



EMPLOYMENT TRIBUNALS

Claimant: Miss A Abdi

Respondent: Dunton Environmental Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Midlands West Employment Tribunal (by video)

On: 24 February 2025

Before: Employment Judge Kelly (sitting alone)

Appearances

For the claimant: In person

For the respondent: Mr Frew of counsel

JUDGMENT

The Judgment of the Employment Tribunal is that:

The claimant's claim for breach of contract is dismissed.

REASONS

1. By a claim of 24 Mar 2023, the claimant brought a claim for breach of contract against the respondent. This followed a period of early conciliation from 14 Mar 2023 to 16 Mar 2023. The claimant was employed by the respondent from 14 Feb 2022 to 31 Aug 2022.
2. The claim for breach of contract concerned a claim for 6 months' pay for the period September 2022 to February 2023. At the preliminary hearing in this claim on 9 Oct 2024, the Judge recorded that that the claimant said that 'the company contractually agreed to pay her 6 months full pay in instalments from September 2023 to the end of February 2023.' (We note that the first reference to 2023 appears to be a mistake and should refer to 2022.)

3. At the start of the hearing, the claimant said she wished to amend her claim to claim 12 months pay instead of six. She said that she wanted to claim compensation in respect of the respondent putting post termination restrictive covenants in her contract of employment; she said that she applied to the respondent to be released from her covenants and the respondent refused and, therefore, she claimed 12 months pay. We refused this application for the following reasons:
 - a. On 4 Dec 2024, the claimant had applied to the Tribunal seeking an amendment to her claim to claim 12 months' pay. By letter of 24 Dec 2024, EJ Boyle refused this application. Therefore, this amendment application had already been considered and refused.
 - b. The Tribunal does not have jurisdiction to consider a claim for breach of contract related to a term which is a covenant in restraint of trade.
4. In response to this refusal to allow the amendment, the claimant asked why we were having the hearing. We reminded the claimant of her pleaded case. The claimant then agreed to continue on the basis of her claim as pleaded in the claim form, that she was owed 6 months pay on the basis of an oral information that she would receive this given to her by the respondent.
5. There was a preliminary issue as to whether the Tribunal had jurisdiction to hear the claim given that the claimant had approached ACAS for early conciliation outside the primary time limit, that is three months from the effective date of termination of the contract giving rise to the claim. To have been within the primary time limit, the claimant should have started early conciliation by 30 Nov 2022. Instead, she did not do so until 16 Mar 2023. The claimant conceded that the claim was brought outside the primary time limit. Therefore, the Tribunal had to determine whether it was not reasonably practicable for the claimant to have presented the claim in time and, if so, whether it was presented within a reasonable further period.
6. The claimant relied on ill health as explaining why it was not reasonably practicable for her to have brought the claim within the primary time limit. The Tribunal suggested to her that she may be relying on an argument that she could not bring the claim until the respondent had failed to make the payment which she was claiming, but the claimant categorically rejected this argument. She relied solely on her alleged ill health.
7. If the claimant could demonstrate that the Tribunal had jurisdiction to hear her claim, the substantive issues were as follows:
 - a. Did the respondent inform the claimant that it would make a payment to her of 6 months pay after the end of her employment?
 - b. If so, was consideration given for this to make it a legally binding contract?
8. We were referred to a bundle of documents of 191 pages. The claimant had drawn up a witness statement and gave oral evidence and was cross examined. For the respondent:

- a. Christopher Gellion, non executive director of the respondent, had drawn up a witness statement and gave oral evidence and was cross examined.
 - b. Lara Roe, business director of the respondent, had drawn up a witness statement and gave oral evidence and was cross examined.
9. References to page numbers below are to pages in the hearing bundle. Subtitles in this judgment are to provide ease of reference and are not intended to assist interpretation of the judgment.

Evidence relating to time issue

10. The claimant said in her witness statement that she had encountered significant health challenges since the termination of her employment with the respondent. She referred to ongoing discomfort and fatigue. She said she was plagued by low energy and chronic tiredness. She also had aches and pains, headaches, muscle soreness and digestive issues and was undergoing investigations for medical conditions.
11. The only evidence in the bundle relating to the claimant's ill health was a fit note for the period 5 Aug 22 to 19 Aug 22 stating that the claimant was not fit for work due to stress. No medical evidence was provided to support a serious medical condition or one that could mean it was not reasonably feasible for the claimant to have presented her claim in time. No evidence was presented about what had changed in the claimant's health which allowed the claimant to present her claim to ACAS on 14 Mar 2023 and present her employment tribunal claim on 24/3/23 when she had, she said, been unable to do so before then.
12. On 26 Jan 2023, the claimant was well enough to register a new limited company at Companies House. It was the claimant's evidence that, after the end of her employment with the respondent, she would have obtained a new job in HR had it not been for post termination restrictive covenants in her employment contract which she said prevented this.

Law on time issue

13. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (Order) provides former employees with the ability to bring breach of contract claims in the Employment Tribunal.
14. Under Article 7 of the Order: an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented-
- a. (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or ...
 - b. (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

15. In *Palmer v Southend on Sea Borough Council 1984 ICR 372*, the court of appeal concluded that reasonably practicable means 'reasonably feasible'.
16. In *London Underground Ltd v Noel [1999] IRLR 621* the Court of Appeal opined as follows on the reasonable practicality test: the 'period may be extended when the tribunal is satisfied 'that it was not reasonably practicable for the complaint to be presented before the end of that period. The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, 'in all the circumstances', nor when it is 'just and reasonable', nor even where the tribunal, 'considers that there is good reason' for doing so."

The approach

17. The onus of proving that presentation of the claim in time was not reasonably practicable rests with the claimant.
18. A debilitating illness may mean that it is not reasonably practicable for a claimant to start early conciliation in time. However, the onus is on the claimant to prove that it was not reasonably practicable for them to start early conciliation in time by reason of ill health which will usually require appropriate medical evidence.

Conclusion on time issue

19. We conclude that it was reasonably feasible for the claimant to have presented the claim (IE started early conciliation) in time for the following reasons.
20. The claimant provided no medical evidence to support her contention that she was too unwell to present her claim in time. A fit note for the period 5 Aug 22 to 19 Aug 22 stating that the claimant was not fit for work due to stress is not evidence that it was not reasonably feasible for the claimant to have started early conciliation in the period ending 30 Nov 2022, which would have been within the primary time limit. The fit note period ended prior to the end of employment. There was no indication in the fit note that the stress condition was so severe or likely to be of such long duration that the claimant would not be able to start early conciliation in the subsequent three months. The evidence in the claimant's witness statement of her health was general and unsupported by medical evidence to indicate a severe medical condition.
21. Contradicting the claimant's assertion that she was too unwell to present her claim in time, the claimant said she would have worked in HR after leaving the respondent's employment, had it not been for post termination restrictive covenants. If she was well enough to work, she was well enough to present her claim.
22. Even if she had been too unwell to present her claim before 30 Nov 2022, she was certainly well enough by 26 Jan 2023 when she was well enough to register a new limited company; and so by waiting until 14 Mar 23 to start

early conciliation, she did not present the claim within a further period which was reasonable.

23. Therefore, the Tribunal does not have jurisdiction to hear the claim and the claim is dismissed.

24. We will nevertheless continue to consider the substantive issue.

Evidence relating to whether the claimant had a contractual entitlement to 6 months' pay after the end of her employment

25. According to the claimant, she had worked in HR for 13 years and was a member of the CIPD. She had experience, in working for employers, of preparing for Employment Tribunal claims, including assisting with the preparation of witness statements.

26. The claimant was employed by the respondent as head of HR under a contract of employment of 8 Feb 2022. Under clause 5.1 of this contract, she was paid an annual salary of £60,000 and a car allowance of £400, payable in equal monthly instalments.

27. Further provisions of the contract were that:

- a. At its discretion, the respondent could end her employment summarily by payment in lieu of notice. There was no other provision for payment to be made after the end of employment.
- b. The employment could be terminated by either party on notice.
- c. At section 16, post termination restrictive covenants were imposed on the claimant not to work for a restricted business for 6 months after the end of working for the respondent or do various other things of a competitive nature. There was no provision for a payment to be made to the claimant in respect of this 6 month period.

28. The claimant resigned on 29 Jul 2022, effective 31 Aug 2022 (p80). On 29 July, the claimant was still in her contractual probationary period and the minimum required notice to terminate employment by either party was one week.

29. The respondent replied on 29 July (p81) confirming that the claimant's employment would end on 31 Aug 2022. Included in this reply was a reminder that that the claimant would continue to be bound by obligations in her contract of employment, including confidentiality and post termination restrictions.

30. On 2 Aug 2022, the claimant called Joanna Heywood, assistant to the directors, asking her to send the claimant an updated resignation acceptance letter removing the section on 'bounded confidentiality'. She confirmed this request by email and Ms Heywood responded that she would need approval of Lara Roe to do this.

31. Ms Roe subsequently instructed Ms Heywood to tell the claimant that the letter would not be re-issued.
32. According to the claimant's witness statement, the next thing that happened was a meeting with Ms Roe and Chris Gellion, when the claimant was placed on immediate garden leave due to stress the claimant was suffering. Ms Roe then enquired if there was anything else she could assist the claimant with and the claimant said she preferred to go home. Accordingly, she was sent home. 'Lara reassured me that the restrictive covenants outlined in section 16 of my employment contract would apply and that I would receive payments as stipulated in the agreement'. Under cross examination, the claimant said that, by 'payments stipulated in the agreement', she was referring to the contract of employment providing that she would be paid the salary of £60,000 plus car allowance.
33. In the hearing, under questions from the Judge, the claimant said there was another meeting with Ms Roe on her own in Ms Roe's office prior to the above meeting. She could not give its date. She said she had not mentioned it in her witness statement because she relied on the respondent putting it in their witness statement. She said that it was in this meeting that she was told she would be paid 6 months' pay. She said the conversation was as follows: The claimant asked what about payment in relation to the restrictive covenants – 12 months was ages. 'She [IE Ms Roe] reassured me verbally I would receive payments'. Ms Roe did not mention dates or what the payments would be. She only said the claimant would be receiving payments.
34. On her claim form, the claimant wrote that, she resigned in July 2022. She received a resignation acceptance from Jo Heywood which highlighted the terms and conditions in her employment contract. On 29 Jul 2022, she asked for clarity. She discussed the terms and conditions with Lara Roe who advised that she would receive 6 months pay (until Feb 2023).
35. Ms Roe denied that there was any meeting with the claimant other than that attended also by Mr Gellion. She denied that anything was said to the claimant about receiving payments or that there was any discussion about restrictive covenants.
36. Mr Gellion's evidence was that nothing was said in the meeting he had attended about any payments to the claimant and Ms Roe did not tell him anything about such an arrangement.
37. Nothing further was said about the issue and the claimant's employment ended.
38. On 13 Feb 2023, the claimant wrote to the respondent saying, 'According to my employment contract, I have yet to receive my payment in the amount of £12,130 due on 31 February 2023...If the payment is not made by 31 February 2023 I will file court papers.' (p83)

39. On 28 Feb 2023, the claimant emailed the respondent again saying the amount of £30,000 gross, £12102 net due to her on 28 February remained outstanding and that the 'Debt relates to: Restrictive covenants (para 16).'
40. Under cross examination, the claimant explained her claim to payment after termination of employment as being on the basis that the respondent had damaged her for a whole year by not allowing her to work. We understand her to have been referring to her understanding of the post termination restrictive covenants in her employment contract. She also said that clause 5.1 of her contract was amended so that the entitlement was to 12 months pay under the post termination restrictive covenants. She said that the restrictive covenants lasting 12 months went hand in hand with her salary entitlement.

Law on breach of contract claim

41. The Order provides former employees with the ability to bring breach of contract claims in the Employment Tribunal.
42. However, under Article 4(b) of the Order proceedings for breach of contract may not be brought if the claim is not one to which article 5 applies. Article 5 includes a claim for breach of a term which is a term which is a covenant in restraint of trade.
43. Chitty on Contracts 35th Ed. 4-001 states: 'The first requirement for the formation of a contract is that the parties should have reached agreement. Generally speaking, the law regards an agreement as having been reached when an offer made by one of the parties (the offeror) is accepted by the other to whom the offer is addressed (the offeree or acceptor). However, such an agreement may still lack contractual force because it is incomplete, because its terms are not sufficiently certain, because its operation is subject to a condition which fails to occur or because it was made without any intention to create legal relations. An agreement may also lack contractual force for want of consideration.'

Conclusions on breach of contract claim

44. In her witness statement and to the Judge in the hearing, the claimant did not give evidence that Ms Roe told her that she would be paid 6 months' money after the end of her employment.
- a. There was nothing in her witness statement to support the alleged statement by Ms Roe that she would be paid 6 months money after the end of the employment. The witness statement merely said that, in the meeting with Ms Roe and Mr Gellion, Ms Roe told her that she would receive payments stipulated in the agreement. The claimant said in the hearing that this related to her salary and car allowance in her contract of employment.
 - i. There were no payments stipulated in the agreement to be paid after the end of employment (other than if the respondent opted

to terminate summarily and pay in lieu of notice, which was not the case here.)

- b. Even orally in the hearing, the claimant's evidence was that Ms Roe, in a meeting without Mr Gellion, told the claimant that she would receive payments, without specifying what these payments were or when they would be paid.
 - i. Such a statement from Ms Roe could easily have related to payment of final salary and any outstanding pay in lieu of holiday.

45. In any event, we prefer the evidence of Ms Roe that there was no meeting between her and the claimant apart from the meeting also attended by Mr Gellion. If there had been such a meeting, we consider that the claimant, an experienced HR professional who had been involved in preparing for employment tribunal hearings, would have included it in her witness statement. If there was no such meeting, Ms Roe could not have informed the claimant in the meeting that she would be paid 6 months money as contended by the claimant.

46. The claimant has not therefore provided any evidence to support her contention in her claim form that Ms Roe told her she would be paid 6 months pay.

47. In her emails to the respondent of 13 Feb 2023 and 28 Feb 2023, the claimant made no mention of any oral advice on payment made to her by Ms Roe. On the contrary, she only referred to her contract of employment and then, more specifically, to restrictive covenants (paragraph 16). This is contradictory with her current claim that Ms Roe said she would be paid 6 months money.

48. If it were the case, as identified by the claimant at the preliminary hearing, that monthly payments had been promised, one would have expected the claimant to start complaining about non payment in September 2022.

49. We find that the claimant lacked all credibility in her claim that Ms Roe advised her that she would receive 6 months' pay to February 2023. Not only did she fail to give any evidence to support this claim, but at the start of the hearing, she attempted to bring her claim on another basis altogether and, when this was refused, she appeared not to know what the basis of her claim was, asking why we were having the hearing. The claimant also, under cross examination, explained her claim to payment after termination of employment as being on the basis that the respondent had damaged her for a whole year by not allowing her to work, rather than being on the basis of an oral assurance from Ms Roe.

50. We find that the respondent did not advise the claimant that she would receive 6 months pay for the period September 2022 to February 2023. The question of whether consideration was given does not therefore arise. There was no contractual agreement to pay the claimant 6 months pay for the

period September 2022 to February 2023. The respondent was not in breach of contract by failing to make such a payment.

51. Accordingly, if the claim had not been dismissed as being out of time, we would have dismissed it on its substantive merits.

52. We consider that the claimant's approach to her claim was entirely unreasonable. She brought her claim on the basis of an alleged oral advice that she would be paid 6 months money which she failed to support in her evidence and which we have found was not made to her. In the hearing, she then explained her claim on an entirely different basis as a claim for 12 months money based on allegedly being excluded from the labour market by post termination restrictive covenants. It was unreasonable for the claimant to have started her claim on the basis of an alleged oral information that she would be paid 6 months money when no such information was given to her, and it was unreasonable for her to pursue that claim when she was actually intent on bringing her claim on a different basis.

Employment Judge Kelly

Approved on 14 March 2025