



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Amini

**Respondent:** Ustun Catering Limited (Substituted for Mr K Ustun)

**Heard at:** Manchester Employment Tribunal

**On:** 7 May 2024

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

## Representation

**Claimant:** Mr A Hussain (friend)

**Respondent:** Mr K Ustun (Director)

# RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant's employer was Ustun Catering Limited. Under rule 34 of the Employment Tribunal Rules 2013 it is substituted as the respondent in this case instead of Mr K Ustun.
2. The claimant's claim is not struck out under rule 37(1)(b) of the Employment Tribunal Rules 2013.
3. However, the claim was not presented within the applicable time limit. It was reasonably practicable to do so. The claim is therefore dismissed.

# REASONS

## Introduction

1. This was the final hearing of the claimant's claim for wages he said he was owed by his former employer. As I explain below, the claimant had brought the claim against Mr K Ustun but I decided that the correct employer was Ustun

Catering Limited (registered at Companies House under company number 13914373).

2. The wages related to the period when the claimant worked as a chef at the respondent's restaurant.

3. Mr Amini was represented by his friend Mr Hussain. Mr Ustun represented the respondent.

4. We had the assistance of Mr Seifzadeh, a Farsi (Persian) interpreter for the claimant throughout the hearing.

### **Background**

5. The final hearing of this case was meant to be on 20 February 2024 but the parties had not prepared witness statements nor brought relevant documents to that hearing. Because of that, Employment Judge Dunlop changed that final hearing into a preliminary hearing. She made orders telling the parties what they must do to prepare the case for a hearing today.

6. She listed this final hearing for one day. Everyone attended in person at Manchester Employment Tribunal.

7. Employment Judge Dunlop also identified 4 things that would need to be decided at this hearing. They were:

7.1 Was the claimant employed by Mr Ustun personally or by Ustun Catering Limited?

7.2 Was the claim brought in time. The Early Conciliation process was started one day late on 5 September instead of 4 September. It is out of time unless it was not reasonably practicable for it to have been presented in time.

7.3 Is the claimant owed any money?

7.4 Has the claimant threatened Mr Ustun, and if so, what effect does that have on the claim?

### **The Hearing**

8. Employment Judge Dunlop had ordered the parties to send each other any relevant documents well in advance of this hearing. She ordered Mr Ustun and the claimant (if he wanted to make one) to send each other written witness statements. The parties were supposed to bring 3 printed copies of any relevant documents to the hearing. Neither the claimant nor Mr Ustun had done that. There were no witness statements from any of the parties.

9. The first decision I had to make was whether to go ahead with the hearing. I directed that the parties provide copies of all the documents they had to the Tribunal clerk and the Tribunal arranged for them to be copied so that everyone had a set of the available documents. I gave the parties time to go through the documents. I decided it was in accordance with the overriding objective to go

ahead with the final hearing rather than postpone it for a second time. There were only a small number of documents involved and the parties confirmed they had seen most if not all the documents before the hearing. Because the case had been listed for a whole day there was also time to take a break if a party needed extra time to consider a document. Given the issues involved in the case and the Tribunal resources already used up by the case I decided it was not proportionate to postpone the hearing.

10. It took the morning of the hearing to sort out the documents in the case. I started hearing evidence at 2 p.m. I heard evidence from the claimant, Mr Hussain and Mr Ustun. Because there were no witness statements for the claimant, Mr Hussain or Mr Ustun, I asked each of them open questions at the start of their evidence to find out what their evidence was. Where relevant, I also asked questions after each witness was cross examined to clarify their evidence.

11. Mr Hussain gave evidence because during the claimant's evidence it became apparent that he had helped the claimant in contacting ACAS and in submitting his Tribunal claim.

12. Both the claimant and Mr Hussain were cross examined by Mr Ustun. That was not a straightforward process both because Mr Ustun tended not to ask direct questions and because Mr Hussain and the claimant frequently wanted to challenge what was being said or said they did not understand it.

13. Mr Ustun then gave evidence and was cross examined by Mr Hussain.

14. Both parties at times in witness evidence referred to other evidence they said could help support their case, including other witnesses. However, we had at the start of the hearing decided that it was preferable to go ahead with the hearing rather than postpone to enable further evidence to be obtained. As I made clear to the parties, therefore, I was deciding the case based on the evidence in front of me today.

15. Because of the time spent in sorting out the documents in the case and deciding how best to proceed there was no time to give judgment on the day of the hearing. After hearing the witness evidence I heard submissions from Mr Ustun and Mr Hussain. I then reserved my decision.

**Findings of fact and decisions on the issues identified by Employment Judge Dunlop**

16. I have decided the best way to set out my decision is by reference to the issues identified by EJ Dunlop. I have set out my findings of fact, relevant law and decision on each of those four issues below.

17. My findings are based on the documents I read and the witness evidence I heard. There were disputes between the parties about a number of factual issues including when the claimant worked for the respondent, on what terms and what moneys (if any) had been paid to him.

18. The claimant was not clear in his evidence and struggled in particular to remember dates. He told me that was because he had been in a coma for a year

and a half when he was 13 years old as a result of an injury. I have taken that into account in assessing the relative reliability of his evidence and Mr Ustun's.

**Issue 1: Was the claimant employed by Mr Ustun personally or by Ustun Catering Limited?**

Findings of fact

19. I find that the claimant was employed after he was introduced to Mr Ustun by somebody who was already a chef at the restaurant. He was then interviewed by Mr Ustun who decided to employ him as a chef.

20. I accept Mr Ustun's evidence that employees at the restaurant are always employed through Ustun Catering Limited. Companies House confirms the limited company being established at the restaurant address with Mr Ustun as director. The payslip and P45 provided by the respondent show Ustun Catering Limited as the employer. Mr Ustun's evidence is that all policies and documents show the company as the employer.

21. The claimant's formal grievance letter dated 9 August 2023 claiming his unpaid wages was addressed to Ustun Catering Limited.

Relevant Law

22. For the purposes of the Employment Rights Act 1996, the claimant's employer is the person with whom he had a contract of employment, written or oral.

23. Rule 34 of the Employment Tribunal Rules 2013 provides that:

**"The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included."**

Discussion and decision

24. I find that the claimant was employed by Ustun Catering Limited rather than Mr Ustun personally. The claimant's main argument was that he had been interviewed and appointed by Mr Ustun. However, a limited company has to act through individuals and I do not find the fact that Mr Ustun interviewed and appointed the claimant is enough to make him the claimant's employer. All the other evidence points to the limited company being the employer.

25. In those circumstances I substitute Ustun Catering Limited for Mr Ustun as the respondent in this case because I find it was the claimant's employer and the correct respondent to a claim for unpaid wages.

**Issue 2: Was the claim brought in time. The Early Conciliation process was started one day late on 5 September instead of 4 September. It is out of**

**time unless it was not reasonably practicable for it to have been presented in time.**

Findings of fact

26. The claimant said that he was due to be paid on 5 June 2023. That meant that proceedings should have been started by 4 September 2023. ACAS was not contacted until 5 September 2023. That meant that the time limit extension which applies when early conciliation is started in time did not apply. The Tribunal claim was not lodged until 15 September 2023 so was out of time. The key question is whether it was reasonably practicable for the claim to have been brought in time. A key issue is why the claimant did not contact ACAS within the 3 month time limit. That would have extended the time lime for bringing his claim which would then have been in time.

27. The claimant was able to give very limited evidence about this. I do find that his English is limited and he does not understand technical matters. I do accept Mr Ustun's submission that the claimant's understanding of English was good enough for him to work in the kitchen at the respondent's premises. I also noted that there were times during the hearing when the claimant answered questions directly in English.

28. Both the claimant and Mr Hussain confirmed in evidence that Mr Hussain had helped him throughout the Tribunal and pre-Tribunal process. Based on Mr Hussain's evidence, I find that the claimant and Mr Hussain had been living at the same address until mid May 2023. Mr Hussain had then moved away but from around 7 June, I find that the claimant had got back in touch with Mr Hussain to tell him about the issues with the respondent. I find that by July and August they were back in touch, although not living at the same address. Mr Hussain confirmed that he saw the claimant at least once or twice a week during this period.

29. I find that Mr Hussain had contacted the Citizens Advice Bureau with the claimant. Mr Hussain's evidence was not entirely clear and I find he had a tendency to exaggerate. For example, Mr Hussain suggested that the Employment Tribunal online portal was unavailable for weeks whereas it was unavailable for at most 3-4 days. Mr Hussain also suggested that the Citizens Advice Bureau was closed on at least two days a week. There was a handwritten letter from the Citizens Advice Bureau to the claimant which set out its opening hours and made clear that it was closed on only one day a week.

30. That same letter from the Citizens Advice Bureau provided information about claiming unpaid wages and said that "this must be done quickly before the deadline of 4 September 2023". The letter was undated. However, Mr Hussan confirmed that the CAB had also drafted the formal grievance letter dated 9 August 2023 on the claimant's behalf. On balance I find that the handwritten CAB letter was written at the latest by that date. I find that at the very latest the claimant, with Mr Hussain's assistance, was aware from around 9 August 2023 that the deadline for starting proceedings and contacting ACAS was 4 September 2023.

31. Mr Hussain suggested that the delay in contacting ACAS was because ACAS had sent a link to the wrong form. I asked him a number of times whether he meant a link to the Tribunal ET1 form. He maintained that it was a link to the

early conciliation form. He suggested that had led to a delay of a few weeks in starting early conciliation. I did not find that plausible. Early conciliation can be initiated by telephoning ACAS. The CAB's handwritten letter makes that clear, telling the claimant that if writing to his employer does not work "either call ACAS on the telephone number provided or come back to us for support".

### Relevant Law

32. S.23(2) of the Employment Rights Act 1996 says that an unlawful deductions claim has to be brought before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made or (in the case of a series of deductions) beginning with the date of the last deduction in that series.

33. That time limit is extended by the rules relating to ACAS Early Conciliation so long as Early Conciliation is begun within that primary three-month time limit (**Pearce v Bank of America Merrill Lynch and ors EAT 0067/19**). In this case it was not.

34. If the claim is brought outside that time limit the Tribunal does not have jurisdiction to hear it unless the Tribunal is satisfied (i) that it was not reasonably practicable for the claim to be presented before the end of the relevant period of three months and (ii) that it was presented within such further period as the Tribunal considers reasonable (s.23(4) of ERA).

35. When it comes to the meaning of "reasonably practicable", the courts have said that that means "reasonably feasible" **Palmer v Southend-on-Sea Borough Council [1984] ICR 372, CA**. In **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293** the Court of Appeal confirmed that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

36. When it comes to ignorance of one's rights that can make it not reasonably practicable to present a claim as long as that ignorance is itself reasonable. In **Porter v Bandidge Ltd 1978 ICR 943, CA**, the Court of Appeal, ruled that the correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them. An employee aware of a right to bring a claim can be expected to make enquiries about time limits: **Trevelyan's (Birmingham) Ltd v Norton [1991] ICR 488 EAT**.

### Discussion and Decision

37. I find that from 9 August 2023 at the latest the claimant and Mr Hussain had been advised by the CAB that the deadline for contacting ACAS was 4 September 2023. I also find that the CAB had advised that the claimant should contact ACAS by phone if writing to his employer did not work and that the CAB had provided the telephone number for ACAS.

38. The law regarding reasonable practicability makes it clear that there is an onus on a claimant to take all reasonable steps to ensure that they do bring a claim in time. Even allowing for the claimant's limited English I find that it was reasonably practicable for him, with Mr Hussain's help, to have contacted ACAS

by 4 September 2023. The CAB had made clear that he must act quickly and set out the deadline for action and how to contact ACAS.

39. In those circumstances I find that the claimant's claim is out of time and fails.

**Issue 3: Is the claimant owed any money?**

40. I have found that the claim was brought out of time and fails. In case I am wrong about that, I will briefly set out my findings about the claimant's hours of work, pay and monies received.

41. The claimant said that he worked for the respondent from 5 May 2023 for a total of 15 days. He said he was employed at £15.00 per hour and worked 8-9 hours each day. He claimed he was therefore owed £2052. Employment Judge Dunlop recorded that the claimant had told her that he had been paid £771 by the respondent. At this hearing the claimant changed his position and said that was a mistake and he had not been paid anything by the respondent.

42. Mr Ustun's evidence was that the claimant had worked from 6 April 2023 until around 14 May 2023. He said the claimant was employed at the relevant national minimum wage which was £10.42. He said he had made 2 lump sum payments to the claimant. The first was a payment of £2,000 made at the claimant's request to a friend of the claimant's. The bank details, Mr Ustun said, had been supplied by the claimant. The second was a payment of £600 made in cash. Mr Ustun said that that had been made when the claimant had supplied his national insurance and bank details in May. Mr Hussain for the claimant said that the bank details had been supplied before that date.

43. The only evidence of payment was a payslip for the sum of £771 for May 2023 calculated as 74 hours worked at the minimum wage rate. The P45 supplied was for the same amount. Mr Ustun said that payment made was not actually made to the claimant's bank account – it reflected roughly the payment he had made in cash to the claimant. He said the claimant had asked him not to pay him through his bank account because that might lead to the claimant losing his entitlement to Universal Credit.

44. I did not find either party's evidence entirely reliable. On balance, I preferred the claimant's evidence about his hours and the amount he was due. I did not find it plausible that the respondent would advance him £2000 at the start of his employment. That would represent over 190 hours on the respondent's case, i.e. that payment was at the National Minimum Wage rate. While not condoning the threatening message sent by the claimant, I find that consistent with the claimant not having been paid what he was due.

45. Had the claimant's claim been brought in time I would have found he was entitled to the sum claimed of £2052.

**Issue 4: Has the claimant threatened Mr Ustun, and if so, what effect does that have on the claim?**

Findings of fact

46. The allegation in this case was that the claimant had sent a threatening text message to Mr Ustun. That message had been sent in Farsi but then translated using Google Translate. As translated it said, "*Send me the money, otherwise I will come inside the restaurant and cut your eyebrows in front of all the swordsmen. This money is my right.*"

47. It was agreed by all parties at the hearing that was probably not an accurate translation. The claimant confirmed that as sent, the message referred to him coming to do a dishonour to the respondent, or Mr Ustun specifically, at the restaurant. He thought the reference to "swordsmen" was a mistranslation of "workers" or something of that sort.

48. In his evidence Mr Ustun said he did not take the threat seriously. When asked by Mr Hussain whether he had called the police he said he did not take it seriously and it was just childish.

#### Relevant Law

49. Rule 37 of the Employment Tribunal Rules of Procedure 2013 gives the Tribunal the power to strike out all or part of a claim in certain circumstances. Of potential relevance to this case:

"Rule 37. - Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds -

(a) .....

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;"

50. When it comes to striking out for conducting proceedings unreasonably, scandalously or vexatiously (rule 37(1)(b)), the case of **James v Blockbuster Entertainment Ltd [2006] IRLR 630 CA** says that for the Tribunal to strike out for unreasonable conduct it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps, or that the conduct has made a fair trial impossible. In either case the striking out must be a proportionate response.

#### Discussion and decision

51. E J Dunlop had raised the question of the effect, if any, of the text on the proceedings. I take into account that it was sent before proceedings commenced. I also find that the text message did not amount to conduct which was vexatious or abusive. I take into account that it was a mistranslation. I think it may well have been an angry text because it was demanding money, but I do not think it was a threat and Mr Ustun's evidence suggests he did not take it as such. Even if it fell within rule 37(1)(b) there was no basis for concluding that the conduct had made a fair trial impossible. Mr Ustun was not intimidated by it in any way.

52. In those circumstances I decided that the text did not justify the Tribunal of its own motion striking out the claim.



**Conclusion**

53. I have decided that the claim was brought out of time. I accept that the outcome could be viewed as harsh given it was only one day out of time. However, the question is not how much out of time the claim was but whether it was reasonably practicable to bring it in time. I have found it was so the claim must fail.

Employment Judge McDonald  
Date: 5 August 2024

SENT TO THE PARTIES ON  
6 August 2024

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