EMPLOYMENT TRIBUNALS

Claimant: **Mr D Tytarchuk**

Respondent: **Crossrail Limited**

Heard at: **East London Hearing Centre**

On: **7 August 2019**

Before: **Employment Judge John Crosfill**

Representation

Claimant: No Appearance or representation

Respondent: Mr Matthew Evans a Solicitor from Eversheds LLP

JUDGMENT

1. **The Claimant's claims for 'loss of wages' whether brought as a claim of unlawful deduction from wages contrary to Sections 13 and 23 of the Employment Rights Act 1996 and/or as a claim for wages brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 are struck out pursuant to rule 37(1) (a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.**

2. **As these were the only claims accepted by the tribunal the entirety of the claim is dismissed.**

REASONS

1. On 9 February 2019 the Claimant presented his ET1 tribunal. At section 8 when asked to identify the type and details of claim the Claimant indicated he was claiming unfair dismissal and that he was owed "other payments". He also indicated that he was claiming "loss of earnings and injury to feelings". The claimant's application was considered by

Employment Judge Gilbert who ordered that only the claim for loss of earnings should be accepted. It appears that the basis for that decision was that the Claimant did not profess to have two years of continuous employment with the respondent and therefore tribunal lacked jurisdiction to entertain any complaint of unfair dismissal. In addition, as no claim for discrimination or detriment was advanced by the Claimant there was no jurisdiction to make a general award for "injury to feelings".

2. The Claimant has appealed against the rejection of those parts of his claim to the Employment Appeal Tribunal. He has also sought a reconsideration of that decision. He was informed that the question of a reconsideration would be dealt with at a preliminary hearing. In his request for a reconsideration the Claimant makes no reference to any protected characteristic but does suggest that he was required to work through an umbrella company when others were not. He refers to that as unequal treatment.

3. On 4 April 2019 the Respondent filed its response to the claims and at the same time sought an order striking out the claims on the basis that they could not be maintained against the Respondent because there was no contractual relationship between the Respondent and the Claimant. In the light of that application a preliminary hearing which had been listed for 10 June 2019 was converted into an open preliminary hearing to consider whether the Claims that remained should be struck out or a deposit order made. Unfortunately, that hearing had to be postponed because of a lack of judicial resources. It was then relisted to be heard today 7 August 2019. By a letter dated 21 June 2019 the Claimant made written representations as to why his claims should not be struck out. I will deal with those representations below.

4. At 18:26 on 6 August 2019 the Claimant sent an email to the Employment Tribunal copied to the Respondent. He said: *'due to the continuous attempts by someone to kill me I had to leave the country and won't be able to attend the hearing".* This email was brought to my attention first thing in the morning and the tribunal clerk responded upon my instructions asking whether the Claimant wanted the hearing to proceed in his absence and asking whether he was returning to the United Kingdom or whether he sought to abandon his claim altogether. There was no response to that email. At the outset of the hearing I invited the Respondent to contact the Claimant on his mobile telephone to see what he wanted to do. In fact, unbeknown to me my clerk, of his own initiative, had done the same. The Respondent tried both by telephone and by Whatsap to contact the Claimant but was unable to get through. The Claimant's mobile telephone went straight to voicemail.

5. Mr Evans on behalf of the Respondent asked me to proceed with the hearing in the absence of the Claimant. He said the position was straightforward. I consider it more likely than not that the Claimant knew well before the evening prior to the hearing that he would be unable to attend. In his email he does not actually ask for a postponement. Even if I

should treat his email as an application to adjourn given the paucity of detail and the late timing of the application I would have refused it in any event. I agree with the Respondent that the question of whether the tribunal has jurisdiction to entertain a claim for loss of wages is straightforward. On balance I decided that it was in the interests of justice to proceed with the hearing.

6. In his ET1 the Claimant accepts that he worked through an umbrella company. The full picture that emerged from the documents was that the Respondent contracted with a recruitment company Logic Engagements Ltd for the provision of a Contract Administrator. Logic then engaged the Claimant through Brookson Solutions Limited (which it is common ground is what is commonly referred to as an umbrella company). The Claimant's complaint is that that arrangement meant that he paid more tax than he would have done had he been permitted to contract through what he describes as his own limited company. It is to be inferred, and it is not an attractive inference, that the Claimant's case is that would have been able to pay himself dividends rather than wages and thereby pay less income. That is the basis of his loss of 'wages' claim.

7. I do not consider Claimant is making any claim for wages as defined in section 27 of the Employment Rights Act 1996. He is claiming for losses occasioned by an insistence, as he puts it, that he contracted through an umbrella company. It is not possible to maintain that claim under Part II of the Employment Rights Act 1996.

8. I considered whether the claim might be maintained as a claim for breach of contract under the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994. To maintain such a claim it is necessary for a Claimant to establish that they are employed by the Respondent under a contract of service (an employment contract). It was not the Claimant's case that he was an employee. In his claim form he admits and relies upon the fact that he contracted through an umbrella company. The Respondent is entirely right to say that there was no contractual relationship between them. As such any claim under the Extension of Jurisdiction Order had no reasonable prospects of success and such a claim should be struck out.

9. In his written submissions dated 21 June 2019 the Claimant had, I find for the first time, raise the question of a claim under the Equality Act 2010. He said, and the Respondent accepts, that he could maintain a claim under the Equality Act 2010 on the basis that he was a "contract worker within the meaning of that expression as defined in Section 41 of the Equality Act 1997. The Claimant also sought to say that he was a worker for the purposes of Section 230 of the Employment Rights Act 1996 and referred to ***Pimlico Plumbers Limited v Smith*** **[2018] UKSC 29** in support of that. I consider that latter assertion has no reasonable prospects of success. It is clear that for any claim under legislation not founded upon EU rights to establish that a person is a worker it is necessary to show a contractual relationship see **Sharpe v The Bishop**

of Worcester [2015] EWCA Civ 399. Accordingly the only claim intimated that might possibly be levelled against the Respondent is one under the Equality Act 2010.

10. In his written submissions the Claimant for the first time refers to Section 9 of the Equality Act 2010, the protected characteristic of 'race'. He relied upon the following as acts of discrimination or harassment:

    a. Being asked to work through a umbrella company (therefore he says paying more tax) (said to be direct discrimination); and

    b. One employee saying to another 'even a monkey could do your job now'

    c. Referring to an employee called Mrinal as 'Urinal'; and

    d. Saying that the project manager would not employ anybody from Eastern Europe anymore.

11. I took the view that I should treat the Claimants written submissions as including an application to amend his claim form to include these new allegations of discrimination. The Respondent, through Matthew Evans resisted any application to amend on the basis that time limit for presenting any such claim had expired. He accepted that was a factor to take into account rather than being determinative.

12. I reminded myself of the principles set out in the leading case of ***Selkent Bos Co Limited v Moore*** **[1996] ICR 836**. It was clear to me that, by 21 June 2019 the time limit for presenting the amended claims had expired. The initial decision that the claimant should contract through an umbrella company had been taken prior to 29 August 2017. It was unclear when the other allegations of discrimination were said to have taken place.

13. Other than the complaint about working via an umbrella company the other new matters are not mentioned at all in the ET1 and they are entirely new claims. No explanation has been given as to why they could not have been raised earlier.

14. The Claimant had not indicated that he believed that his nationality had played any part in the decision to require him to work through an umbrella company in his ET1. He only suggested that any treatment of him, and in particular the termination of his contract, was because the Commercial Manager did not manage the contract properly and that his work was demonstrating this. Whilst it is generally impossible to assess the merits of a discrimination claim without hearing evidence I consider that I am entitled to regard the claims as weak principally because of the

fact that they were only advanced as claims of race discrimination when the question of jurisdiction was raised by the Tribunal. If there had been any evidence to support this then, at the time the ET1 was completed, it is very surprising that the Claimant neglected to tick the box referring to discrimination.

15. I recognise that refusing an amendment means that these claims will not be heard and that, assuming they have any merit, that would be prejudicial to the Claimant. I take into account that a significant part of the loss that is said to be suffered is the ability to avoid income tax. I consider it most unlikely that any such tax avoidance scheme would be lawful having regard to the position under IR35.

16. In all the circumstances, and on the assumption that the Claimant is seeking to amend his claim, I decline to permit any amendment to include the claims referred to in the Claimant's written submissions dated 21 June 2019.

17. It therefore follows that all of the claims presently advanced and included in the claim form have no reasonable prospects of success and that they should be struck out.

Employment Judge John Crosfill
Date 7 August 2019