



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. W. Cummings

**Respondent:** Fresh Property Group Ltd

## RECORD OF A PRELIMINARY HEARING

**Heard at:** Exeter

**On:** 29 August 2024

**Before:** Employment Judge Smail

### Appearances

For the Claimant: In person, until he left after the unsuccessful recusal application.

For the Respondent: Ms L. Amartey, counsel

## JUDGMENT ON PRELIMINARY ISSUES

1. The Claimant's application for Employment Judge Smail to recuse himself is dismissed.
2. The Claimant's applications to amend the claim dated 26 May 2024, 30 May 2024, 31 May 2024 and 20 June 2024 (x5) are dismissed.
3. The Claimant's claims of sex discrimination relating to August 2020 (which the Respondent accepted in its communication of 31 May 2024 did not require an amendment) are dismissed for having been presented out-of-time.

Case Management Orders were made today in respect of the Claimant's claim for unfair dismissal, which does proceed to a final hearing, and are contained in a separate document.

# REASONS

## Recusal

1. The claimant applies this morning for me to recuse myself from further conduct of the preliminary hearing. To be fair to him he raised this point as early as the 6 August 2024, some days after having received my judgment given orally on 13 June 2024 and in writing sent to the parties apparently on 11 July 2024, whereby I dismissed his assertion that he was a disabled person at any material time to this case. The Respondent opposes the application.
2. Along with many general observations, the claimant makes a focussed submission in respect of my findings at paragraph 24 and 25 of the reasons.

'24. At one point in December 2023, the GP had been asked to write a letter recording the history of the Claimant's medical difficulties including both gallstones but also mental health. There is a passage in this draft letter. In the event the Claimant did not want to pay £35 for the production of the letter but he has answered questions about it before the Tribunal. The doctor had drafted a letter for approval. The mental health section, which was the bottom quarter of the letter, was in these terms:

"According to his medical records, Mr Cummings has suffered with depression and anxiety for many years with depression being documented in 2016. He was seen on 11 May 2022 with stress at work and was signed off sick with anxiety. It is documented above that he is being fully assessed by a liaison psychiatrist who advised talking therapy. The referral was made recently to the mental health service. I was concerned by the content of emails and phone contact with Mr Cummings who was expressing suicide. He had been provided with contact details for urgent mental health support and we have encouraged him to make contact with them."

25. The Claimant told us that the reference to 2016 was essentially misplaced. For a short period in 2016, he had recorded mental health difficulties which were documented, and which were submitted to the local authority to advance his position on the waiting list for social housing. Once he got that social housing, he tells us that ended that particular episode. I had the impression that the Claimant had manufactured the assertion to get the accommodation. He has not sought to argue that there have been recurrent mental health difficulties going back to 2016; he was at pains to say otherwise. He has also expressed the view that the gallstones episode is separate, as he sees it, from the work-related problems; and indeed he tells us that the reason why he did not adduce the medical evidence in the first place for today's purposes (notwithstanding their obvious relevance) was that it was about gallstones.

3. That finding at paragraph 25 reflects the evidence that the claimant gave the Tribunal. There was express enquiry made by me in that hearing as to why it was that he did not agree with that GP's letter saying he had suffered with depression and anxiety for many years with depression being documented in 2016. As the finding states, he was at pains to say that his mental health problems did not go back to 2016, he made it clear that the episode in 2016 was to do with a housing matter and was not relevant, contrary to what the doctor suggested, to an overall long-term condition of depression and anxiety. That was his position; not my position. I recorded what his position was in analysing whether the claimant was a disabled person at the relevant time. I did have the impression as I stated that the claimant had manufactured the assertion to get the accommodation. It was that: an impression. I had that impression because the claimant was not relying upon that episode as indicating a long-term condition of depression and anxiety. He explained it wholly in the context of going up the ladder in terms of qualifying for social housing.
4. That was one finding of several made resulting in a rejection of the claimant's assertion that he was a disabled person at the material times. I rejected that argument for the reasons given in the judgment.
5. The Claimant tells me he has made a reconsideration application. That is yet to be referred to me by the administration. I will deal with it when forwarded. I also reminded the Claimant of his right to appeal to the Employment Appeal Tribunal and that there was a time limit for doing so.
6. The purpose behind the remainder of the preliminary hearing is to assess whether and on what terms the claimant should be permitted to amend his claim and to determine the Respondent's application that the sex discrimination claim should be dismissed as being out-of-time. That is going to engage the law on amendments and time limits. We did not have time to address those matters on the last occasion largely because of time taken to consider all the documentation the Claimant wanted to rely upon in respect of the disability issue.
7. The claimant was employed by the respondent between 15 September 2018 and 2 February 2023. He was absent from work with stress from 29 April 2022 up until the time of his dismissal. The effective date of termination was 2 February 2023. He had been off work for some ten months prior to the dismissal. He wishes to introduce by way of amendment events that took place long before the primary period of limitation for these claims which is three months. He will have to make the application to amend by making submissions as to why the amendment should be granted.
8. The fact that I made findings in respect of the claimant's claim to have been a disabled person at the relevant time does not in my judgment preclude me from

fairly assessing whether it is right or wrong to grant these amendments and to determine the issue of time limits for the sex discrimination claim. Ms Amartey submits that the issue is whether to an informed observer it would seem that I was actually or apparently prejudiced biased against the Claimant. My judgment is that the Respondent is right that an informed observer would not come to that conclusion. I came to a judgment on the issue of disability. I would now have to make a judgment on the matter of amendments and time limited. I do not therefore agree to recusing myself. A party to litigation cannot pick and choose their Judge.

9. The claimant has added to his submissions today that whether or not I recuse myself, he proposes to recuse me on the basis that I am not trusted. He tells me that I am not to be regarded as an independent Judge, I am a representative of the Government, and am in effect in league with the Respondent's directors. I have decided to ignore those statements rather than take action such as to consider whether or not to strike out the Claimant's claims for scandalous conduct.
10. Regrettably for the Claimant parties cannot pick and choose Judges. I am the Judge assigned to this case and it is for me to make the decisions on his applications to amend, and the Respondent's application to dismiss the sex discrimination claim for being out-of-time, in accordance with the law of amendments and time limits. I am perfectly able and willing to do that. If the claimant choses to disengage from the process and leave that is a matter for him. He has been told it could very well have adverse consequences to the future of his case.
11. At the conclusion of the ruling on recusal the claimant left the building and has not subsequently participated.

#### Applications to amend

12. The Claimant, having left, has failed to pursue his many applications for amendment. Accordingly, I dismiss them.

#### The sex discrimination claims relating to August 2020

13. The Case Management Order sent to the parties on 26 July 2024, also listed as issues whether any or all of the claim, should be struck out on the basis that the Tribunal does not have jurisdiction to hear them. The word 'dismissed' may have been better than 'struck out' but the meaning is clear.
14. The claimant was ordered at paragraph 12 of that Order as follows –

By 9 August 2024, the claimant will produce a witness statement of no more than 1500 words setting out why his sex discrimination complaints were not

presented to the Tribunal earlier and any factors relevant to the delay in presenting the complaints.

15. The Claimant has provided a witness statement. The Respondent has provided a bundle of documents in support of its application. Accordingly, the matter of time limits for the sex discrimination claim is squarely before the hearing and I have addressed the question of whether the sex discrimination claims should be dismissed on the basis that they were presented out of time or alternatively whether it would be just and equitable to extend time.
16. Prior to my involvement in the proceedings the case came before Employment Judge Roper at a preliminary hearing on 23 April 2024. Employment Judge Roper identified the unfair dismissal issues which remain and will go forward to a final hearing, should the claimant wish to pursue his claim of unfair dismissal. It also listed issues of disability discrimination. Those claims now fall away because I have ruled the claimant was not disabled at any relevant time. In correspondence the parties were given fourteen days to check the accuracy of the issues. The claimant had ticked the sex discrimination box. He did allude to certain incidents in his original claim. The respondents accepted that by letter from their solicitors of 31 May 2024. They say that it is right that the following should have been added to the issues as claims of direct sex discrimination.
  - (a) In August 2020 during an interview for the general manager for the barn role the claimant was not offered the opportunity by Katie Lewis and Josh Wisniewski to explain his concerns about the recruitment process.
  - (b) In August 2020 during an interview for the general manager for the barn role Katie Lewis and Josh Wisniewski did not give serious consideration to the claimant's answers to questions.
  - (c) In August 2020 the claimant was not offered a second interview for the general manager for the barn role.
  - (d) In August 2020 the claimant was not offered the general manager for the barn role.
17. As we know the claim was presented on 2 May 2023 with an ACAS certificate and notice of conciliation being the same day on 18 April 2023. These allegations about August 2020 are plainly outside the primary period of limitation.
18. Section 123 of the Equality Act 2010 deals with the time limits for bringing claims under that Act (discrimination claims).
  - (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.

19. The Tribunal does have a discretion to extend time should it be just and equitable to do so. The length of, and reasons for, the delay and whether the delay has prejudiced the respondent evidentially need to be considered.
20. The claimant in his witness statement gives the primary explanation that he was fearful to raise the matter. However, the claimant had been raising to the Respondent matters of alleged sex discrimination and other matters of complaint for a considerable period of time prior to the presentation of the claim.
21. He did in August 2020 raise concerns about the interview process internally. He again did so on 2 February 2021 raising concerns of sex discrimination. He told the Respondent that in September/October 2021 he learnt of the perfect comparator against whom to prove less favourable treatment. That perfect comparator was Emily Tine.
22. Within the Respondent the claimant was put on a performance improvement plan. He raised complaints, treated as grievances, about his performance improvement plan on 18 August 2021 and March 2022.
23. He had been intimating claims to the Employment Tribunal directly to the respondent and mentioning ACAS conciliation on twelve occasions between 13 May 2022 and 18 December 2022. He made extensive reference to his intention to bring Employment proceedings in a capability meeting of 23 January 2023.
24. His telling the Respondent he had the perfect comparator in September/October 2021 would suggest that as the last arguably reasonable date for him to bring proceedings challenging matters that had occurred in August 2020. If he wanted to bring proceedings, having intimated them extensively, he should have done so considerably earlier than 2 May 2023.
25. The respondent asserts in its application on time limits that Katie Lewis and Josh Wisniewski have now left the business. They say that a search has not managed to glean any documents recording the decision-making processes in August 2020. There would plainly be evidential prejudice on the respondent in having to deal with these allegations now, four years after the incident, and at the time of the ET1 some two years and nine months afterwards.
26. I am satisfied on the balance of prejudice that this claim should be dismissed for having been presented out of time. The narrative of the claimant's employment in the later years and months was far more about capability to do the job. He was off as we know from 29 April 2022 and a collapse of the employment relationship is evident from the exchange of emails over the later months. The events of August 2020 were far from being the centre of focus at the end of the claimant's employment. The August 2020 claims are dismissed for being out of time.

27. That means the claim left is the one of unfair dismissal and the issues are as set out in the Order of Employment Judge Roper on 23 April 2024.

**Employment Judge Smail  
1 September 2024**

Sent to the parties on:  
11 September 2024  
For the Tribunal Office