claimant has had time, and more documentation, from which she ought to have been able at least to formulate an approximate figure for the sums she wants to claim. Granting the amendment is likely to lead to delay, as further evidence is going to be required, and a further hearing necessitated. Whilst these claims are not that old, it is now over a year since the claimant's employment ended. Some finality must be achieved.

35. Further, and with all due respect to the claimant, the sums involved are unlikely to be large (the claimant was paid at £10.00 per hour, £60 per day, although the Tribunal does not underestimate the significance of such sums to employees on low incomes), and it does become disproportionate to continue to invest the Tribunal's and the respondent's time on very modest claims. Finally, the Tribunal is entitled to consider the merits of the proposed amendment. It seems to the Tribunal that this proposed claim is highly speculative – there may be something in it, but that is all the claimant seems to be able to say.

36. For all these reasons, the Tribunal does not permit the claimant to amend her claim to add a claim for deductions from wages in relation to the end of February 2023 to March 2023.

### **Conclusion.**

37. The claimant's claims, therefore will not be amended, and the claims which she does have before the Tribunal have been, or will be, dismissed. It appears that no judgment dismissing the claim for a redundancy payment (for which the claimant does not qualify) has been made, which the Tribunal will now do.

### **Costs application.**

38. At the conclusion of the hearing the respondent made an application for costs. It did so on the basis of rule 76(2), that the claimant had breached Tribunal orders. Ms Bouffé submitted that the claimant was in breach of the orders, and it was not necessary for the Tribunal to find that her conduct was unreasonable, breach of the orders triggers the entitlement to consider making a costs order.



39. The Employment Judge reserved the decision on this application. That was for a number of reasons. Firstly, if the claimant wants the Tribunal to take her ability to pay into account when determining the application, she needs to provide the Tribunal with details of her means, her income and expenditure, savings, and any assets she owns. Secondly, to the extent that the claimant has health issues, and will be seeking to rely upon those as explaining her failure to comply with the Tribunal's orders, she should provide evidence to support any such contentions. Thirdly, the extent to which the respondent did not respond to her initial enquiries in April 2023 about her final payslip may be a relevant factor, and she should produce evidence about his.

40. On the respondent's side, no figure for costs was provided, so a statement of costs (assuming summary determination is sought) is required.

41. If either party considers that a further hearing on the costs application is required (and further written representations can be made if appropriate), application can be made in due course.

Employment Judge Holmes  
Date: 15 May 2024

JUDGMENT SENT TO THE PARTIES ON

Date: 30 May 2024

FOR THE TRIBUNAL OFFICE

**(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.**

**(2) Under rule 6, if this Order 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 rules 74-84.**

**(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.**

