EMPLOYMENT TRIBUNALS

Claimant: Mr John Juniper

Respondents: (1) Stripe 21 Ltd (in voluntary liquidation)
(2) Stripe 21 Group Ltd
(3) Mr Stephen P North
(4) ISDNTOVOIP Ltd (formerly Stripe 21 VN Ltd; in voluntary liquidation)

Heard at: Croydon Employment Tribunal **On: 11 November 2020**

Before: Employment Judge Michell (sitting alone)

Appearances

For the claimant:	In person
For the first respondent:	Mr Stephen North (company director, with consent of the liquidator)
For the second respondent:	Ms Patricia Hall (consultant)
For the third respondent:	In person
For the fourth respondent:	No appearance or representation

WRITTEN REASONS

1. I gave oral judgment in this case on 11 November. Following promulgation of my written judgment, I have received a request from the claimant for written reasons within the 14 day period for which r.62(3) of Sch. 1 to the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 ("the ET Regs") provides.

Background

2. The claimant worked as a field engineer from 26.11.07 until his summary dismissal for alleged misconduct on 28.9.18 ("EDT"). His claim was presented to the tribunal on 21.1.19. It was initially brought only against Stripe 21 Ltd ("R1"). On 11.6.19, judgment was entered against R1 under r.21 of Sch. 1 to the ET

Regs. On 18.9.19, Stripe 21 Group Ltd ("R2") and Mr North ("R3") were added as parties. On 8.6.20, EJ Simon Cheetham QC made various directions for a hearing to determine whether R1 or R4 was the claimant's employer at the EDT. He also added ISDNTOVOIP Ltd ("R4") as a respondent. He observed (in my view, correctly) that "there is no apparent basis upon which either [R2 or R3] could have been the claimant's employer", and that the real candidates were R1 or R4. On that occasion, and before me, the claimant did not seek to assert to the contrary.

3. EJ Cheetham QC observed that it was unlikely R1 or R4 had the assets to satisfy any judgment. (I do not understand that gloomy picture to have changed since 8.6.20.) He also made clear that, notwithstanding the r.21 judgment, R1 could participate in relation to the hearing to determine the identity of the claimant's employer at the material time, as well as regards remedy if appropriate.

11.11.20 Hearing & Issues

4. The 11.11.20 hearing was remote, by CVP. The parties did not object to that course being taken. A face to face hearing was not held because it was not practicable and the issues could be determined in a remote hearing.

5. I heard evidence from the claimant and from R3 (for himself and with the permission of the liquidator on behalf of R1). I heard oral argument from the claimant, from R3 (for himself and on behalf of R1), and from Ms Hall on behalf of R2. I was referred in evidence and during submissions to a bundle of about 200 pages.

6. The claimant confirmed that he only pursued a claim in relation to 'ordinary' unfair dismissal, wrongful dismissal, unlawful deduction of wages, and direct age discrimination. He clarified his age discrimination claim was solely in relation to a comment made to him in August 2018. He agreed that it was appropriate to vary the 11.6.19 judgment so as to allow R1 to defend (just) the age discrimination claim. He argued his employer at all material times had been R1 rather than R4.

Factual findings and conclusions

R2

7. Having heard submissions from the claimant and Ms Hall, I found that there was no reasonable basis to continue a claim against R2, and I dismissed it for that reason. This was because R2 was not incorporated as an entity until post-EDT. (The claimant was concerned that, for "remedy purposes", he might lose something if the claim against R2 was dismissed. Hence he did not voluntarily withdraw that claim. However, I did not consider the mere fact R2 might have been better able to satisfy a judgment than R1 or R4 – both of which were in voluntary liquidation- of itself gave any reasonable basis for the claim against R2 to continue.)

Identity of employer

8. It was common ground that the claimant had been employed from 26.1.07 by TSI Group Ltd, and that he had transferred to R4 -of which R3 was the owner, and which itself owed R1- by operation of the TUPE Regulations 2006 in February 2015. In February 2017, a winding up petition was presented against R4, which was and remained in financial difficulties. The contentious issue was whether or not the claimant had transferred to R1 (of which R3 was also a director) at about that time.

9. Having heard from the claimant, R3 and Ms Hall, I determined that R1 was the claimant's employer at the appropriate time. This was because:
    a. I accepted the claimant's evidence that in or around February 2017:
        i. some or all of R4's staff (including the claimant) were told they were immediately transferring to R1, who would be their employer; and
        ii. customers of R4 were sent letters explaining that their business had transferred to R1, and that R1 would deal with matters going forward. (The claimant had sought disclosure of those letters from R1/the liquidator, without substantive response.)
    b. The limited number of claimant's payslips which were in the bundle (relating to his last few months of employment in 2018) were in the name of R1. I accepted the claimant's oral evidence that from about February or March 2017, R1 paid his wage, and issued him with wages slips showing

as much. (R1, R3 and R4 did not produce any paperwork to contradict this evidence. R3 was also unable to explain why R1 rather than R4 issued the wages slips and 'paid the bills'. R3 said this was an 'HR matter'.)

c. Letters concerning the 2018 disciplinary and grievance process in relation to the claimant were sent on R1's headed note paper, rather than on R4's note paper, despite the fact that R4 had its own stationary.

d. The claimant's P45 states that R1 was his employer. (This, and the previous evidence I have set out above, was not definitive of the issue. But it was a material part of the whole picture.)

10. After I had made my findings as to the identity of the appropriate employer, the claimant agreed that his claims against R3 and R4 could be dismissed upon his withdrawal of them. I therefore dismissed them.

Age discrimination claim

11. I heard evidence about the alleged discriminatory comment. The claimant explained that during the disciplinary process leading to his dismissal, on 16.8.18 he had been questioned about his allegedly slow performance in actioning a works ticket "a couple of months before". The claimant complained that R1 had been more lenient to a younger employee ("GL") in 2018 in relation to the same kind of issue. (The claimant was 42 years old at the time, whereas GL was 22 years old. According to the documents generated during the grievance process, the claimant was in third youngest of the approximately 8 members of staff.) The claimant had asked why this was so. He alleged he was told in answer that GL "is a young and junior member of staff".

12. R3 explained (and I accepted) there had been a few previous occasions when the claimant had been asked to 'buck up' his performance. Moreover, R3 said (and I accepted) that GL was "a new recruit still on probation", whereas the claimant had over 11 years' experience. GL was in a much more junior role, and was much less well paid, than the claimant. I therefore accepted R3's evidence that "it was reasonable to expect a higher level of performance" from the claimant and that expectation levels in relation to GL were understandably lower, because he was at the start of his career. I accepted that different levels of expectation

based on those factors was the context in which any such remark was made, and that this (rather than the claimant's/GL's age *per se*) the reason for any such comment I found the remark -and picking the claimant up on his allegedly slow performance- did not amount to less favourable treatment on grounds of age.

13. In any event, the claim was presented to the tribunal on 21.1.19 following completion of the Early Conciliation process for which 'Day A' was 23.11.8 and 'Day B' was 23.12.18. The age discrimination was therefore out of time -in the light of s.123(1)(a) of the Equality Act 2019 and because more than 3 months passed between 16.8.18 and Day A. The claimant did not advance any reason as to why it was just and equitable to extend time in his case. The tribunal therefore did not in fact have jurisdiction to consider the age discrimination claim. For that reason alone, the claim had to fail.

Unlawful deductions claim

14. The claimant asserted at he had not been paid for being put on the 'out of hours' ("OOH") rota. He said he ought to have been paid £175pcm from 28.9.16 for this.

15. However, I accepted R3's evidence to the effect that:
    a. the claimant was already paid for overtime;
    b. the increase in salary the claimant received when he transferred to R4 was on the basis that he would be available from time to time to do the OOH rota;
    c. the claimant agreed to take OOH calls because it gave him "first refusal on any resulting overtime";
    d. the amount of time the claimant was needed to carry out OOH calls was minimal, and "there was no tangible additional workload" on which to base any 'on call' payment; and
    e. no additional on call payment was "requested, discussed or agreed" with the claimant.

    Thus I rejected the claimant's unlawful deductions claim.

Unfair/wrongful dismissal claim

16. Judgment having already been entered, I needed to determine remedy in respect of the unfair and wrongful dismissal claims As to this:
    a. The claimant was out of work from the EDT until 2.11.18 (5 weeks), when he found (at least) equally well-paid work on a temporary basis. He was then out of work from 5.2.20 until 14.9.20, when he again found (at least) equally well-paid work under a 12 month temporary contract.
    b. R3 told me and I accepted as follows:
        i. R1's business had shrunk very significantly in the last few years. Its turnover had halved from 2015, when it had 15 staff. By 2017, it had about 12 staff. In 2018, it lost much of its client base to the same competitor. Thus during 2018, staff numbers dropped to less than 10, and by 2019 to about 6. By the time of the hearing, R1 had only 3 full time staff.
        ii. The need for the systems in which the claimant was an expert had "reduced dramatically", as a result of clients 'virtualising' in the Cloud. As a result, R1 no longer had any virtual systems, their last customer having cancelled in December 2019.
        iii. The above matters had a significant impact on whether or not, but for his dismissal, the claimant would by 2020 have been in any event still employed by R1. The chances were "5%, at best".

17. Applying these facts, and a broad brush approach I awarded the claimant his 'full' losses (salary and car allowance) for the initial 5 week period. As that period overlapped with the 1 month's 'lost' notice period, I did not make a separate award in respect of the wrongful dismissal claim. I then awarded the claimant a further 5% of such 'full' losses for the period 5.2.20 to 14.9.20. I considered that any claim for loss beyond that latter date would be too speculative to be appropriate.

18. The claimant was also entitled to and was awarded the appropriate basic award and compensation for loss of statutory rights.

Employment Judge Michell

2 December 2020