



EMPLOYMENT TRIBUNALS

Claimant: Mr SA Rivzi

Respondent: Pass A Pizza Ltd

Preliminary Hearing held at London South on 25 October 2017

Before: Employment Judge Pritchard

Representation

Claimant: Ms C Caesar, the Claimant's partner

Respondent: Mr A MacPhail, counsel

JUDGMENT

- 1 The Claimant's claim of religion or belief discrimination is dismissed upon withdrawal.
- 2 The Claimant's other claims are struck out:
 - a. The Tribunal does not have jurisdiction to consider the Claimant's unfair dismissal claim under section 98 of the Employment Rights Act 1996 because he had not been continuously employed for a period of not less than two years ending with the effective date of termination.
 - b. The Claimant's claims of:
 - i. unfair dismissal under section 99 of the Employment Rights Act 1996;
 - ii. detriment under sections 47C and 48 of the Employment Rights Act;
 - iii. unlawful deductions from wages under sections 13 and 23 of the Employment Rights Act 1996;
 - iv. holiday pay under Regulations 14(2) and 30(1)(b) of the Working Time Regulations 1998 and/or sections 13 and 23 of the Employment Rights Act 1996;

- v. breach of contract (notice pay) under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994; and
- vi. direct race and direct sex discrimination

were presented present outside the statutory time limit and the Tribunal does not have jurisdiction to consider them.

REASONS

1. By way of an ET1 claim form presented on 7 August 2017 (“the Second Proceedings”) , the Claimant ticked the boxes to indicate that he was bringing the following claims:
 - 1.1. Unfair dismissal
 - 1.2. Pregnancy or maternity discrimination
 - 1.3. Religion or belief discrimination
 - 1.4. Race discrimination
 - 1.5. Sex discrimination
 - 1.6. Notice pay
 - 1.7. Holiday pay
 - 1.8. Arrears of pay
 - 1.9. Other payments
2. The case came before the Tribunal to consider the Respondent’s application to strike out the Claimant’s claims. The Respondent provided the Tribunal with a bundle of documents together with an extract from Harvey on Industrial Relations and Employment Law relating to the rule in Henderson v Henderson: abuse of process.
3. The Claimant did not attend this preliminary hearing; he is said to be suffering from post traumatic stress disorder. The Claimant was however represented at the preliminary hearing by his partner, Ms Caesar, who assured the Tribunal that she had the Claimant’s full authority to explain the claims the Claimant was making, and the claims he was not making, and to speak on his behalf. Ms Caesar opposed the Respondent’s application and produced a small clip of documents for the Tribunal’s consideration.
4. Ms Caesar told the Tribunal that the Claimant was not claiming religion or belief discrimination and that he had ticked the wrong box in the ET1. Ms Caesar gave no explanation as to why the box “other payments” had been ticked. With regard to the remaining claims, based upon what Ms Caesar told me:
 - 4.1. The thrust of the Claimant’s unfair dismissal claim is that the Respondent had fabricated the wrongdoing with which he was accused. This claim can be properly categorised as a claim for “ordinary” unfair dismissal under section 98 of the Employment Rights Act 1996.

4.2. The Claimant's claim that he had suffered pregnancy or maternity discrimination was:

4.2.1. the Respondent's failure to grant the Claimant shared parental leave or pay for it; and

4.2.2. the Respondent's failure to allow the Claimant to return to work;

4.2.3. the Claimant had been dismissed because he had complained about not having been granted shared parental leave or paid for it.

This claim can be properly categorised as a complaint that the Claimant suffered detriments under section 47C and 48 of the Employment Relations Act 1996 taken together with Regulations 19(2)(e)(ii) of the Maternity and Parental Leave Regulations 1999; and a claim that he was "automatically" unfairly dismissed under section 99 of the Employment Rights Act 1996 taken together with Regulations 20(1) and 20(3)(e)(ii) of the Maternity and Parental Leave Regulations 1999.

4.3. The Claimant is of Indian nationality. He claims that he was treated less favourably than other employees who are citizens of the European Union in that the Respondent failed to pay him sick pay and holiday pay, paid him late, and failed to compensate him for an accident at work. This claim can be properly categorised as a complaint of direct race discrimination under sections 9, 13 and 39 of the Equality Act 2010.

4.4. The Claimant's sex discrimination claim is that he was treated less favourably than a woman who would have been permitted to return to work following a period of (shared) maternity leave. This claim can be properly categorised as a complaint of direct sex discrimination under sections 11, 13 and 39 of the Equality Act 2010.

4.5. The Claimant was dismissed without notice and he claims that he is entitled to be compensated. This is a claim for breach of contract under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

4.6. The Claimant's claim for holiday pay relates to holiday he had accrued upon termination of his employment. This is a claim under Regulations 14(2) and 30(1)(b) of the Working Time Regulations 1998; alternatively a claim under sections 13 and 23 of the Employment Rights Act 1996.

4.7. The Claimant's claim for arrears of pay relates to the wages he claims were due payable to him while on suspension, partly full wages and partly, because he fell ill during the suspension period, statutory sick pay. This is a claim under sections 13 and 23 of the Employment Rights Act 1996.

4.8. Towards the end of the preliminary hearing, Ms Caesar said that the Respondent had also discriminated against the Claimant in the way it dealt with his appeal against dismissal and this was a continuation of the discrimination that had already taken place.

The issue for determination

5. The issue before the Tribunal was whether the Claimant's claims should be struck out as having been presented outside the relevant statutory time limits and/or whether they should be struck out as an abuse of process.

Relevant findings of fact

6. The Claimant commenced employment with the Respondent on 23 March 2015 as a pizza delivery driver.
7. On 16 August 2016, the Claimant presented an ET1 to the Employment Tribunal ("the First Proceedings"). Ms Caesar assisted her partner during the litigation process. The Respondent resisted the claims arising in the First Proceedings.
8. The Claimant's complaints in the First Proceedings were initially considered by Employment Judge Freer at a Preliminary Hearing on 20 January 2017 when the Claimant was permitted to amend his particulars of claim. The claims identified in Employment Judge Freer's consequent Case Management Order can be briefly described as follows:
 - 8.1. Non-payment of shared parental leave pay from 1 May 2016 to 7 November 2016;
 - 8.2. Non-payment of two weeks' paternity leave pay from February 2016;
 - 8.3. Non-payment of statutory sick pay in respect of the period 19 December 2015 to 7 February 2016;
 - 8.4. Non-payment of holiday pay in respect of the 2015 leave year;
 - 8.5. Detriment under section 47C of the Employment Rights Act 1996 by reason of the Claimant having requested paternity and shared parental leave; the detriments alleged were that the Respondent would not allow the Claimant to return to work in February 2016 and in November 2016.
 - 8.6. Direct sex discrimination under section 13 of the Equality Act 2010. The Claimant alleged that he had been treated less favourably than a hypothetical comparator when he was not paid for paternity leave, shared parental leave or sick pay, and was not allowed to return to work.
 - 8.7. Victimisation under section 27 of the Equality Act 2010 (mistakenly shown in Employment Judge Freer's Case Management Order as a claim under section 21). The Claimant relied on:
 - 8.7.1. The protected act of contacting ACAS in April 2016 regarding his paternity leave and shared parental leave complaints and being subjected to the following detriments as a result: not being paid paternity leave pay, shared parental leave and/or sick pay and not being allowed to return to work.

- 8.7.2. The protected act of notifying the Respondent of his intention to pursue a sex discrimination claim by email sent to the Respondent on 6 December 2016 and being subjected to the following detriments as a result: disciplinary proceedings being brought and having been asked to attend a disciplinary hearing.
9. Employment Judge Freer's Case Management Order also records that the Claimant's application to amend his particulars of claim to introduce a race discrimination claim was refused. The case was listed for a final hearing over four consecutive days commencing 19 June 2017.
10. By email dated 18 February 2017, the Claimant was informed that he was dismissed by reason of misconduct with immediate effect, without notice following a disciplinary hearing which had been held in his absence on 10 February 2017. The Effective Date of Termination was 18 February 2017.
11. By email dated 2 March 2017, the Claimant applied to amend his claim to include a complaint of unfair dismissal on the basis of having been dismissed without notice on 18 February 2017. The Claimant also indicated his wish to appeal against Employment Judge Freer's decision not to allow him to amend his claim to include a claim of race discrimination; he complained that he had been given no reasons for the decision and that by denying them paternity rights, the Respondent treated Indians and Pakistanis less favourably than EU citizens.
12. By letter dated 29 March 2017, sent upon the instruction of Employment Judge Freer, the Tribunal asked the Respondent to provide comments on the Claimant's requests by 12 April 2017. Upon no comments having been received from the Respondent, Employment Judge Freer caused a further letter to be sent to the Respondent asking for a reply by 2 May 2017. By letter to the Tribunal dated 2 May 2017, copied to the Claimant by email, the Respondent objected to the Claimant's request for the claim to be amended. The Respondent submitted that any claim of unfair dismissal should be run as a separate claim so that the final hearing could proceed as listed. The Respondent also objected to the idea that the decision not to allow the Claimant to amend his claim to include race discrimination should be reviewed; the Respondent noted that the Claimant had provided no grounds why the decision should be reconsidered or why it might be in the interest of justice to do so.
13. In the meantime, on 5 April 2017, the Claimant had been informed that his appeal against dismissal had been unsuccessful.
14. In April 2017 the Claimant and Ms Caesar suffered from typhoid illness which they contracted while at a family wedding in India. This led to the Claimant being initially unable to fly home from India and his return to the UK was delayed. Upon their return, Ms Caesar suffered a miscarriage and was hospitalised on 24 April 2017 until her discharge the following day.
15. The Tribunal wrote to the parties by letter dated 19 May 2017 recording Employment Judge Freer's decision that

"The Claimant's application to amend his claim to include unfair dismissal is refused. The application is too late, there has already been

a substantial application to amend, it is a substantive new claim and the balance of prejudice tips in favour of the respondent”

16. By email dated 29 May 2017 the Claimant wrote to the Tribunal to object to Employment Judge Freer’s refusal and appealed against it (it appears that this email was actually sent to the Tribunal on 30 May 2017).
17. The Tribunal wrote to the Claimant upon the instruction of Employment Judge Freer on 5 June 2017 as follows:

“The decision not to allow the amendment remains. If the Claimant wishes to pursue an unfair dismissal claim he must submit a fresh claim. If the hearing dates in June are lost this matter cannot currently be re-listed until June next year”

18. On 20 June 2017, the Claimant commenced ACAS Early Conciliation with regard to the Second Proceedings. Conciliation was closed on 20 July 2017 and, as stated above, the Claimant presented his claim relating to these Second Proceedings on 7 August 2017.
19. The Claimant’s claims in the First Proceedings were considered at the final hearing before a Full Tribunal between 19 and 22 June chaired by Employment Judge Balogun. Judgment was reserved and a written decision, dismissing all the Claimant’s claims, was sent to the parties on 24 August 2017 (the Claimant has subsequently appealed that decision to the Employment Appeal Tribunal, Employment Judge Balogun having refused the Claimant’s application for reconsideration of the judgment).

Applicable law

Qualifying service requirement

20. Under section 108 of the Employment Rights Act 1996, an employee does not have the right to bring a claim of “ordinary” unfair dismissal unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

Time limits under the Employment Rights Act 1996

21. By Section 111(2) of the Employment Rights Act 1996 a Tribunal shall not consider a complaint of unfair dismissal unless it is presented to a Tribunal:

- 21.1. Before the end of the period of 3 months beginning with the effective date of termination or;
- 21.2. Within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that period of 3 months

22. This time limit is set out in similar terms in relation to claims for: deductions from wages under sections 13 and 23 of the Employment Rights Act 1996 with time running from the date of the deduction or series of deductions; detriment claims under sections 47C and 48 of the Employment Rights Act

1996 with time running from the act or failure to act to which the claim relates or the last in a series of acts or failures; holiday pay claims under Regulations 14 and 30 of the Working Time Regulations 1998 beginning on the date on which it is alleged the exercise of the right should have been permitted; and notice pay claims which are breach of contract claims under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 with time running from the effective date of termination or the last day the employee worked for the employer.

23. In each case, where ACAS is contacted within the primary time limit, a potential claimant will, in most circumstances, have the benefit of the legislative provisions relating to extension to time under the ACAS Early Conciliation procedure.
24. The burden of proof in showing that it was not reasonably practicable to present the claim in time rests upon the Claimant; see Porter v Bandridge Ltd [1978] ICR 943 CA. If the Claimant does succeed in doing so then the Tribunal must also be satisfied that the time in which the claim was in fact presented was in itself reasonable. There is a plethora of appellate case law on the subject of “reasonable practicability”. One of the leading cases is Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 CA in which May LJ referred to the test as being in effect one of “reasonable feasibility” (in other words somewhere between the physical possibility and pure reasonableness). A number of factors may need to be considered. The list of factors is non-exhaustive but may include the manner and reason for the dismissal; the extent to which the internal grievance process was in use; physical or mental impairment.

Time limits under the Equality Act 2010

25. Section 123(1) of the Equality Act 2010 provides that a complaint 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 Tribunal thinks just and equitable.
26. Under section 123(3)
- (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
27. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something:
- (a) when P does an act inconsistent with doing it; or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

28. In Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 the Court of Appeal held that when determining whether an act extended over a period of time (expressed in current legislation as conduct extending over a period) a Tribunal should focus on the substance of the complaints that an employer was responsible for an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably on the grounds of a protected characteristic. This will be distinct from a succession of unconnected or isolated specific acts for which time will begin to run from the date when each specific act was committed. One relevant but not conclusive factor is whether the same or different individuals were involved; see: Aziz v FDA 2010 EWCA Civ 304 CA. At a preliminary hearing when a Claimant, otherwise out of time, seeks to show an act extending over period, he must show a prima facie case; see Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548 CA.

Just and equitable extension

29. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

30. In accordance with the guidance set out in British Coal Corporation v Keeble [1997] IRLR 336, the Tribunal might have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case. It is sufficient that all relevant factors are considered. See: Department of Constitutional Affairs v Jones [2008] IRLR 128 CA; Southwark London Borough Council v Afolabi 2003 ICR 800 CA.

31. As identified in Miller v Ministry of Justice UKEAT/003/004/15 at paragraph 12, there are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.

32. If a Claimant advances no case to support an extension of time, he is not entitled to one. However, even if there is no good reason for the delay, it might still be just and equitable to extend time. See for example: Rathakrishnan v Pizza Express Restaurants Ltd UKEAT 0073/15.

Other factors which might be relevant in individual cases

33. The fact that a Claimant has been given incorrect advice about time limits which has led to the Claimant making a claim out of time can be a relevant factor in deciding whether or not it is just and equitable to extend time. This principle will apply whether or not the incorrect advice has been given by a solicitor or other advisor. See for example: Chohan v Derby Law Centre 2004 IRLR 685; Wright v Wolverhampton City Council EAT 0117/08.
34. Similarly, *reasonable* ignorance of time limits can be a relevant factor in deciding whether or not it is just and equitable to extend time. See: Director of Public Prosecutions v Marshall 1998 ICR 518 EAT. In such cases, the date from which a Claimant could have become aware of the right to present a worthwhile complaint is relevant.
35. In Apelogun-Gabriels v Lambeth London Borough Council [2001] EWCA Civ 1853 it was said that that the fact that a Claimant deferred commencing proceedings in the Tribunal while awaiting the outcome of internal proceedings is only one factor to be taken into account when considering an application to extend time.

The rule in Henderson v Henderson and estoppel

36. The essence of this rule is that a litigant will be estopped from bringing claims that might have been brought forward at the time but were not. To do so will be an abuse of process.
37. A party will be estopped from reopening an issue that has been decided in earlier proceedings involving the same parties.

Conclusion

38. It is clear that the Claimant was not continuously employed by the Respondent for two years ending with the effective date of termination. Accordingly, the Tribunal has no jurisdiction to consider his claim of unfair dismissal under section 98 of the Employment Rights Act 1996.
39. The Claimant did not contact ACAS within the primary three month time limit and the extension of time provisions do not therefore apply. The last possible date upon which his causes of action could have arisen under the various provisions of the Employment Rights Act 1996 and under the Tribunals Extension of Jurisdiction (England and Wales) Order 1994 was 18 February 2017. At the latest, the primary time limit expired on 17 May 2017. The Claimant did not present his claim until 7 August 2017.
40. As at 18 February 2017, the Claimant clearly had at least a broad view of his legal rights, not only because Ms Caesar on his behalf had sought legal advice from a solicitor at the Waterloo Action Group, but also because he, with Ms Caesar's assistance, had already presented a claim to the Tribunal in the First Proceedings. Further, he must have known of his right to claim unfair dismissal since he made an application on 2 March 2017 to amend his claim to include it.

41. Although the Claimant and Ms Caesar fell ill while in India in April 2017 for a limited time during the primary limitation period, it is clear that this did not prevent the Claimant from contacting ACAS or presenting his claims in time. Ms Caesar, on the Claimant's behalf, was capable of communicating with the Tribunal and the Respondent in relation to the First Proceedings during the majority of the primary limitation period. Indeed, the Claimant made an application to amend his claim during the primary limitation period to include unfair dismissal and sought to challenge Employment Judge Freer's decision to refuse it.
42. Ms Caesar submitted that the Respondent's delay in replying to Employment Judge Freer's request for comments had been intentional and in order to prejudice the Claimant's ability to have his application to amend considered in time. The Tribunal is unable to accept that submission; there was no evidence as to the reason why the Respondent did not reply until prompted. In any event, the Respondent's delay did not mean it was not reasonably feasible for relevant claims to have been made.
43. Ms Caesar sought to persuade the Tribunal that she had relied on the "advice" of Employment Judge Freer that the Claimant could present a fresh claim. The Tribunal is unable to accept that anything Employment Judge Freer might have said meant it was not reasonably feasible for the claim to have been presented in time. The Tribunal notes that, in any event, by the time the Tribunal's letter of 5 June 2017 was sent, the primary time limit had already expired.
44. Ms Caesar was unable to persuade the Tribunal that it was not reasonably feasible for the relevant claims to have been presented (or for ACAS to have been contacted) within the primary time limit.
45. Even if it had not been reasonably practicable for the claim to have been made in time, the Tribunal would in any event conclude that the claim had not been presented within a period thereafter. Ms Caesar provided the Tribunal with no credible reason why the claims had been presented two and half months after the expiry of the primary time limit.
46. For the reasons set out above, the Tribunal does not have jurisdiction to consider the Claimant's claims of "automatic" unfair dismissal, detriment, unlawful deductions from wages, holiday pay, and notice pay. In reaching this conclusion, the Tribunal has had no need to consider whether or not presentation of those claims in the Second Proceedings amounts to an abuse of process.
47. Turning to the Claimant's claims under the Equality Act 2010, the Tribunal concludes that it would not be just and equitable to extend time such that they can be considered. During the relevant primary time limits, the Claimant was already a party to proceedings and clearly knew how to present a claim. As Ms Caesar said, contacting ACAS for the purposes of Early Conciliation was simply a matter of making a telephone call. Further, Ms Caesar, on the Claimant's behalf had taken legal advice; there was no suggestion that the advice Ms Caesar had received about time limits might have been incorrect or that she did not appreciate the applicable time limits (indeed, Ms Caesar told the Tribunal that after the application to amend to include unfair dismissal in

the First Proceedings had initially been refused she thought it “was hopeless and would be out of time” until she received the Tribunal’s letter in which Employment Judge Freer said that the Claimant could submit a fresh claim). There was no suggestion that the Claimant deferred presenting his claim pending the outcome of the appeal process. Ms Caesar gave no rational explanation for the delay in presenting the claim (she said she was preparing for the First Proceedings at the time). There has been a significant delay in bringing the Second Proceedings. If the Second Proceedings are allowed to proceed, the Respondent will be required to face a claim which would otherwise be defeated by a limitation defence and will inevitably incur not insignificant costs. Given the delay, there is a risk that memories as to relevant events will fade and witness evidence become unreliable. In the Tribunal’s judgment the balance of prejudice falls in the Respondent’s favour.

48. In any event, with regard to the Claimant’s allegation that he was treated less favourably than a woman who would have been permitted to return to work following a period of (shared) maternity leave, this was an issue which was determined and rejected in the First Proceedings. Seeking to re-litigate that issue is an abuse of process.
49. The Tribunal has had regard to Ms Caesar’s submission that the Claimant’s appeal was discriminatory. However, that allegation is simply not pleaded and Ms Caesar did not explain how the appeal might have been discriminatory. As the Honourable Mr Justice Langstaff observed in Chandhok v Tirkey UKEAT/0190/14/KN:

16. ... The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.

17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in

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ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

50. In any event, the Claimant has not shown a prima facie case that his dismissal and his appeal was an act extending over a period.

51. For the reasons set out above, the Claimant's claims are dismissed.

Employment Judge **Pritchard**

Date: 27 October 2017