



## EMPLOYMENT TRIBUNALS

**Claimant**  
**Mr J Warrilow**

v

**Respondent**  
**Openwork Ltd**

## PRELIMINARY HEARING

**Heard at: Watford**  
**Before: Employment Judge Jack**

**On: 31 July 2018**

### **Appearances:**

**For the Claimant: In Person**  
**For the Respondents: Ms S Omeri, Counsel**

## JUDGMENT

1. The claimant was not an employee of the respondent.
2. The claim of unfair dismissal and age discrimination has no reasonable prospect of success and is struck out pursuant to Rule 37(1)(a) of the Tribunal's Rules of Procedure.

## REASONS

1. By an ET1 presented on 23 November 2017 the claimant complains of unfair dismissal and of age discrimination. The respondent denies that the claimant was an employee and denies age discrimination.
2. By an order made by Employment Judge Palmer at a case management preliminary hearing, it was ordered that the following issues should be determined namely whether the claimant is an employee so that the tribunal has jurisdiction to hear the claim. The respondent argued that the claimant was a Director of another company and worked as a Franchise Agent.

3. The second issue is whether the claim has no or little prospect of success.
4. Directions were given by Employment Judge Palmer as to disclosure.
5. The respondent was late in providing its disclosure and the claimant complains that certain documents have not been provided. I shall consider this point below.
6. The directions also provided for exchange of witness statements. The claimant did not serve a witness statement but he did serve what he described as a Meeting Agenda. It was agreed at the hearing that this could stand as his evidence and he deposed to its truth when he gave his live evidence.
7. The respondent relied on a witness statement of Christopher Hallatt who gave live evidence.

### **The law**

- 8 The tribunal's procedure rules give a power in Rule 37(1)(a) to strike out all or part of a claim or response on any of the following grounds: "(a) that it ... has no reasonable prospect of success..."
- 9 Section 94(1) of the Employment Rights Act 1996 gives an employee a right not to be unfairly dismissed by his employer. It is thus critical to the claimant's case on unfair dismissal that he be employed by the respondent. The respondent says that he was not, he was a Director of a company which he owned called Alban Financial Services Limited. There was, the respondent alleges, no contractual relationship between the claimant and the respondent governing his actions as a Financial Adviser.
- 10 Under the Equality Act there are various protected characteristics. Under s.4 this includes age. Section 39(2)(c) of the 2010 Act provides that:

“An employer A must not discriminate against a person B:

- (a) in the arrangements A makes for deciding to whom to offer employment
  - (b) As to the terms on which A offers B employment
  - (c) By not offering B employment.
2. An employer A must not discriminate against an employee of A's B
    - (a) as to B's terms of employment
    - (b) in the way A applauds B excess or by not affording B access to opportunities for promotion, transfer or training or for receiving any other benefit facility of service
    - (c) By dismissing
    - (d) by subjecting B to any other detriment.”

- 11 In the current case the only detriment relied on by the claimant to found his claim of age discrimination is the dismissal itself.
- 12 Under s.39 it is critical that there be an employment relationship between the claimant and the respondent. However, even if the claimant was not employed by the respondent and instead did his work as Director or an employee of Alban Financial Services Limited, s.41 may have relevance. Section 41 (1) provides:
- “A principal must not discriminate against a contract worker
- (a) As to the terms on which the principal allows the worker to do the work
  - (b) By not allowing the worker to do or to continue to do the work
  - (c) In the way the principal affords the worker access or by not affording the worker access to opportunities for receiving a benefit, facility or service
  - (d) By subjecting the worker to any other detriment.”
- 13 The principal is defined in ss.5 as “a person who makes work available for an individual who is:
- (a) Employed by another person, and
  - (b) Supplied by that other person in furtherance of a contract which the principal is a party whether or not that other person is a party to it.
- 14 Thus, in this case, it may be possible to treat the respondent as the principal, Alban Financial Services Limited as the other person and the claimant as the contract worker. I shall not decide that point but I shall assume that it potentially, applies.

### **The facts**

- 15 The claimant was born on 20 May 1949 and is thus 69 years old.
- 16 On 10 October 1980 he started work for a predecessor of the respondent. The respondent’s name has changed on numerous occasions. Back in 1980 it was Hambro Life, it then became Hambro Dunbar for a short time, then Allied Dunbar and then it was taken over by Zurich and took the name Zurich Advice Network. In 2005 it became Openwork Limited but just before it became Openwork Limited there was a company Indirect Solutions Limited which subsequently changed its name to Openwork and it is Indirect Solutions Limited with whom the last of the 2005 contract was entered.
- 17 The claimant worked for the respondent for nearly, somewhat over 14 years, but on 1 January 1995 he took a self-employed contract with, what had by this time had become Allied Dunbar. I have not been shown a copy of that contract. In March 2005 the claimant entered a franchise agreement with Indirect Solutions Limited. The claimant by this time was trading as Alban Financial Services. He was the sole principal in that firm. The franchise agreement had various terms

on which Ms Omeri relies to say that it cannot be considered even on the basis of the wider interpretations of such contracts approved by the Supreme Court in Pimlico Plumbers Limited v Smith [2018] UK SC 29. For reasons which I will come to, I do not need to determine that.

- 18 On 11 July 2014 the claimant became a Director of Alban Financial Services Limited which was a company he had established in order to take over the business which he had been carrying out as a sole trader.
- 19 On 30 September 2014 a Deed of Novation was made between the claimant, Alban Financial Services Limited, and the respondent. That provided for all the rights and obligations which had previously been those of the claimant to now be obligations of Alban Financial Services Limited. At the same time a guarantee was given by the claimant of Alban Financial Services Limited's liabilities to the respondent. The guarantee is the only contract existing after that date between the claimant and the respondent.
- 20 In 2015 Mike Murrow, who is a Senior Executive in the respondent, is sad by the claimant to have spoken at a conference for the Financial Advisers who carry out work on behalf of the respondent. The claimant alleges that Mr Murrow said that the respondent was going to recruit more younger advisers and that older representatives would be retired. That was disputed by the respondent and I do not accept the claimant's case on that. Mr Hallett, who gave evidence for the respondent, said that the workforce was indeed growing older and that the respondent, like the industry, needed to recruit younger advisers but they could not recruit sufficient numbers of younger advisers, thus they were reliant on older representatives, some of whom worked in to their 80s.
- 21 The one instance the claimant relied on to show that an older representative had been retired was a man of 74 or 75 who surrendered his licenses. Mr Hallett explained that he knew of that case but that that was a voluntary decision on the part of a man who wanted to effectively to enter semi-retirement and he therefore surrendered his licenses but continued to work as an introducer of clients to the respondent.
- 22 In the first half of June 2017 the claimant went on holiday to Turkey. There he was the victim of an extremely unfortunate criminal action in the course of which he was pushed and fell off a pavement. He fell to the road hitting his head and had to be taken to hospital where he underwent numerous investigations. He had a blood clot on his brain and was at risk of suffering a stroke. It seems clear that it was that incident which gave rise to a change in his psychological state. The claimant has adduced a report, prepared by Dr Jonathan Kennedy at the Royal Free Hospital. He diagnosed the claimant with behavioral variant frontotemporal dementia, intermittent episodes of loss of consciousness, likely to be cardio-vascular in nature. The GP investigating three alcoholic excess but no obvious dependent syndrome. He then explained some of the background; he attended the consultation with Dr Kennedy with his wife and Dr Kennedy records that:

“his wife wanted him to tell me that he has also been accused of sexual harassment which he completely denies. I also asked Mrs Warrilow for her thoughts and she feels that the most early changes related to uninhibited behavior. He could be slightly

explicit in conversations about his wife and he was said recently to have shown some explicit photographs to people at a party. IT is complete contrast to how he would have behaved normally and his wife describes him as always being a gentleman.”

23 He then recites the family history and then says;

“I have shared with Mr Warrilow that sadly I think he has a behavioral variant frontotemporal dementia. IU am sure this accounts for his change in behavior over the last couple of years and is likely to be a significant factor in his behavior at work. I think it is important to make it clear as he pursues his employment tribunal.”

24 He then talks about further investigations and steps which would be taken.

25 The incident, as I have said, which led to this change was in June 2017. On 26 and 27 July 2017 the claimant was supposed to attend a training event at the respondent’s Swindon Office, this was to do with pension transfers. The claimant arrived three hours late for the training. He says that was due to a transport difficulty caused by road congestion but he then did not attend the second day at all. Whilst he was at the training it appears that three of the respondent’s female employees complained about his behavior. The claimant says that there has never been any written complaint and that may well be true but I am satisfied that there were complaints made by female employees about his behavior.

26 As a result of his failure to complete the training event or to do the test which was subsequently to be completed, the respondent suspended the claimant’s Conduct of Business XXXX XXX, that effectively meant that he could not act as a Financial Consultant while the period of suspension was continuing.

27 There were exchanges of emails including one of 7 August 2017 from Jenny Close, who was the Training and Competence Director of the respondent and it reads:

“Hi Jim,

I just like to reassure you that the issues which you have been struggling to access Zurich’s systems is unrelated to the temporary suspension of your COGs license. Your supervisor, Robert, has arranged to visit you on Wednesday and at the same time a member of the Zurich Team being on hand to try and help resolve your access issue. After receiving your email this afternoon and speaking with Mark Waldrige at Zurich, I believe Carly has again spoken with you and any previous access issues have been resolved. In addition, an offer has been made for Zurich to undertake any necessary keying to facilitate the transaction.

As part of Robert’s visit on Wednesday it will be important to understand any additional servicing activity or client request linked to COBs advice to ensure we can support an appropriate way forward ahead of your COBs license being reinstated. I have spoken with Robert and he is also on copy to this email.

It’s not my intention to obviate any discussion relating to questions about the license impact on other advisers. However, you were the only adviser booked to attend the course that day. As we discussed when we last spoke I have made arrangements for you to complete the Day 2 of the APS Course on 24 August and spend some time with AQT from approximately 2pm as per the original plan.

If you have any queries ahead of 24 August do let me know.”

- 28 The claimant complains that that was misleading in that the respondent in fact had sent an email to the various suppliers of financial details saying that the claimant’s COB license had been suspended and therefore he could not have access. However, it is not necessary for me to determine whether that was deliberately misleading the claimant or whether it was simply a misunderstanding as to what the problem was. At any rate, on 29 August 2017, the suspension of the claimant was confirmed by Mr Morrow. He dealt with what he says;

“The current position.

Just to reiterate, my responsibility is to ensure that anyone advising under Open Works Wealth Proposition is doing so safely and securely and that customers are getting good outcomes. I have a responsibility to ensure our advisers are trained, licensed and supervised accordingly. And from a consumer prospective, that all advice given is suitable.

The original reason for the direct supervision earlier this year was to address concerns about your advice quality and suitability. These concerns had not been fully resolved yet and have ultimately been overtaken by the decision to suspend your license following the fit and proper concerns and erratic behavior raised with you after the training event in Swindon on 26 and 27 July. We agreed on 23 August that it would not be appropriate for you to travel to Swindon on 24 to sit the test from the Pensions Training event as, even if you pass it we would not be in a position to reinstate your license. It is essential therefore that we find an interim solution through a locum adviser to allow you to look after you, the needs of your wealth clients, specifically in the meantime. We discussed the possibility of that being through a couple of local advisers and I need you to resolve this by the beginning of next week, week commencing 28 August, otherwise Open Work will have to impose a locum.

Next Step

Following our meetings, I did check to see if your Zurich Platform Access had been suspended and it has not. Access has been available up to 23 August but under the circumstances of asking to confirm that access has now been fully suspended while we consider the future options.

In terms of next steps, you referenced that your GP has recommended a psychiatrist meeting on 5 September linked to the medication he prescribed. I am separately looking to see if we can help with some kind of Occupational Health Assessment that might prove inciteful. I will come back on this separately.”

- 29 The 1 September 2017 is alleged to be the date of the dismissal. In oral evidence though the claimant suggested it might be later on 20 September 2017 he resigned from his position at Alban Financial Services Limited, that is an email of 27 September 2017 on page 148 of the bundle.
- 30 On 23 November 2017, the ET1 was presented.
- 31 The basis of the claim for age discrimination is put in the Agenda document in this way:

“Did his dismissal involve discrimination? I have no evidence though I and my legal representatives have on five occasions requested disclosure by Open Work this has not been forthcoming. A discussion with their solicitor elicited a further promise of disclosure but so far not a further word.”

- 32 In fact, throughout the entire debacle Open Work has not written to Mr Warrilow once.
- 33 The Company, not making due disclosure, leads up to believe that they had something to hide. An internal memorandum or an email expressing joy at ridding the company of an elderly worker is the most likely and the disposal of sick old man from the Adviser Salesforce seems to be most likely. I do not accept that there is such a smoking gun as is suggested there. It is inherently improbable that an email in such terms would be sent and there is no evidence that disclosure which has been given by the respondent, is anything other than what they are obliged to produce.
- 34 I turn then to the issues.

### **The issues**

- 35 Was the claimant an employee of the respondent. No. There was no correct contractual relationship between the claimant and the respondent. The only contractual arrangements between them were the guarantees which the claimant gave of Alban Financial Services Limited's obligations to the claimant. In those circumstances it is not necessary to examine the difference between employees and workers and, therefore, not necessary to discuss the various judgments which have been relied on by the claimant and the respondent. In the absence of a contractual relationship there can be no unfair dismissal claim.
- 36 As to whether the claim has little or no prospect of success. In my judgment there is no evidence that the suspension of the claimant was caused by his age. On the contrary, the evidence is overwhelming that the reason for his suspension was that he had not completed the course on 26 and 27 July 2017 and had not passed the test subsequently, coupled with the complaints which had been made by the female employees.
- 37 In those circumstances the claim has no reasonable prospect of success and stands to be struck out.
- 38 For completeness I should add that the claimant, at the outset, suggested that he might have a claim for disability discrimination. He had not formulated any amendment to his ET1 and, in those circumstances, I have not been able to deal with it. If he seeks to pursue that, he will of course be substantially out of time and may need to seek the extension of time and there made by substantial issues as to whether he has any reasonable prospect of success in relation to such a claim. However, because the matter is not before me, I make no determination.

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**Employment Judge Jack 25.8.2018**

Sent to the parties on:

30 August 2018

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For the Tribunal:

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