EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Ajram	**v**	**TMD Management Limited**

Heard at: Watford **On**: 9 April 2020
Before: Employment Judge Bedeau

Appearances
For the Claimant: Mr P Wareing, Counsel – written submissions
For the Respondent: Mr C Brazier, Solicitor – written submissions

JUDGMENT

1. The tribunal does not have jurisdiction to hear and determine the claims against the respondent as it was dissolved on 28 November 2017.

2. The tribunal does not have jurisdiction to hear and determine the claims against the TMD Technologies Ltd.

REASONS

1. By a claim form presented to the tribunal on 19 July 2019, the claimant who worked as a Chauffeur, claims unfair dismissal; notice pay; holiday pay; unauthorised deductions from wages; and personal injury having suffered depression and bipolar.

2. In the response presented to the tribunal on 16 September 2019, it is averred that the tribunal does not have jurisdiction to hear and determine any of the claims against the respondent as it had been dissolved. The response was presented on behalf of TMD Technologies Ltd, a company that had contracted with the claimant on several separate occasions for him to provide services as a Chauffeur. It avers that the claimant was not an employee but a self-employed independent contractor. Accordingly, the tribunal does not have jurisdiction to hear and determine the claims. He was never engaged by the respondent and resigned without notice on 24 April 2019. From 1995 to the date of his termination of the contract, he was self-employed working for TMD Technologies Ltd.

3. On 20 August 2019, the case was listed for a preliminary hearing, in private. On an application by the respondent's representatives, on 1 December

2019, Employment Judge Loy, converted the preliminary hearing to a preliminary hearing in public to be heard today, 9 April 2020.

The issue

4. Employment Judge Lewis ruled that the issue for me to hear and determine is whether the tribunal has jurisdiction to hear and determine the claims against the respondent, TMD Management Limited, as it had been dissolved on 28 November 2017?

Written submissions

5. I did not hear any evidence. The parties agreed that the matter can be dealt with by written submissions which I received from Mr Wareing, Counsel on behalf of the claimant, and from Mr Brazier, Solicitor on behalf of the respondent in these proceedings and TMD Technologies Ltd. In addition, on behalf of the respondent, I was sent a bundle of documents comprising of 89 pages.

6. It is not disputed that the respondent was dissolved on 28 November 2017. From the documents in the bundle it would appear that the claimant had contracted with TMD Technologies Ltd on numerous occasions up until 24 April 2019, when he terminated the agreement or as he asserts, was dismissed from his position as a Chauffeur.

7. He notified ACAS on 6 June 2019 and an early conciliation certificate was issued on 13 June 219, R165389/19/61. He also notified ACAS in respect of TMD Technologies Ltd on 6 June 2019 and a certificate was issued on 13 June 2019, R165375/19/90. It must be assumed from this that he had in mind issuing proceedings against both companies. However, proceedings were only issued against the respondent and not against TD Technologies Ltd. On the claim form the claimant put Mr Wareing, his Counsel, as his legal representative. It was not clear to me why TMD Technologies Ltd was not named as another respondent. This matter was not addressed in Mr Wareing's written submissions. Also, not addressed by Mr Wareing is an application to add TD Technologies Ltd.

8. Mr Brazier submits that I should be reluctant to substitute TMD Technologies Ltd of my own volition because that would involve not having the correct ACAS conciliation number on the claim form. The early conciliation number relates to the respondent and not TMD Technologies Ltd. To adopt that approach would go against the judgment of the Employment Appeal Tribunal in the case of E.ON v Caspall [2020] ICR 552, EAT. In that case, Her Honour Judge Eady QC, as she then was, ruled that the tribunal cannot apply Rule 29, power to amend, to cure a defective claim form that has the wrong early conciliation number put in by the claimant's solicitors. The requirements of Rule 12 do not go away.

9. Further, Mr Brazier submitted, Rule 34 requires the tribunal to exercise its discretion but in this case the claimant had been legally represented for some time and no attempt had been made to apply to substitute TMD Technologies Ltd in place of the respondent. The tribunal should refuse to exercise its discretion in the claimant's favour.

10. Furthermore, as the respondent was dissolved on 28 November 2017, the claimant had three months plus the extension due to conciliation, to present his claim form and failed to do so. No explanation had been given for the failure.

11. Mr Wareing submitted that the tribunal should consider striking out the respondent's defence as it had been presented out of time. The claim form was presented on 19 July 2019. The respondent had 28 days within which to send its response under Rule 16(1). It was presented on 16 September 2019 and should have been rejected under Rules 18 and 21. A judgment should have been issued under Rule 21 as the response was not presented in time.

12. It does not appear that notice was given by Mr Wareing to the respondent's representatives that this argument would be raised in his submissions. I, therefore, did not have Mr Brazier's response to it. It would be unfair and unjust to rule on this point.

13. Mr Wareing further submitted that TMD Technologies Limited by presenting a response, became, in his words, "subrogated to the claim by the very fact that it filed a response to it." That there had been a calculated attempt to confuse the claimant as to the identity of his employer given that the letter he was provided with confirming his dismissal from his role as Chauffeur, was written on the headed paper of the respondent. There was no indication that it was done on behalf of TMD Technologies Ltd. For that reason, there was no need for an application for permission to amend the claim form as the name of his employer was on the letter confirming his dismissal, namely TMD Management Ltd.

14. In paragraph 18 of Mr Wareing's written submissions, he wrote the following:

> "On any premise, whether that means adjusting the name of the stated respondent or taking any other form of procedural step to variation of the claim, this claim should continue to the full merits hearing if the tribunal is satisfied that the respondent's name should be amended to TD Technologies because, either:
>
> (a) The respondents have voluntarily adopted the status of respondent to the claim by filing a response to it – or
>
> (b) (the respondents tried deliberately to mislead the claimant as to the identity of his employer, so as to create this difficulty or a similar one, should he choose to try to pursue a claim for unfair dismissal."

The law

15. Schedule 1, Rule 8(2) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states:

> "(2) A claim form may be presented in England and Wales if –
>
> (a) The respondent, or one of the respondents, resides or carries on business in England and Wales."

16. This rule clearly requires a respondent to be resident or carries on business in England and wales. It cannot apply to a company that is dissolved as it no longer resides or carries on business in England and Wales. It does not exist as a legal entity

17. Rule 12 provides for the rejection of a claim form in specific circumstances but can be accepted if the claimant made a minor error, Rule 12(2A).

18. Rule 34 provides:

> "34 The tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, 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 proceedings; and may remove any party apparently wrongly included."

19. In the case of Drake International Systems Limited v Blue Arrow Limited, UK EAT/282/15, (2016) ICR 445, Blue Arrow, the transferee of a business, wanted to make a claim under TUPE Regulations 11 and 12 against the transferor but it was uncertain as to the identity of the latter as there were several related companies. It presented an early conciliation notification form to ACAS citing the parent company as the prospective respondent, and an early conciliation certificate was issued. It then issued a claim against the parent company and, in its response, the parent company denied that it was the proper respondent and gave the names of four of its subsidiary companies as the transferors of the business. The tribunal then, on application by the claimant, exercised its discretion to substitute those four subsidiaries for the parent company under Rule 34. The question on appeal was whether the claimant should have gone through the early conciliation process with each of the subsidiaries as a pre-condition to the tribunal having jurisdiction to decide the claim. Langstaff J held that there was no such requirement. He rejected an argument that the power of the tribunal under Rule 34 was restricted by the introduction of the early conciliation provisions so that no new respondent could be added or substituted unless the claimant first embark on the early conciliation process in relation to it. He held that there is nothing in Rule 34 that is inconsistent with the early conciliation rules, as the early conciliation rules only apply to the pre-claim stage of litigation.

20. In that case it was ruled that the Judge has to clearly set out the basis for exercising his or her discretion by allowing the substitution of a respondent.

21. In the Presidential Guidance on General Case Management, paragraph 16, it sets out the circumstances in which a party may be added or removed from proceedings. Paragraph 16.1 states the following:

> "Where the claimant does not know, possibly by reason of a business transfer situation, who is the correct employer to be made respondent to the claim."

22. Paragraph 18 states that the application to add a party must be made promptly.

23. In exercising the discretion whether to add or substitute a party, the application should be treated like an application to amend, adopting the approach in the case of Cocking v Sandhurst (Stationers) Ltd, approved in the case of Drinkwater Sabey Ltd v Burnett and another [1995] ICR 328, judgment of the EAT. The tribunal must have regard to all the circumstances of the case and should not be restricted to out of time provisions. The tribunal can take into account whether or not there was a genuine mistake in believing the respondent was the correct respondent and to consider the issue of prejudice.

Conclusion

24. The claimant has not made a formal application to substitute TMD Technologies Ltd in place of the respondent and not separate proceedings have been issued against it. I have no information as to why TMD Management Ltd is the respondent save for a letter given to the claimant, according to Mr Wareing, on its headed note paper. The claimant had access to legal advice at all times after the presentation of his claim form, yet no application had been made to substitute TMD Technologies Ltd. The claimant was aware of the issue when the respondent presented its response on 16 September 2019, but no application to substitute was made or issue a claim against TMD Technologies Ltd.

25. It is the claimant's position that there is no need to apply to substitute as the dismissal letter was written on the respondent's headed notepaper designed to confuse the claimant. This argument has little credence because the claimant had two certificates from ACAS, one in relation to the respondent and the other in relation to TMD Technologies Limited.

26. I was not persuaded that it is in the interests of justice to exercise my discretion and substitute TMD Technologies Ltd in place of the respondent.

27. Accordingly, the tribunal does not have any jurisdiction to hear and determine claims against the respondent as that company is not a legal entity, having been dissolved on 28 November 207. The claims are, therefore, struck out.

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Employment Judge Bedeau

Date: ……31 July 20……..

Sent to the parties on: 28 September 20

For the Tribunal Office