



EMPLOYMENT TRIBUNALS

Claimant **Mr Klarens Simoni**

Represented by **In person**

Respondent **1. Cabaret Club (West End) Ltd**
2. Proud Publishing Ltd
3. Alexander Proud
4. The Strand Photography Gallery Limited

Represented by **1.& 2. Did not attend and were not represented**
3. Mr C Bilmes, General Manager Legal

Employment Judge Brown

Open Preliminary Hearing held on 27 July 2020 by CVP

JUDGMENT

- 1. The Strand Photography Gallery Limited is added as Fourth Respondent to the claims.**
- 2. At the time of his dismissal, the Claimant was employed by The Fourth Respondent, Strand Photography Gallery Limited, following a TUPE transfer from the Second Respondent.**
- 3. The claim against Alexander Proud, the Third Respondent, is struck out.**

REASONS

- 1. This Open Preliminary Hearing was conducted remotely by CVP videolink. Members of the public could attend, but none did.**
- 2. The Hearing was listed to decide the following issues:**

- a. The identity of the Claimant's employer;
 - b. Whether the claim against any of the Respondents should be struck out.
3. The Claimant brings claims of unfair dismissal, including automatically unfair dismissal on the grounds of protected disclosure under *s103A ERA 1996*, protected disclosure detriment under *s47B ERA 1996*, a redundancy payment, failure to pay holiday pay, failure to permit daily rest breaks under *reg 12 WTRs 1998* and unlawful deductions from wages and breach of contract, including failure to pay notice pay, pension contributions, tips, bonuses and NIC contributions. The Claimant further contends that he was only given one contract, at the outset of his employment, and that an uplift for unreasonable failure to comply with the ACAS Code of Practice on Disciplinary Procedures is appropriate in this case.
4. The Claimant originally brought his claim against the first 3 Respondents. The First and Second Respondents are in creditors' voluntary liquidation.
5. At this hearing, the Third Respondent, who was represented by Mr Bilmes, contended in his skeleton argument that the Claimant was employed by The Strand Photography Gallery Limited. The Third Respondent said that The Strand Photography Gallery was the correct respondent to the claims. It was not in dispute that the Claimant was paid by The Strand Photography Gallery Limited for his work in January 2020 and that the Claimant's last 2 payslips, dated 21 February 2020 and 26 March 2020, showed The Strand Photography Gallery Limited as the employer. It was also not in dispute that the Claimant's P60 for 2019 – 2020 gave the employer's name and address as The Strand Photography Gallery Limited.
6. I asked the Claimant whether he wanted to add The Strand Photography Gallery Limited as a Respondent, given that the Third Respondent was now saying that The Strand Photography Gallery Limited was the correct respondent. The Claimant said that he did. Mr Bilmes did not object to me adding The Strand Photography Gallery Limited as Fourth Respondent.
7. I added The Strand Photography Gallery Limited as Fourth Respondent because it appeared to me that The Strand Photography Gallery Limited could be his employer and could therefore be liable for a remedy in the claims. Under *rule 34 ET Rules of Procedure 2013* the Tribunal has power, on its own initiative, or on the application of a party to add any person as a party, by way of substitution or otherwise, if it appears that there are

issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings. The power to add a party applies at any stage of the proceedings. A Tribunal can join another Respondent to an existing claim even after the time limit for bringing a fresh claim against that Respondent has expired – *Drinkwater Sabey Ltd v Burnett* [1995] ICR 328, EAT.

8. The Claimant gave evidence to the Tribunal. He was cross examined by Mr Bilmes on behalf of the Third Respondent.
9. Mr Proud did not give evidence.
10. Mr Bilmes told me, and the Claimant did not dispute, that the Second Respondent had gone into insolvency on 27 February 2020.
11. Mr Bilmes told me that Mr Bilmes is employed by both the Third Respondent, Mr Proud, and the Fourth Respondent, The Strand Photography Gallery. Mr Bilmes, on behalf of the Third Respondent, told me that the Claimant had been paid by The Strand Photography Gallery on 21 February 2020, before the Second Respondent became insolvent, and that the Claimant's employment had transferred from the Second Respondent to the Fourth Respondent between 11 January 2020 and 10 February 2020. Mr Bilmes, on behalf of Mr Proud, told me that the Fourth Respondent is a solvent company and that the Claimant had transferred to it before the Claimant's employment ended. He told me that Mr Proud is the sole owner of the Fourth Respondent and that Mr Bilmes, on behalf of Mr Proud, appreciated the implications of conceding that the Claimant TUPE transferred to the Fourth Respondent.
12. The Claimant and Mr Bilmes both made submissions.

Findings of Fact

13. The Claimant was employed by all, some, or one, of the Respondents from 3 May 2019 until 7 February 2020.
14. The Claimant commenced employment with the First Respondent (Cabaret Club (West End) Ltd) as a waiter at its premises in 8 Victoria Embankment, London WC2R 2AB, pursuant to a contract of employment dated 13 May 2019.
15. An HMRC record "Income received to date", in respect of the Claimant, records that the Claimant was paid by the First Respondent until 15 July 2019. The record says, "This employer

told us how much you were paid to 15 July 2019 when your employment with them ended.

16. An HMRC record "Check Your Income Tax" records that the Claimant received £1,729.32 from his employment by Cabaret Club West End Limited, £3,278.82 from his employment by Proud Publishing Limited and £47.49 from his employment by The Strand Photography Gallery Limited in the Tax Year 2019 – 2020.
17. The Claimant produced his payslips, which showed that he was last paid by the Second Respondent, Proud Publishing Limited, from 15 July 2019 until a payslip dated 24 January 2020. He was paid for the period 11 January 2020 – 10 February 2020 by The Strand Photography Gallery.
18. The Claimant told me, and I accepted, that he had done the relevant work in January 2020, for which he was paid on 21 February 2020 by The Strand Photography Gallery.
19. In his claim form, the Claimant said that he was dismissed by his manager Angela Altini ("AA") on 7 February 2020; the claim form stated, "[The Claimant's] employment was terminated with immediate effect by way of telephone call at 18.16 on 7/02/2020 and subsequently notified in writing via text message communication (WhatsApp Message) at 19.24 by AA."
20. The Claimant confirmed, in evidence, that Angela Altini dismissed him.
21. Mr Bilmes asked the Claimant what detriments he relied in his claim. The Claimant replied that he relied on not being given shifts. He said that he believed that Angela Altini, and assistant manager, Sandra Agajeva, drew up the rotas, along with other managers. He did not say that Mr Proud drew up the rotas. The Claimant also said that he was subjected to a detriment by Sandra Agajeva, when she criticised him for having made a protected disclosure.
22. The Claimant said in his witness statement, and I accepted, that his personal interactions with Mr Proud had been minimal and cordial.
23. The Claimant also said of Mr Proud, "I have been employed by his companies, albeit it was until later I discovered that I had been employed by three different companies in just a matter of nine months."
24. The Claimant told me, and I accepted, that Mr Proud was the director and major shareholder of all the company respondents in this claim.

Relevant Law

25. By 47B Employment Rights Act 1996

“(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 that the worker has made a protected disclosure.

[(1A) A worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.”

26. An Employment Judge has power to strike out a claim on the ground that it has no reasonable prospect of success under *Employment Tribunal Rules of Procedure 2013, Rule 37*. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, *Teeside Public Transport Company Limited (T/a Travel Dundee) v Riley* [2012] CSIH 46, at 30 and *Balls v Downham Market High School & College* [2011] IRLR 217 EAT. In that case Lady Smith said: “The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word ‘no’ because it shows that the test is not whether the Claimant’s claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral recollections regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect”.

27. A case should not be struck out on the grounds of having no reasonable prospect of success where there are relevant issues of fact to be determined, *A v B* [2011] EWCA Civ 1378, *North Glamorgan NHS Trust v Ezsias*, [2007] ICR 1126 ; *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] CSIH 46.

28. In *Antuzis v DJ Houghton Catching Services Ltd* [2019] IRLR 629 the QBD considered claims for breaches of express or implied terms of the claimants' employment contracts by reason of unpaid wages, unlawful deductions and fees, and lack of holiday pay. The claims for breaches of contract included any related claims under statute or statutory instrument. It considered a preliminary issue about whether the defendant directors could be personally, jointly

and/or severally liable to the claimants for the company's alleged breaches. The QBD held that the defendant directors of a company were liable for inducing breaches of contract by that company. In doing so, the QBD applied the rule in *Said v Butt* [1920] All ER Rep 232 that a director of a company would not be liable for inducing breach of contract by that company if he/she had been acting bona fide within the scope of his authority, (see [9], [111]-[113] of the judgment. It was the officer's conduct and intention in relation to his duties towards the company - not towards the third party - that provided the focus of the 'bona fide' enquiry to be undertaken pursuant to the rule in *Said v Butt*.

Discussion and Decision

29. The Claimant told me that he believed that failures to pay employer pension contributions, bonuses, NICs – A and transfers of employee contracts cannot be authorised by managerial or administrative staff.
30. He said that the Third Respondent could be liable for the claims in the same way as the directors in *Antuzis v DJ Houghton Catching Services Ltd* [2019] IRLR 629.
31. On the facts, I accepted Mr Bilmes contentions that the Claimant's employment TUPE transferred to The Strand Photography Gallery before the Claimant's dismissal in February 2020.
32. The Strand Photography Gallery had paid the Claimant for the work he carried out in January 2020 and was shown on records from HMRC as the Claimant's last employer in 2020.
33. The Claimant's P60 for 2019/2020 also showed The Strand Photography Gallery as the Claimant's employer, not the First or Second Respondent.
34. The Claimant did not contradict this conclusion. In his statement, he said that he had now discovered that he had been employed by 3 different companies in 9 months. The last of these, on the uncontested facts, was The Strand Photography Gallery.
35. I then considered whether the Third Respondent could also be a Respondent to the claim. It was not in dispute that the Third Respondent is a director of the Fourth Respondent.
36. By 47B Employment Rights Act 1996
“(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 that the worker has made a protected disclosure.

[(1A) A worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
(a) by another worker of W's employer in the course of that other worker's employment, or
(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

37. The Claimant did not contend that this case came within the extended meaning of “worker” and “employer” under *s43K ERA 1996*. On the facts of this case, that section did not appear applicable in any event.

38. I considered whether, on the facts alleged by the Claimant, the Third Respondent might be liable as “another worker” or an “agent” of the employer. On the facts in this case, however, the Claimant did not allege that Mr Proud had taken any of the decisions which were said to amount to detriments. The Claimant did not allege that Mr Proud decided on rotas, or that Mr Proud had criticised the Claimant for making protected disclosures. There was no basis for a finding that Mr Proud had done any of the relevant detrimental acts.

39. I considered whether Mr Proud might be liable for inducing a breach of contract. I concluded that a claim for inducing breach of contract did not come within the jurisdiction of the Employment Tribunal, but of the High Court. The Employment Tribunal has statutory jurisdiction conferred upon it by particular statutes. It does not have jurisdiction to decide disputes concerning directors’ duties to companies, which would be the foundation of a claim for inducing breach of contract.

40. I therefore concluded that, on the facts alleged by the Claimant, there was no claim which had a reasonable prospect of success against Mr Proud. The Claimant’s claims are properly brought against his employer, the Fourth Respondent.

41. I struck out the claims against Mr Proud the Third Respondent.

42. I did not strike out the claims against the First and Second Respondents. They did not appear at this hearing and made no submissions about striking out claims against them. In addition, in the Claimant’s skeleton argument, he said that he wished to amend his claim to add a claim for failure to inform and consult on a TUPE transfer. As the Fourth Respondent had not yet been served with the proceedings, I considered that it was not appropriate to decide that application at today’s hearing. I said that the Claimant should set out his amendment application in writing and that the Fourth Respondent should have an opportunity to respond to it. However, because the transferee can be jointly and severally liable for a claim of failure to inform and consult under TUPE, I considered that it was

not appropriate to strike out the claims against the First and Second Respondents at this stage. It might not be fair to the Fourth Respondent to remove the First and Second Respondents, which might have relevant evidence to give on a TUPE 2006 failure to inform and consult claim.

Employment Judge Brown

London Central 27 July 2020

Date sent to parties-29/7/20

For the Tribunal Office
