EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr N S Ozcelebi	**v**	**McLaren Automotive Limited**

Heard at: Cambridge (by CVP) **On:** 9 September 2022

Before: Regional Employment Judge Foxwell

Appearances:

For the Claimant: In person
For the Respondent: No attendance and not represented

RECONSIDERATION JUDGMENT

The claimant's application for reconsideration of the rejection of his claim is dismissed. Rejection of the claim is confirmed.

REASONS

Introduction

1. The Claimant, Mr Nevzat Ozcelebi, began working for McLaren Automotive Limited ("the Company") as a Senior Cost Engineer on 21 June 2021. Following the termination of his employment in 2022, he presented a complaint to the Tribunal on 7 April 2022 alleging automatically unfair dismissal and that he had been subjected to detriments for making public interest disclosures (a "whistleblowing" claim). The claimant alleges that he made disclosures about unreasonably high prices he says the Company pays for some components. This hearing does not concern the merits of this claim, about which I make no comment, but I accept that the claimant sought to invoke the Tribunal's whistleblowing jurisdiction under Part IVA and section 103A of the Employment Rights Act 1996 when presenting his claim to it.

2. The claimant submitted his claim online using the correct (prescribed) claim form and it is marked as received by the Tribunal on 7 April 2022. The claimant told me, and I accept, that he sent the form only a few minutes after midnight on 7 April 2022.

3. The Tribunal's prescribed form requires claimants to answer questions about ACAS early conciliation. A claimant must say whether they have an early

conciliation certificate issued by ACAS and, if so, they are required to enter the certificate number on the form. For those claimants who have not obtained a form there are four options they can tick to explain why. Mr Ozcelebi ticked the fourth option, namely that his claim consisted of a complaint of unfair dismissal which contained an application for interim relief. I accept that the claim form contains a complaint of unfair dismissal and contains an application for interim relief.

4. At my direction and in a letter dated 6 May 2022, the Tribunal rejected the claim. I shall explain the concept of rejection of a claim to the Employment Tribunal in more detail below but the grounds for rejection were that the claim did not contain a valid claim of interim relief nor an early conciliation certificate number.

5. On 20 May 2022 the Claimant wrote to the Tribunal requesting reconsideration of the decision to reject his claim. The application was referred to me and, while the claimant had not expressly requested a hearing, given the matters raised I took the view that I may need to hear evidence to decide whether the claim should be accepted. I therefore directed that a hearing take place and that is what has happened today.

6. For the sake of completeness, notice of this reconsideration hearing was sent to the claimant on 8 August 2022.

7. As the Tribunal rejected the claimant's claim, it has not been served on the Company nor has the Tribunal sent any correspondence to the Company. The Company is presently not party to these proceedings and has not been involved in this hearing, which was attended by the claimant alone.

The hearing

8. The hearing was conducted remotely by Cloud Video Platform (CVP). I took evidence from the claimant on affirmation, heard and read his submissions and considered the documents he had sent to the Tribunal.

9. The claimant explained to me some of the background to his claim: he claims that he disclosed what he describes as "corruption" on the part of some employees of the Company in the procurement of parts. He alleges that this led to him being treated differently and then dismissed. The claimant told me that he has a strong claim which he can support with comprehensive evidence. It would be inappropriate for me to express any view on the merits of his claim at this stage but for the purposes of this hearing I accepted that the claimant has arguable claims of whistleblowing detriment and dismissal. I explained to the claimant that the issue I was considering however did not concern the merits of his claim but whether the Tribunal had jurisdiction to hear his claim at all. While I think that the claimant understood this distinction, it is fair to say that it is not one that he always drew when giving evidence and making his submissions.

The legal framework

Early conciliation

10. Section 18A of the Employment Tribunals Act 1996 ("ETA") requires a person, described as the "prospective claimant", to provide to ACAS prescribed information in a prescribed manner about a claim before presenting an application to institute "relevant proceedings" in an Employment Tribunal. This process is known as "early conciliation" and in simpler terms the requirement is for the would-be claimant to contact ACAS using the prescribed method before starting relevant proceedings in the Employment Tribunal.

11. ACAS provides confirmation of compliance with this requirement by issuing an "early conciliation certificate". As noted above, there is space on the claim form for a claimant to enter the certificate number to confirm that they have complied with this requirement.

12. "Relevant proceedings" are defined in Regulations made under section 18A of the ETA. It is sufficient to state that claims of unfair dismissal, including complaints of automatic unfair dismissal and detriment for whistleblowing are relevant proceedings. There are, in fact, very few exceptions to what constitutes "relevant proceedings" and, therefore, to the requirement to follow this early conciliation procedure. One exception is in regulation 3(1)(d) of the Employment Tribunals (Early Conciliation: Exemptions and Rules and Procedures) Regulations 2014 ("the 2014 Regulations"); this exempts *"proceedings under part X of the Employment Rights Act 1996 where the application to institute those proceedings is accompanied by an application under Section 128 of that Act…."* Section 128 is the provision in the Employment Rights Act 1996 ("ERA") which enables a claimant to apply for interim relief in a claim of automatic unfair dismissal for whistleblowing. In short, therefore, the Regulations permit a claimant to present a claim to an Employment Tribunal without an early conciliation certificate where there is a claim of automatic unfair dismissal under section 103A and an application for interim relief under section 128 of the ERA.

Applications for interim relief

13. Section 128 of the ERA says as follows:

> *(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—*
>
> > *(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—*
> >
> > > *(i) section … 103A* [whistleblowing dismissals]*, or*
> >
> > > *(ii) …., or*
> >
> > *(b) …..*
>
> *may apply to the tribunal for interim relief.*
>
> ***(2) The Tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination***

(whether before, on or after that date). [emphasis added]

(3) …..
(4) …..
(5) …..

14. As stated above, I accept that the claimant's claim contains a claim of automatic unfair dismissal under section 103A and an application for interim relief. I have highlighted section 128(2) however as this contains the time limit for any such application; seven days beginning on the day immediately after the "effective date of termination". There is no provision under section 128 or elsewhere in the ERA empowering me to extend this time limit.

The effective date of termination

15. The "effective date of termination" is a statutory concept defined in section 97 of the ERA as follows:

(1) Subject to the following provisions of this section, in this Part "the effective date of termination"—

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.

(2) Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) "the material date" means—

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer.

(4) …..

(5) …..

16. In short, the effective date if termination is the date when notice expires for employees dismissed with notice and for those not given notice, when the dismissal "takes effect". Subsection 3 provides for minimum statutory notice

under Part IX of the ERA to be added to arrive at the effective date of termination for some purposes under the Act, but this does not apply to applications for interim relief under section 128.

Summary of relevant legal provisions

17. In summary, therefore:

    17.1 A potential claimant must obtain an early conciliation certificate before bringing a claim of unfair dismissal unless the claim is a type which can and is accompanied by an application under section 128 of the ERA for interim relief.

    17.2 An application for interim relief "cannot be entertained" if it is presented more than seven days after the "effective date of termination".

    17.3 The effective date of termination must be decided in accordance with section 97.

Rejection of claims by the Tribunal

18 The Tribunal's power to reject claims presented to it is contained in rules 10, 11 and 12 of the Tribunals Rules of Procedure 2013 (contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013). Rule 12 deals with rejection for non-compliance with early conciliation and the material parts say as follows:

> *Rejection: substantive defects*
>
> *12. (1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—*
>
> *(a) one which the Tribunal has no jurisdiction to consider;*
>
> *(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;*
>
> *(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;*
>
> *(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;*
>
> *(da) one which institutes relevant proceedings and the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate;*
>
> *(e) one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number*

relates; or

(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a)[, (b), (c) or (d)](c) of paragraph (1).

(2ZA) ….

(2A) …..

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.

18. Rule 12(1)(d) is the basis upon which the claim was originally rejected by the Tribunal.

Findings of fact and analysis

19. Against that background, I turn to my findings of fact which I make on the balance of probabilities having regard to the evidence which the Claimant gave me today and the documentary evidence he has provided.

20. The Claimant identified the date of his dismissal as 30 March 2022 in his claim form. This date appears in the main body of the form at box 5.1 and in the penultimate paragraph of the Grounds of Claim which it, where the claimant said as follows:

"unfortunately, I could not get support from them and I was dismissed on 30 March 2022 by J Clement."

21. In his application of 20 May 2022 for reconsideration the Claimant also said as follows:

"I was dismissed on 30/03/2022 face-to-face, without notice by Jonathan Clement – Head Purchasing. However, I received the termination letter via email on 01/04/2022 first time and it was written that I will receive payment of 3 months in lieu of notice period (Pilon)."

22. Elsewhere in this document the claimant refers to a meeting on the morning of 30 March 2022 in which he says he made protected disclosures concerning incompetency and corruption to Mr Clement and to an HR advisor, Holly Cooper. He then refers to a second meeting in the afternoon with Ms Cooper and says as follows:

"I was dismissed immediately at the end of the meeting at 16:30 on 30 March 2022 accompanied by security guards and they took my laptop

normally in case of serious misconduct, but I did not commit any misconduct. On the contrary I endeavoured to stop the wrongdoing during my employment. J Clement did not provide any relevant background information, dates of the incidents and the names of the people involved in his claims in the termination letter."

23. The claimant has provided me with a copy of the "termination letter" he refers to. He received it by email on 1 April 2022; it is headed "Termination of employment" and is signed on behalf of Jonathan Clement, Head of Purchasing. Mr Clement wrote as follows:

"I am writing further to our meeting on 30 March 2022 to confirm its content and the company's subsequent decision. I explained that we had concerns over your behaviours including concerns interactions with colleagues and suppliers during your employment. As a result, as a company we have lost trust in your ability to be successful in your role.

On that basis, I am left with no alternative but to dismiss you on grounds of breakdown of mutual trust and confidence. Your last day of service with the company will be 30 March 2022. I have arranged for you to receive all monies due to you up to and including your last day of service including accrued holiday, this will subject to tax and national insurance. In addition, you will receive payment of 3 months in lieu of your notice period."

Mr Clement continues:

"Your P45 and final payslip will be uploaded to your iipay portal on your final payday. To ensure you have access to this after your employment end date, we will share your correspondence email address with iipay, this is the personal email you shared with us when you joined and will enable you to access the portal without your McLaren email for three months after your leave date. If you would prefer us not to share your correspondence email address, then please reach out to you HR assistant immediately."

24. If 30 March 2022 was the effective date of termination, the final date upon which an application under section 128 for interim relief could be "entertained" would be 6 April 2022. This claim was presented on 7 April 2022 and that was the basis upon which this claim was originally rejected by the Employment Tribunal; it had been presented a day too late to constitute an application under ERA section 128 so the requirement for an early conciliation certificate applied.

25. The Claimant told me in his evidence today that events on 30 March 2022 were "ambiguous". He reiterated that he had made disclosures in a meeting in the morning and had a further meeting in the afternoon in which he was required to return his company laptop and was then escorted from the Company's premises by security guards. He told me that he found this humiliating and an affront to his dignity, but he maintained that it was unclear to him whether he had been dismissed until he received confirmation in writing on 1 April 2022. Additionally, it was his evidence (repeated in submissions) that in any case a dismissal could not be effective until it had

been confirmed in writing.

26. The claimant does not dispute that he was dismissed with pay in lieu of notice rather than being given notice of dismissal; he maintained, however, that the dismissal "took effect" (to use the words of section 97) on 1 April 2022 when it was confirmed in writing. As his claim form was presented within 7 days counted from the day after this it was a properly constituted application for interim relief under section 128 and the exemption from early conciliation applied.

27. Accordingly, the question at the heart of this application for reconsideration is whether the effective date of termination was 30 March or 1 April 2022.

28. When I asked the claimant about those instances in his claim form and his reconsideration application where he had referred to having been dismissed on 30 March 2022, he told me that he was unfamiliar with the law, that he had had to prepare his claim form within a very short space of time and had not appreciated the implications of citing the earlier date when he says things were ambiguous and had not been officially confirmed. He also said that he had contacted the Tribunal office after submitting his claim form to explain these things and to ask for an opportunity to make any changes that might be necessary. Unhelpful as it may seem, it is not the role of the Tribunal administration to provide such assistance or advice to the litigants that come before it as the Employment Tribunal is an independent judicial body which does not provide legal advice to parties.

29. The claimant told me in evidence that he did not receive his final payments (pay in lieu of notice, salary and, possibly, holiday pay) until 29 April 2022; I accept this evidence. He said that this was consistent with termination taking effect later than 30 March 2022 because, according to him, for it to be an effective termination that day he should have received all the termination payments then due to him.

30. The claimant obtained an early conciliation certificate from ACAS on 8 April 2022 (certificate number: R142302/22/61), the day after the presentation of his claim. He presented a further claim based on this certificate on 29 June 2022 which proceeds under case number 3308984/2022.

The claimant's closing submissions

31. The claimant emphasised the following matters in his closing argument, all of which I have considered:

    29.1 the importance of and public interest in whistleblowing claims being heard;

    29.2 the strength of his claim and the quality of the evidence he has to support it;

    29.3 the importance of what he termed "official confirmation of termination by letter" when calculating the effective date of termination; he reminded me that he did not receive written confirmation of dismissal until 1 April 2022; and

29.4 the injustice, as he sees it, of the very short time limit provided for in ERA section 128; he considers that this undermines the justice and fairness of the legal system in this country particularly for self-represented parties like himself who are required to act at an unreasonably fast pace.

32. In addition to these oral submissions, I considered written submissions the claimant had sent to the Tribunal on 29 June 2022. He referred there to a Supreme Court decision on pay in lieu of notice. I asked the claimant whether he could remember the name of the case or the reference, but he could not. I think he may have had in mind the decision of the Supreme Court in **Geys v Société Générale [2013] 1 AC 523**. I have considered that decision in reaching my conclusions in this case.

Discussion and conclusion

33. This is not a case where the claimant argues that he was on notice of dismissal when he presented his claim to the Tribunal, on the contrary he accepts that he had been dismissed, the only question is whether this happened on 30 March or 1 April 2022.

34. The weight of the evidence shows, and I find that the claimant's dismissal took effect on the afternoon of 30 March 2022 when he was told that he was dismissed by Mr Clement and Ms Cooper. He was required to hand over his laptop immediately and was escorted from the building. I reject the claimant's evidence that events on 30 March 2022 were ambiguous. It is evident that the claimant thought he had been dismissed that day, because he cited 30 March as his final day of employment in his claim form (where he mentions it twice) and in his application for reconsideration.

35. I have had regard to the claimant's evidence about the timing of payment of his final pay, but settlement of sums due under a contract is not evidence, without more, that the contract continued until they were paid. The contrary is almost universally the case on the ending of employment because of the need to calculate and process final pay through payroll. Furthermore, there is no reference to the timing of pay being a relevant consideration for determining the effective date of termination under ERA section 97.

36. I do not find that, as a matter of law, some further confirmation was required in writing for the dismissal communicated on 30 March 2022 to take effect. The law is settled that, for the purpose of establishing the effective date of termination in dismissals without notice, the termination takes effect when it is communicated to the employee (see **British Building Engineering Appliances Limited v Dedman 1973 IRLR 379** and, for a more recent example, **Rabess v London Fire and Emergency Planning Authority 2017 IRLR 147**, Court of Appeal). Section 97 simply does not require confirmation of an unequivocal dismissal to be in writing for it to take effect.

37. The Supreme Court's decision in **Geys** (supra) resolves the conflict at common law between the "elective" and "automatic" theories of termination of an employment contract following a repudiatory breach by a party, but it does not apply to the statutory concept of the "effective date of termination"

under the ERA.

38. I find, therefore, that this claim was presented eight days after the effective date of termination, excluding the date of dismissal itself.

39. The Tribunal is not permitted to "entertain an application for interim relief" presented more than 7 days after the effective date of termination and it follows from my finding that the claimant has not met this requirement. Nevertheless, his claim is of a type for which interim relief is available and it does contain an application for interim relief, albeit one which was presented outside the short time limit. This begs the question whether this is enough to fall within the exemption in regulation 3(1)(d) of the 2014 Regulations?

40. I do not find that the exemption applies to late applications for interim relief. The wording of the exemption is specific: it must be an application under section 128 of the 1996 Act. Section 128 is also specific: Tribunals may not "entertain" a late application. I think that this means more than simply that a Tribunal cannot hear such an application, it means that the Tribunal should not accept or process the application in any way or for any purpose. Effectively, a late application for interim relief is not an application at all.

41. I am reinforced in this view by the absence of any statutory discretion to extend the time limit in section 128(2).

42. I find, therefore, that the exemption in regulation 3(1)(d) did not apply to this claim.

43. As the claim instituted relevant proceedings, the claimant required an early conciliation certificate as a precondition of presenting it. Without this, the Tribunal simply has no jurisdiction to hear the claim and the decision to reject it under Rule 12(1)(d) was correct.

44. The claimant obtained an early conciliation certificate on 8 April 2022, but this does not cure the fundamental defect in these proceedings because a prospective claimant must obtain a certificate before instituting proceedings, not after (see **Pryce v Baxter Storey [2022] EAT 61**).

45. For these reasons I find that this claim was correctly rejected and, accordingly, the claimant's application is dismissed. I acknowledge that the interplay between the early conciliation procedure, applications for interim relief and the effective date of termination is a complex one for litigants to understand and I have considerable sympathy with the claimant who was undoubtedly trying to present a timely application for interim relief. That said, having established the facts, I have no discretion in my application of the law.

Regional Employment Judge Foxwell

Date: …15 September 2022….

Case No: 3304282/2022

Judgment sent to the parties on:

16 September 2022

L TAYLOR-HIBBERD