EMPLOYMENT TRIBUNALS

Claimant: Mr D P Hoppe

Respondents: 1. Cabinet Office
2. Civil Service Commission

Heard at: Manchester **On:** 25 March 2019

Before: Employment Judge Ross

REPRESENTATION:

Claimant: In person (on telephone)
Both Respondents: Mr A Serr, Counsel

JUDGMENT

1. The claimant's claim is struck out on the ground that it has no reasonable prospect of success pursuant to Rule 37(1)(a) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

1. The claimant was employed by HMRC from 1984 until he was dismissed in 2015. This claim was presented on 17 July 2018. The response filed on behalf of both respondents stated that neither respondent had ever employed the claimant and neither had he worked under the extended definition of worker in Section 43K Employment Rights Act 1996 for the purposes of the Public Interest Disclosure Act 1998. Accordingly, the Tribunal did not have jurisdiction to hear the claim.

2. This Preliminary Hearing was listed by Employment Judge Franey at a Case Management Hearing on 30 November 2018. Judge Franey's Order was signed by him on 14 November 2018 and sent to the parties on 18 December 2018.

3. At the outset of this hearing EJ Ross confirmed that the issues for the Tribunal were as listed by Employment Judge Franey namely:-

(a) Whether the Tribunal has jurisdiction to hear the claim in the light of the respondent's contention that the claim was presented out of time;

(b) Whether the claim should be struck out on the basis it has no reasonable prospect of success;

(c) If not, whether the claimant should be required to pay a deposit as a condition of pursuing his claim because it has little reasonable prospect of success;

(d) Whether the claimant's application for permission to amend his claim made on 30 October 2018 should be granted and refused; and

(e) Any other matters of case management which arise including consideration of future reasonable adjustments and a possible "ground rules hearing".

4. At 20:30 on the evening before the hearing, 24/3/19 the claimant emailed the Tribunal. He confirmed that he was withdrawing his application for permission to amend his claim made on 30 October 2018, Issue (d) above, because he had presented a new claim case number 2400171/19.

5. In these circumstances Employment Judge Ross informed the parties she accepted the claimant's withdrawal of that application.

6. A separate issue required clarification in relation to case number 2400171/19. On 19/3/19 case number 2413478/18 (this case) was referred to Employment Judge Franey to consider whether the new 2019 claim 2400171/19 should be combined with this claim. Employment Judge Franey ruled on 19/3/19 that it should not be because it was premature to do so. He stated consideration could be given to combination by the Judge dealing with the 2018 claim (this claim) at the end of this preliminary hearing if appropriate.

7. Unfortunately, that direction had not been communicated to the parties by the time of this hearing on 25/3/19. Meanwhile, case number 2400171/19 (the 2019 claim) had been referred to Regional Employment Judge Parkin in relation to an application by the third respondent in that case, that the third respondent should be struck out as a respondent because the claimant had not and had never been an employee or worker of the third respondent. Regional Employment Judge Parkin ruled on 22 March 2019 (not having seen the instruction of Employment Judge Franey) that the application of the third respondent in relation to the 2019 claim should also be dealt with at the Preliminary Hearing on 25 March 2019 in this case, case number 2413478/18.

8. Employment Judge Ross ruled that given the decision that the cases were not at this stage combined, given Regional Employment Judge Parkin had not seen the direction of Employment Judge Franey and taking into account the overriding objective the application for strike out by the third respondent in relation to the 2019 claim will be heard on another date.

9. The other issue was the attendance of the claimant by telephone. In his email of 24 March 2019 sent to the Tribunal at 20:30 the claimant requested to attend the hearing by telephone. He relied on his state of ill health and disability. His email states "I have not been able to get a further appointment with the doctor but given the last medical evidence from Dr Edwards met the criterion stated but was ignored on 2408488/15 it would be best if a grounds rule hearing is held and the Tribunal clarify what evidence it desires per the applications attached".

10. Employment Judge Ross checked the medical evidence on case number 2408488/15. It is dated 5/2/19 from Dr J Edwards, the claimant's GP. Dr Edwards confirmed the claimant "continues to have substantial symptoms of anxiety and low mood and these especially pertain to emotions that are driven by stressful stimulae". Dr Edwards stated, "he finds that during periods of time of psychological stress his anxiety symptoms are exceedingly debilitating, driving both physical and psychological symptoms which impair his ability to concentrate, think rationally and remain calm". He went on to note that "Mr Hoppe feels that he is currently not in a position to be able to represent himself adequately in the court because of the physiological symptoms that are driven by psychological stress that this engenders. Unfortunately, my role as a GP leads me to be unable to formally assess this as this lies outside my field of training, he certainly continues to represent substantial anxiety symptoms to me in surgery". He then referred to "Dr Junaid's report of 13 September, referring to "an underlying diagnosis of depression, associated anxiety symptoms". The Tribunal did not have sight of the report from Dr Junaid.

11. Given that the claimant had provided medical evidence stating that he suffered from anxiety Employment Judge Ross determined it was consistent with the overriding objective to permit the claimant to attend the hearing as he requested, by telephone. In reaching this decision, Employment Judge Ross was satisfied that given the application for strike out and the application for a deposit did not require the claimant to give evidence, the interests of justice could be served by the claimant attending, as he wished on the telephone and the respondent in person.

12. However, Employment Judge Ross was not satisfied it was appropriate to hear the application that the claim was presented out of time on the telephone- Issue (a) above. Although Rule 46 ET Rules of Procedure provides for hearings by electronic communication, Rule 56 says Preliminary Hearings shall be conducted in public except where Rule 50 (privacy and restrictions on disclosure) or Rule 94 (national security proceedings) apply. In a hearing conducted electronically Rule 46 states it is on the condition that "the parties and the members of the public attending the hearing are able to hear what the Tribunal hears and see any witness as seen by the Tribunal". This is not possible if a party is attending on the telephone.

13. Therefore, if the out of time application was to proceed Employment Judge Ross considered that the claimant would need to attend, either in person or via Skype as he would need to give evidence in person about whether or not it was reasonably practicable for him to present his claim within time and whether or not he did so within such further time as was reasonable. Accordingly, she determined that issue (a) would not be heard on 25/3/19.

14. At the conclusion of the respondent's application for strike out and/or deposit the claimant's reply, Employment Judge Ross raised the issue of consideration of future reasonable adjustments and a possible "ground rules hearing". In fact given the outcome of the strike out application such an order is no longer necessary in this case. Employment Judge Ross stated that the Tribunal was sympathetic to making reasonable adjustments because a party was suffering from a disability or impairment. The impairment identified by the claimant's GP is anxiety. However the claimant's GP was unable to state whether or not the condition of anxiety meant the claimant was:-

(i) Unable to conduct his case and/or to give evidence at a final hearing.

15. Employment Judge Ross said that before the Tribunal could put in place reasonable adjustments or set up a "ground rules" hearing to discuss reasonable adjustments the Tribunal needed evidence from a medical practitioner which stated:-

(i) The impairment or condition from which the claimant suffers;(The condition in this case is anxiety)

(ii) Whether the impairment or condition prevents the claimant from representing himself in Tribunal proceedings and if so when that stage of affairs will cease;

(iii) Whether the claimant is unable by reason of his condition or impairment to attend a Tribunal hearing to represent himself and if so, when that state of affairs may cease;

(iv) Whether the claimant by reason of his impairment is unable to attend the Tribunal to give evidence and be cross examined and if so, when that state of affairs is likely to cease.

(v) It would assist the Tribunal if the medical practitioner can identify any adjustments which would enable the claimant to participate in the proceedings for example attending remotely via Skype, having the hearing listed over a lengthier period of time with shorter days and/or regular breaks whilst conducting the hearing or giving evidence.

16. Although no order was made in this claim for the provision of such evidence because the claim was struck out (see below) it is likely it will be relevant in any ongoing claim.

Application to strike out the claim

17. Mr Serr presented a written submission at page 228 to 233 of the bundle. The submission was that the claim has no reasonable prospect of success because the claimant was not employed by either respondent as an employee within the meaning of Section 230 of the Employment Rights Act 1996, nor as a worker as defined in Section 230(3) ERA 1996 nor in the extended provision of worker within the meaning of Section 43K ERA 1996. He drew to the Tribunal's attention the cases of **McTigue -v- University Hospitals NHS Foundation Trust 2016 IRLR 742**, **Day -v- Lewisham and Greenwich NHS Trust and Another 2017 IRLR 623, Sharpe -v- Bishop of Worcester 2015 IRLR 663 CA** and **Gilham -v- Ministry of Justice 2018 IRLR 315**. He also referred to **Secretary of State for Justice -v- Betts 2017 ICR 1130** and a first instance decision in another of the claimant's cases **Hoppe -v- NAO and others case number 2404018/17**

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18. For the claimant a written submission was also presented and attached to his email of 24 March 2019. He stated at page 2 "as I understand it such application is a matter of smoke and mirrors to focus on proving a point that neither Cabinet Office or Civil Service Commission were my employer and obtain dismissal. It is not disputed that neither Cabinet Office or Civil Service Commission were not my employers in the same way that the status of the respondents in 2400171/19 other than HMRC is not claimed to be that of an employer. But that does not mean as is indicated in the application to dismiss them from the cases that they are not appropriate respondents to answer for their actions or failure to act. The ET1 form clearly accommodates multiple respondents. As employee seeking redress is never likely to be seeking it from more than one employer in a single case brought. The relationship between the respondents is not of strangers, they are all part of the Civil Service or are contracted to provide services to the Civil Service. The application for disclosure of the nature and basis of the relationships between the respondents is required in order to understand the applicability of ERA 47B (1A)(b) which is why the dismissal of the applications for disclosure has been appealed. Further, in the instance of the Minister for the Civil Service the respondent has identified that the Minister holds a statutory legal responsibility for the Civil Service including the HMRC employer entity. Whilst the application was dismissed and is appealed, there is nothing stopping Employment Tribunal from responding positively to a further application made in this document at 3 below and order the disclosure by the respondents of the basis and nature of the working relationships and their roles in the execution of the actions required of an employer that are identified in the matters brought to the Tribunal in these cases. No further discussion should be required on this matter".

Consideration and Discussion

19. In his ET1 the claimant seeks to bring a public interest disclosure detriment claim or "whistleblowing" claim against the first respondent, the Cabinet Office and/or the Civil Service Commission, the second respondent.

20. In order to be eligible to bring such a claim the claimant must either be employed by or be a worker for either of the respondents. See S47B(1) " A worker

has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground he made a protected disclosure"

21. The definition of employee and worker is found elsewhere in the Employment Rights Act 1996. An employee in Section 230(1) of the Employment Rights Act 1996 means an individual who has entered into or works under (or where the employment has ceased worked) under a contract of employment. There is no dispute that the claimant never had a contract of employment with either Cabinet Office or the Civil Service Commission.

22. Section 230(3) states "a worker means an individual who has entered into or works under (or where the employment has ceased, worked under):

(a) A contract of employment or

(b) Any other contract whether express or implied and (if it is express) whether oral or in writing whereby the individual undertakes to do or perform personally any work or services for any other party to the contract whose status is not by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.

23. There is no dispute the claimant did not work as a worker for either the Cabinet Office or the Civil Service Commission.

24. The claimant himself confirms his own submission that he was not employed by either respondent. The claimant argues that "that does not mean that they are not appropriate respondents to answer for their actions or failures to act".

25. The claimant goes on to state "the relationship between the respondents is not one of strangers, they are all part of the Civil Service or are contracted to provide services to the Civil Service".

26. The claimant also relies on Section 47B(1)(A)(b) which says a worker has a right not to be subject to any detriment "by an agent of w's employer with the employer's authority". The claimant was an employee for HMRC. There is no evidence that either of the respondents is an agent of HMRC.

27. The Tribunal was taken to paragraph 3 of the response which explains the status of the Civil Service Commission: "the second respondent is a non-departmental public body and was established on a statutory basis under the Constitutional Reform and Governance Act 2010 "CRaGA." It is independent of government and the civil service. Its role is to regulate recruitment to the Civil Service, promote civil service values and hear complaints under the Civil Service code.

28. The statutory basis of the Civil Service Commission was produced for the Tribunal at page 134 to 155 with particular reference to pages 135 and 136 confirms "there is to be a body corporate called the Civil Service Commission "the Commission". The Act sets out that the Commission "has the role in relation to selections for appointment to the Civil Service" see paragraph 3 and that the

Commission has the role of "Management of the Civil Service", see paragraph 3 page 136.

29. So far as the first respondent is concerned it is a Ministerial Department which supports the Prime Minister and ensures the effective running of government.

30. Given that the claimant agrees he never worked for nor was employed by either of the respondents it is insufficient for him to simply state that because the ET1 form clearly accommodates multiple respondents and the relationship between the respondents is not of strangers, he is therefore entitled to bring a claim against them.

31. The height of the claimant's argument is that the Cabinet Office or Civil Service Commission is not a relationship of "strangers, they are all part of the Civil Service or contracted to provide services to the Civil Service". That is not sufficient to bring a claim in the Employment Tribunal for whistleblowing. As my colleague Employment Judge Ryan stated in another of the claimant's claims, a general proposition of a common employer is unsupported by any legislative vision or any other precedent

32. A claim for public interest disclosure detriment can be brought in the Employment Tribunal by an individual who is an employee or a worker within the meaning of Section 230(1) or 230(3) ERA 1996 of a respondent. The claimant is excluded because he was neither for the first or second respondent. Neither is there any evidence that either respondent was an agent of HMRC. Therefore s471A(b) is not engage either.

33. The only other possibility is the extended worker meaning within Section 43K of the Employment Rights Act 1996. The definition states:-

> (i) For the purposes of this part "worker includes an individual who is not a worker as defined by Section 230(3) but who:
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> (a) works or worked for a person in circumstances in which:
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> (i) he is or was introduced or supplied to do that work by a third party and
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> (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or both of them.
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> (b) Contracts or contracted with a person for the purposes of that person's business for the execution of work to be done in a place not under the control or management of that person and would fall within Section 230(3)(b) if for "personally", in that provision there were substituted "whether personally or otherwise"

and any reference to a worker's contract to employment or a worker being employed shall be construed accordingly".

34. I remind myself that this extended definition enabled an agency worker to bring a claim against an end user client, McTeague -v- University Hospital NHS Foundation Trust 2016 IRLR 742. Likewise, this extended definition permitted a Junior Doctor to bring, in principal, a complaint of detriment against a body with whom he had a training contract but who was not his employer.

35. However, the protection has limits. In **Sharp -v- The Bishop of Worcester 2015 IRLR 663** the Court of Appeal held that there must be a contract in existence for Section 43K(1)(a) to apply and in **Gillam -v- Ministry of Justice 2018 IRLR 315 CA** it was held a District Judge was an office holder and did not have a contract and accordingly was not a worker for the purposes of ERA 1996 Section 230(3).

36. I reminded myself of the policy behind the extended statutory provision at 43K. Lord Borrie, one of the sponsors of the legislation in Parliament observed during the second reading of the public interest disclosure bill that "recognising the importance of the issue, the Bill covers individuals such as trainees, home workers and professionals in the NHS who are not normally protected by an employment law" Hansard HL 11 May 1988 COL890.

37. I also reminded myself of the guidance in **McTigue -v- University Hospital Bristol NHS Foundation Trust** where the correct approach to identifying whether an individual is a worker within the meaning of Section 43K(1)(a) is set out. The first relevant question is for whom does or did the individual work. There is no dispute the claimant worked for HMRC. The case goes on to state if the individual was a worker defined by Section 230(3) ERA 1996 there is no need to rely on Section 43K for the purpose of the whistleblowing protection.

38. In this case the claimant was employed by HMRC. He agrees he was an employee of HMRC. He had no relationship of agency as governed by the case law with either of the respondents. He did not work for R1 or R2, neither R1 nor R2 introduce or supply the claimant to HMRC or to each other. Neither R1 nor R2 in any way substantially determined the terms on which the claimant worked for HMRC. There was no contract existing between the claimant and R1 or R2 of any kind. Accordingly, S43K is not applicable.

39. Finally, the claimant relies on an application for specific discovery which has been refused by EJ Franey as an argument that his claim should not be dismissed. This application for disclosure which was refused by Employment Judge Franey because: -

(a) The merits of the claim as pleaded will be assessed primarily on the basis of statement of case on each side without the Tribunal hearing evidence although the parties can make submissions and rely on any key

documents they wish to put forward. The time for disclosure of documents relevant to the issues in the case comes at a later stage.

(b) The documents sought do not appear directly relevant to the question of who employed the claimant. That is a matter to be determined primarily by reference to his employment documentation. The claimant has not established sufficient relevance to require disclosure of this preliminary stage.

40. See Order of Employment Judge Franey dated 8 February 2019 and sent to the parties 21 February 2019. The claimant appealed against that order, the appeal was rejected by Her Honour Judge Eadie QC on 19 March 2019.

41. I am not satisfied an application for discovery of documents which has been rejected as being not relevant to the issues the Tribunal has to determine is a matter the claimant can rely upon in showing that he was employed or a worker for either of the respondents or that section 47B(1)(A)(b) ERA 1996 applies.

42. The Tribunal finds the claimant is incorrect when he states: “the application for disclosure of the nature and basis of the relationships between the respondents is required in order to understand the applicability of 47B(1)(A)(b).”

43. The nature of the claimant’s employment relationship with the respondents is not in dispute. The claimant admits he was not employed by either of them. He accepts he did not work for either of them. Accordingly, there is no need for any disclosure of information about the relationship of bodies for whom he never worked and agrees he never worked.

44. Accordingly, I find that this is a case where there is no reasonable prospect of success because the claimant does not have jurisdiction to bring a claim against either of the respondents. The claim is therefore struck out.

45. There is no need for me to consider the deposit application or the time limit application because the claim is struck out.

Employment Judge Ross

Date 5 April 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 April 2019

FOR THE TRIBUNAL OFFICE

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