



EMPLOYMENT TRIBUNALS

Between:

Mr D Hughes
Claimant

and

Rolls Royce PLC
Respondent

AT A PRELIMINARY HEARING

Held at: Nottingham **On:** 17 December 2018

Before: Employment Judge Clark

Representation

For the Claimant: In person

For the Respondent: Mr French-Williams, Solicitor

JUDGMENT having been sent to the parties on 27 December 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

- 1) On 27 July 2018, the Claimant presented claims against the Respondent in respect of –
 - unfair dismissal;
 - breach of contract;
 - age discrimination;
 - holiday pay;
 - arrears of pay.

- 2) Before an ET3 was filed, there was some initial correspondence generated because it appeared that the Claimant did not have the necessary 2 years' qualifying service to bring a claim for unfair dismissal. On 9 August, the Claimant produced some further information. That did not deal with the issue of qualifying service but did set out further elements of the Claimant's case insofar as he was contending that he was an employee of the Respondent. In that regard, he sought to rely on a letter from a Nigel Hill dated 31 July 2018 which was written for the purpose of dealing with a response to an allegation of data breach. I return to that later.
- 3) The Respondent filed its ET3 in due course setting out its defence. It notes how the ET1 is not particularised in any great detail or, in some cases, at all. It sets out the nature of the defence to the allegations so far as each is understood. In essence, it is that the Claimant was never an employee and was never in a contractual relationship with it. He had been engaged through a consultancy or agency by the name of Alexander Mann Solutions from 10 July 2017. This arrangement lasted about 6 weeks until 23 August 2017 when it was terminated due to the respondent's dissatisfaction with the Claimant's manner of engagement with his colleagues. It also raises a significant matter of the timing of the claim, it being the case that on everyone's analysis the claim was presented some 11 months or so after the end of the relationship between the two parties.
- 4) There is a great deal of correspondence on the tribunal file from the Claimant setting out, in many respects, a number of criticism of the Respondent and the Respondent's lawyers and he articulates his firm view that but for the events in August 2017, he would by now have progressed to the most senior management position for his type of specialism commanding a salary in the region of £200,000 per year.

This Hearing

- 5) On 16 November, Employment Judge Legard set this matter down for the purpose of determining whether all or part of the claim should be struck out on the basis that it has no reasonable prospect of success and/or the imposition of a deposit on the basis that it has little reasonable prospect of success and, if necessary, to give further directions for the management of the claim.

The Background Facts

- 6) For the purpose of this hearing I do not determine the evidence or make findings of fact but I do need to set out the factual background, a large part of which is not in dispute. Where it is contentious, I seek to summarise the competing assertions.

- 7) Rolls Royce is a well-known large employer. It is common ground that the Claimant entered into a working engagement with the Respondent on 10 July 2017 which was procured through the agency I have already referred to, Alexander Mann Solutions. The agency has a long history of providing technical employees to the respondent under this form of tripartite relationship. The Respondent paid Alexander Mann for the services of the claimant (and other individuals it supplied) and Alexander Mann paid the Claimant.
- 8) It is also common ground throughout the relatively short period of time that the Claimant was undertaking work under this arrangement for Rolls Royce, that all his remuneration was received through Alexander Mann.
- 9) There is no documentation before me beyond the correspondence, the Claimant's skeleton arguments and the original pleadings. There is certainly nothing before me likely to be adduced in evidence in respect of any contractual documentation or other correspondence that might displace what appears to be the common understanding of how this arrangement came into existence and operated. It seems likely therefore that any factual enquiry would be likely to find that there was simply an open ended agency arrangement for such time as any of the parties found it appropriate for it to continue.
- 10) The Claimant's initial pleaded case has developed in subsequent correspondence. He says that at some point after about a week or two he had a discussion with the Plant Manager during which he was contracted to undertake a piece of work of such status and so far out of the realms of that for which he had previously been required to undertake that it must have amounted to a new relationship of direct employment between him and Rolls Royce. That work is said to have commenced sometime around the end of July or the beginning of August. That work was said to be to implement a "new technology" with the use of televisions upstream of production to review arrears and defects. The claimant says he embarked on this task by writing to a James Buck, who was a more junior manager to tell him that the Plant Manager had agreed that they were going to implement this new technology. There is no discernible change in the surrounding relationship.
- 11) On 23 August, the Claimant was invited to contribute to a full day meeting of what is called a "controlled plan review" meeting in the course of which he spoke out and described the approach being taken by those managers gathered there as "a fairy-tale"; that they were 500 units in arrears and the desktop exercise that they were performing served no purpose to remedying the problems that the organisation had.
- 12) Whatever the rights and wrongs of the views he expressed, this led to a heated reaction from those involved and during the lunchtime break, the Claimant was asked not to return to the meeting. A complaint was lodged about his contribution

and it seems on that same day he was informed he was not required any further with Rolls Royce. What I have summarised thus far is the claimant's account and it is wholly consistent with the thrust of the Respondent's account of how the parties' relationship came to an end.

- 13) Before I deal with the claims that are brought based on that background, the Claimant lodged a complaint with the respondent about the incident with Mr James Buck and others and he says that he never received a reply nor was it investigated. He says he would have expected it to have been investigated "because that is the ethos and approach that rolls Royce adopt" and indeed is a right of his to have such a matter investigated.
- 14) It is necessary to briefly summarise what the parties will say about what happened after their relationship came to an end because the Claimant says he was labouring under a belief that there was an investigation underway and that he therefore felt no need to take matters further at that time. He says he felt there was a risk that any step he took might interfere with the investigation or indeed might be seen to be vexatious. Having said that, he does not suggest that he chased the progress or outcome of any internal investigation nor did he pursue the investigation any further with the employer, which was not in fact investigating anything at all and has still not investigated anything in response to the Claimant's complaint.
- 15) Instead, the claimant says he left matters alone until he reached a point where he concluded that the Respondent was dishonest and had deliberately failed to deal with his investigation and it was only then that he decided to present a claim to the employment tribunal, which he did on 27 July 2018, approximately 11 months after the events.

The ET1

- 16) The ET1 identifies various claims by ticking the relevant boxes. As to the age discrimination claim, beyond it being ticked, it is simply not referred to in the narrative of the claim nor is it possible to discern the basis upon which it is suggested the claim of age discrimination is advanced in any of the number of numerous subsequent emails from the Claimant nor, indeed, the skeleton argument and all submissions that have been advanced today.
- 17) The breach of contract claim for the purposes of jurisdiction of this tribunal must be brought by an employee and be arising or outstanding on the termination of employment. The ET1 might be capable of being interpreted in a way that such a claim could be inferred as a failure to pay notice, although "notice pay" is not one of the boxes that is ticked by the Claimant. The holiday pay and arrears of pay are again ticked but it is not at all clear, either from the ET1 or the subsequent correspondence, what it is that lies behind those claims. Again, they have not

been clarified in the skeleton arguments or submissions before me today. The other claim is, of course, one of unfair dismissal.

Discussion and Conclusions

- 18) The purpose of this hearing today is not make findings of fact nor is it to decide the issues, but to consider the contentions the parties will advance under each of those five claims and to do so in the context of the powers given to the tribunal under rules 37 and 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
- 19) Rule 37 gives the tribunal a power to strike out a claim when at any stage in the proceedings, either on its own initiative or on the application of a party, a claim or response has no reasonable prospect of success. By rule 39, a deposit order may be made as a condition of allowing any claim to proceed where any specific allegation or argument in it has little reasonable prospect of success.
- 20) In determining those two tests, it is not for me to make findings as to what the outcome of the relevant matters would be but to assess the contentions of the parties in a way which enables me to properly put them within either of those two tests or, if they fall into neither of those two tests, then the matter simply proceeds to a final hearing. It is against that background to consider the individual elements of the claims.
- 21) The first is the claim of unfair dismissal. It is common ground the Claimant was engaged at the outset in circumstances in which he was not an employee of this Respondent. The case of unfair dismissal on that point alone would immediately lead to a strike out as it is an essential element of such a claim that the parties' relationship is one of employer and employee. However, the Claimant says that sometime during the 6 weeks or so that he was employed by Alexander Mann to work at Rolls Royce, circumstances changed to enable him to properly say that he became an employee. The two most significant points he relies on in support of his contention are these.
- a) That upon commencing work at Rolls Royce, he was issued with a security pass which originally had an expiry date of 6 months on it. He says that security pass expiry date was consistent with a 6 month contract but for other reasons to do with security, it became inappropriate for him to continue on a 6 month basis and that had to be increased to 12 months. He says the change in the security pass expiry date establishes that he had a one year contract at that time.
 - b) That in a separated and unrelated complaint to the Respondent about a data breach, he received correspondence from an individual called Nigel Hill, in the course of which Mr Hill sent an email response dated 31 July 2018, part of which said: *"I understand that your contract with Rolls Royce was terminated*

on 23 August 2017...". The Claimant relies on that passage to evidence his version that things had changed soon after he started and he had in fact become a direct employee of Rolls Royce.

- 22) That sentence has little probative value. It has still less when it is put into context. The passage was written in response to a suggestion that somebody else had lied or falsified a response to an enquiry about the claimant's status which suggested that the Claimant had never had any relationship with Rolls Royce. Mr Hill clearly gave his response in the context of the investigation he had undertaken into this allegation which actually showed the original offending statement made about the claimant said: "*Having made internal enquiries, we have no records which indicate that you are a current employee or contractor or the Company ...*". It is in respect of that that investigation that Mr Hill reports his understanding and conclusion that the Claimant's contract with Rolls Royce was terminated on 23 August seems to show that the original statement was factually correct at the time it was written. It is simply fanciful to suggest that this gives support for a different legal relationship emerging than the one that is accepted as being the initial relationship between the parties. As to the security pass being extended from 6 to 12 months, that is a factor which I find is most unlikely to have any bearing on the legal relationship and I did not find this at all persuasive against the accepted fact that Alexander Mann paid the claimant throughout.
- 23) Those are the two evidential reference points principally relied upon by the Claimant to establish that his status changed to that of employee. The third matter is that he says there was a difference in the quality and nature of the tasks he was engaged in as directed by Mr Grimshaw/ Mr Whitehouse such as to take it out of the realms of his agency engagement. However, despite that contention he continued to be paid by Alexander Mann and there is nothing by way of written contract, letter or so much as a text, email or phone call to support the contention of a change of status. Not only that but it is a contention which sits in stark contrast with the evidence that the respondent will advance that there was never any direct contractual relationship and showing a continuation of the arrangement with Alexander Mann.
- 24) The question for me then is not to make findings on those contentions; the question is whether those contentions have reasonable prospects of successfully establishing before a tribunal that the claimant's initial agency status turned into one of an employee. I am entirely satisfied that there are no reasonable prospects of that contention succeeding and nothing the claimant relies on has any real weight in displacing the agency relationship.
- 25) In any event, this is a claim which requires 2 years' qualifying service and there is simply 6 weeks or so of a relationship and nowhere in the ET1, or subsequent correspondence, is it contended that the termination arose through any of the prohibited circumstances that may have excluded the requirement for qualifying

service. In the absence of qualifying service also, the claim of unfair dismissal is doomed to fail and has no reasonable prospect of success.

26) Even then there is a third reason to consider strike out which is that this claim is brought 11 months after the termination rather than the 3 months that the law requires. That time limit is of course subject to extension on a “not reasonably practicability test” and in seeking to persuade me to exercise my discretion to extend time under that test, the Claimant relies on the contention that he was, in one way or another, misled by Mr Grimshaw, or possibly Mr Whitehouse, but certainly by agents of the Respondent to the effect this his complaint was being investigated. Even if that is the case, it only goes so far. Everybody accepts there was in fact no investigation. The issue for me, however, is the extent to which such a representation could give rise to the not reasonably practicability extension of time. My conclusion is that even if there was an initial point at which the claimant was labouring under some belief the complaint was being looked into it does not assist him. Firstly, it does not provide a factual basis for establishing why it was not reasonably practicable to present a claim in time. Secondly, an internal investigation into a complaint is by its nature analogous to internal appeals or grievances which the authorities have made clear does not provide a basis for the necessary degree of impracticability. Thirdly, even if there was some initial delay which could be excused, which I am not satisfied is the case, the second part of the test goes to consider “such further period as is reasonable” and it seems to me the best the claimant could establish is that if he did not immediately bring a claim due to his belief in the internal investigation, he ought to have been chasing it within a matter of a month or so after leaving his employment. He did not and the further delay in presenting the claim was not reasonable.

27) The claim of unfair dismissal will therefore be struck out all or any of those three grounds.

28) The breach of contract claim, to the extent that this is understood, fails for similar reasons. The jurisdiction, time limit and discretion to extend are set out in the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1996. Such a claim may be brought only by an employee. The claim is doomed to fail for the same reasons as the unfair dismissal claim. Similarly, such a claim must be brought within 3 months of the effective date of termination or such further period as it is reasonable where it was not reasonably practicable to bring the claim within that period. Again, the same considerations apply to the question of the prospects of that claim getting past the jurisdictional hurdle.

29) The holiday pay and arrears of pay claims are not particularised and whilst either may rely on the status of an individual as a worker, as opposed to an employee, it is only if the Claimant succeeds in his contention in respect of the change of status following discussions with Mr Whitehouse that he enters into a contractual

relationship with the Respondent directly, otherwise he is a worker engaged by Alexander Mann deployed on a contract worker basis to the Respondent. Whilst worker status is enough, the contractual basis of the status still has to be with the respondent. In those circumstances, if there is any holiday pay due or if there is any arrears of pay, neither of which is advanced further on the pleadings, the Respondent to such a claim is Alexander Mann and not the Respondent. On the basis of what I have already said about the claimant's contention of a change of status, I am satisfied that there is no reasonable prospect of successfully showing that there was such a contractual status with this Respondent. In any event, both matters are out of time for the same reason as provided already.

30)The only other matter remaining is the age discrimination claim. The elements of that claim remain ethereal. They are not discernible either in the ET1 or any further correspondence particularising the claim further. Significantly, it has not been advanced at all today in the oral exchanges before me. It is different to the other claims in the sense that the cause of action for such a claim arises under section 41 of the Equality Act where it is sufficient for an individual to be a contract worker. On everyone's assessment from the outset was such a contract worker so he does not face the same jurisdictional hurdle of either qualifying service or employee status.

31)But, this is a claim that is similarly substantially out of time. It is out of time under a different test for extension, however, that is just and equitable and as is readily acknowledged by the Respondent in its fair summary of the law, that test is perhaps less strict than the not reasonably practicable test. It still requires the Claimant at a future hearing to establish that it is just and equitable to extend time. This is not a slight delay; it is a substantial delay and there is no way of knowing what basis the age discrimination is said to take. Consequently, Mr French-Williams has no idea whether the potentially key players are continuing in their employment with the Respondent or not and whether they would be jeopardised in defending the matter. It is common ground that the respondent has undertaken an extensive redundancy process during the intervening period. Mr French Williams also points to the fact that even if they are still in employment, the period of time is sufficient for memories to have faded and for the Respondent to be prejudiced accordingly.

32)The Claimant accepts that during the intervening period, the Respondent has undergone a significant restructuring with the result that something approaching 5,000 of its middle managers have been made redundant or otherwise had their employment terminated. For his part, the claimant believes that Mr Whitehouse himself no longer works in the Respondent's business.

33)So, the question is whether the age discrimination claim falls within either of the tests to be applied today under rules 37 and 39. There are two matters that stand between the claim proceeding as of right. They are the absence of any discernible

claim being particularised and the time limit. The absence of any of obvious particulars is itself a serious concern. It is not unusual to see it in an ET1 of an unrepresented claimant but in this case, the claimant has taken advantage of numerous opportunities to set out his further particulars without mention of age discrimination. He has had opportunity to develop his claim before me today in oral submissions without mention of age discrimination. There is simply no claim being advanced beyond the box being ticked. That, in itself, is in my judgement sufficient for me to be satisfied that this case falls into the category of no reasonable prospect of success but the claimant will also have to overcome the additional hurdle of engaging jurisdiction on the just and equitable basis. I am satisfied that the respondent is likely to face prejudice arising from the change in management due to the intervening restructuring and, in any event, the effect passage of time inevitably has on recollections. This is an exercise of balancing the prejudice to both parties. I have had in mind the caution the authorities place on strike out of discrimination claims, typically due to their fact sensitive nature. For example, Anyanwu. It is rare to strike out a claim but in clear cases a tribunal should not shrink from doing so where appropriate. In this case I am satisfied the claimant's claim falls within the category no reasonable prospect of success.

39. For those reasons, the claim in its entirety is struck out.

Employment Judge R Clark
Date: 25/02/2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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