EMPLOYMENT TRIBUNALS

Claimant: **Mr Nikolay Avramov**

Respondent: **(1) BAM Construct UK Limited**
(2) Silver Blaze Limited Trading as Silver Blaze

Heard at: **Watford Hearing Centre (by cloud video platform)**

On: **21 October 2021**

Before: **Employment Judge G Tobin**

Representation
Claimant: In person
Respondent: (1) Ms C Meenan (counsel)
(2) Mr D Sheppard (solicitor)

JUDGMENT AND SUMMARY OF PRELIMINARY HEARING (OPEN)

The Judgment of the Tribunal is that the claimant's claims or allegations as follows have little reasonable prospect of success and are subject to a deposit order of £400.00 each:

1. **The allegation that the first respondent automatically unfairly dismissed the claimant in breach of regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006;**

2. **The allegation that the first respondent failed in its duty to inform and consult representatives in breach of regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006;**

3. **The allegation that the second respondent failed in its duty to inform and consult representatives in breach of regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.**

REASONS

This has been a remote hearing which has been agreed to by the parties. The form of remote hearing was by a video hearing through HM Courts & Tribunal Service Cloud Video Platform. The parties were remote and only the Judge was present at the Hearing Centre. A face-to-face hearing was not held because of the coronavirus pandemic and the ensuing Government restrictions. The relevant matters could be determined in a remote hearing.

The hearing

1 This Preliminary Hearing (Open) was ordered by Employment Judge Lewis on 21 June 2021. The issues to be decided were as follows:

> *To consider if any claim be struck out, or made subject to a deposit order on grounds of hearing [sic] little or no prospects of success. Case manage the hearing.*

2 The first thing yesterday morning, the claimant's solicitor informed the Tribunal that he no longer represented the claimant in this matter. I am not clear when the first respondent provided the 64-page Preliminary Hearing Bundle to the claimant, but this appears before the second respondent served his skeleton argument on all parties, including the Tribunal, early lunchtime yesterday, the lateness of which troubled me. The hearing was slightly delayed because the first respondent served some additional documents and a draft list of issues even later at the end of yesterday afternoon (I received my version just before 10am this morning). I note that there were no orders breached, but both respondents are professionally represented and the provision of important documents to an unrepresented party so late before an important hearing is not acceptable behaviour from either respondent representative, but especially from the first respondent. The Tribunal expects the disclosure of documents and/or submissions in a timely manner, particularly when a claimant is self-representing. The first respondent draft list of issues was perfunctory and the claimant said that he had not had time to engage with this important document.

3 At the hearing, I expressed my concern about this conduct emanating from both respondent's representatives, which I now record for future reference. The respondents are dealing with a self-representing litigant and principles of fairness establish that he should not be taken by surprise by any late disclosure. As well as being discourteous, this could preclude a fair hearing. I warn both respondents not to repeat this behaviour. Do not disclose material at the last minute (metaphorically). Late disclosure means the Tribunal has to assess whether a self-represented litigant has been placed in a position that might preclude a fair hearing. These additional enquiries are time-consuming. Both the default and the Tribunal's inevitable response is unsettling for an individual not used to legal proceedings. The Tribunal may take strong action against both respondents and/or their representatives if this re-occurs.

4 The claimant said that he has read the initial Preliminary Hearing Bundle and I note that most of these documents should be familiar to him. He did not contend that he had been placed at a significant disadvantage by the second respondent's late

submissions and he made no application for an adjournment. However, the claimant said he had not had time to properly consider the implications of the additional documents and I note that one of these 5 documents is a 2009 contract apparently signed by him. There are documents in the additional bundle that he may not have seen.

5 I did not permit consideration of the additional documents, which were served very late on an unrepresented party. I also determined that I would not consider striking out the claimant's claim today because there was a material change in circumstances from the order of Judge Lewis (the late withdrawal of the claimant professional representative followed by the respondent's late provision of documents/submissions). The claimant did not object to my proposal to deal with the deposit order. The claimant argued his position forcefully and I took some considerable time in going through the relevant factual and legal questions and I explained the appropriate legal tests. I determined that I could ensure a fair hearing for the claimant. Not hearing the strike out issue, was a proportionate response, pursuant to the overriding objective of rule 2, so that, on balance, I could deal with key issues and make some progress with the case.

6 At the start of proceedings, I confirmed that everyone had the same documents, i.e. the 64-page Preliminary Hearing Bundle and the second respondent's submissions. I confirmed that I had received the hearing bundle the day before and (unusually) I had time to read through the hearing bundle in advance of this hearing, so I was familiar with most of the documents. I also read the second respondent's submission and confirmed with the parties that there were no other written submissions, or documents from the claimant, outstanding.

Clarification of proceedings

7 At the outset the claimant confirmed that he made the following claims:

i. Ordinary unfair dismissal in respect of his unfair redundancy dismissal

ii. A claim for a redundancy payment

iii. Direct race discrimination in respect of his selection for redundancy

iv. Automatic unfair dismissal in terms of his selection for redundancy for a TUPE reason (and the claimant contends that there was no economic, technical or organisational reason to justify his dismissal).

v. Protective award because the redundancy situation affected approximately 150 members of staff.

vi. Failure to inform and consult representatives in respect of TUPE.

8 Both of the respondent's representatives confirmed that there were no time limit issues in respect of any of these claims and that all of the claims were disputed.

9 The claimant confirmed that he made only one claim made against the second respondent; this is in respect of claim 7(vi) above, although this claim requires a finding that, in fact, a TUPE transfer had taken place so. For the avoidance of doubt claim 7(vi) is also made against the first respondent.

10 So far as the claim of direct race discrimination and the claimant's protected characteristic, Mr Avramov described himself as white of Bulgarian ethnic origin (although he was keen to emphasise that he is a British citizen).

11 The claimant confirmed that paragraph 6 of the details of complaint does not contain any additional claims. This was included in his grounds of claim, I am informed, for "background information" only. For future reference, the respondents need not address these allegations, they are not relevant to any issues that need to be determined.

The law in respect of deposit orders

12 Rule 39 of the Employment Tribunals Rules of Procedure, Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 deals with deposit orders:

> (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
>
> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
>
> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
>
> (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
>
> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
>
> (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
>
> otherwise the deposit shall be refunded.
>
> (6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

13 Rule 39(1) therefore provides a power for targeted case management that is likely to discourage parties (i.e. the claimant in this case) from pursuing weak claims or weak elements in their case.

14 In *Hemdan v Ishmail and anor 2017 ICR 486, EAT*, Mrs Justice Simler (President of the Employment Appeals Tribunal) observed that the purpose of a deposit order was to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if the claim failed. That was legitimate policy, because claims or defences with little prospect caused unnecessary costs to be incurred and time to be spent by the opposing party. They also occupied the limited time and resources of Tribunals that would otherwise be available to other litigants. However, the purpose was not to make it difficult to access

justice or to effect a strike-out through the back door. Indeed, the requirement to consider a party's means in determining the amount of a deposit order (at rule 39(2)) was inconsistent with that being the purpose. It was essential that when a deposit order was deemed appropriate it did not operate to restrict disproportionately the fair trial rights of the paying party, or impair access to justice. Accordingly, an order to pay a deposit had to be one that was capable of being complied with. A party without the means or ability to pay should not be ordered to pay a sum that he was unlikely to be able to raise.

15 The threshold for making a deposit order is that the Tribunal (i.e. me) must be satisfied that there is 'little reasonable prospect' of the particular allegation or argument succeeding. This is different from the criterion for striking out a case under rule 37(1)(a) on the ground that the proceedings have 'no reasonable prospect of success'. There must a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response: *Jansen Van Rensburg v Royal Borough of Kingston-upon-Thames and ors EAT 0096/07*.

16 In respect of the amount of the deposit, this should reflect the party's means. The deposit should be high enough to stand as a warning that, at this preliminary stage, I assess the claimant is advancing or attempting to advance weak claims, i.e. some allegations that upon my preliminary review, I assess as having little reasonable prospect of success.

17 In *Adams v Kingdom Services Group Ltd EAT 0235/18* the EAT held that an Employment Tribunal must give reasons for setting the deposit at a particular amount. In the EAT's view, the requirement to give reasons for 'making' the deposit order under rule 39(3) includes a requirement to give reasons not only for making the order at all but also for the particular amount to be paid.

The claimant's dismissal

18 Despite the open intention of Judge Lewis's intended assessment, the first respondent had not prepared for a review of the core feature of these proceedings – *whether or not a dismissal had occurred.* This is disappointing and does not assist the Tribunal with the overriding objective. The claimant's case as set out in his grounds of complaint is, essentially, that he was employed as a carpenter, he was told that his job was at risk of redundancy and then without proper warning his job was then changed to a Fabric Engineer (possibly located somewhere else) with a huge reduction in wages. The claimant explicitly contended that he was not consulted about this change and such changes were unilaterally imposed upon him without any fair procedure or right of appeal. The first respondent's Response sets out a completely different version of events, which it detailed at paragraphs 4 to 13 of the grounds of resistance. This paints a picture of informing and consulting with the claimant over possible redundancy and it explicitly states that the claimant pursued the Fabric Engineered role – twice and on both occasions voluntarily.

19 On the basis of the pleadings I cannot see where a dismissal is contended to have occurred. That was clearly the point of Judge Lewis ordering this Preliminary Hearing, because its parameters are so wide. The claimant said that his former solicitor told him that he had been dismissed when the first respondent compelled him to take another role. The claimant confirmed that he did not think that there was any dismissal letter and that he did not treat himself as constructively dismissed following this unilateral change to his

terms of employment. The situation is even more perplexing because the claimant informed me at the hearing that he was finally dismissed on 4 June 2021 and that he is pursuing a claim of unfair dismissal (and possibly more) in respect of this later occurrence. He quoted a reference number to me for a claim which appears to have been electronically submitted by his trade union solicitors. The claimant said that he thought his earlier dismissal was a "legal dismissal" and that he had been dismissed again 4 months ago so as to end his employment. As a matter of law, if the claimant has been dismissed earlier, then he does not have the continuity of service to make any further claim of unfair dismissal. Anyway, on his own argument, I cannot see how the claimant's case stacks up in respect of these proceedings.

20 The first respondent's position is equally unfathomable. Ms Meenan referred to paragraph 32 of the grounds of resistance which accepted that the claimant was dismissed and says this was for reason of redundancy. When I queried this Ms Meenan said that it was a *Hogg v Dover College [1990] ICR 139* situation. This equally does not make sense because the respondent's case set out from paragraphs 4 to 13 is diametrically opposed to a *Hogg v Dover* case and seem to contend that no dismissal, in fact, occurred.

21 I asked that Ms Meenan to review the documents carefully and clarify the respondent's position, both to the claimant and to the Tribunal. If the factual matrix set out in the first respondent's grounds of resistance is not accurate then the first respondent will need to apply to amend is Response and also explain why such a key document had be submitted when it was not correct. If the first respondent's solicitors merely misunderstood the law, then this can be corrected in correspondence (to the other parties and the Tribunal) and that does not require a formal application to amend. In any event, the current position is not satisfactory and will need to be addressed. Ultimately, there may need to be a further Preliminary Hearing (Open) in respect of the dismissal issue.

The TUPE issue

22 The claimant did not produce any documents that supported his contention that a TUPE transfer occurred. He said he did not really understand the complex law in this regard, but as a colleague and his former solicitor told him that as he had been replaced by someone from the second respondent contractors for carpentry work it must be in breach of TUPE Regulations. That is not the legal test and TUPE protection only applies, briefly, if the claimant was part of a business entity which transfers, without losing its identity, from the first respondent to the second respondent. Mr Shepherd took us through his clear (and concise) written submission. In particular:

i. At pages 55-56 of the Preliminary Hearing Bundle there was a contract between the first respondent and the second respondent for the supply of various workers at the King's Cross construction site. This contract was to <u>supply</u> various self-employed workers and had been put in place 2 years before the events in question.

ii. Mr Shepherd contended that there was no transfer of assets, carpentry service, etc such as to identify a business entity had transferred between the first respondent to the second respondent or to anyone else of carpentry services. I am mindful that the claimant has the burden of showing that a business transfer occurred, and he said they he could not produce and documents or other

evidence in this regard.

iii. The project surveyor confirmed, at page 64 in the Preliminary Hearing Bundle, that the second respondent was engaged to provide labour supply for project delivery and specifically they were not employed as a subcontractor. The first respondent has retained the overall contract.

iv. Mr Shepherd submitted that the workers supplied under the aforementioned contract were under the supervision of the first respondent and, if necessary, he would adduce evidence in this regard. Certainly, that position is consistent with the documents in the hearing bundle. There is no evidence available to dispute this and the claimant could not identify any document that he has that might dispute the second respondent's assertion.

v. There is a document at page 63 that evidences that no carpenters (as opposed to other workers) were supplied to the first respondent from the second respondent at the relevant time of the purported TUPE transfer.

vi. Significantly, the claimant referred to the second respondent's pay rates for carpenters (at page 54), which was significantly higher than the claimant said he earned. It therefore does not make economic sense that the first respondent would replace carpenters earning between £9 to £14.90 per hour with carpenters engaged by the second respondent at £19 per hour. Even if this was the case, TUPE would operate to transfer the claimant to the second respondent at his existing, and lower, pay.

vii. Ms Meenan contended that the first respondent has asked the claimant to provide any documents to support his contention that a TUPE transfer occurred, and he has not provided any documents.

23 Based on the above, I determined that the claimant's claims based on a TUPE transfer have little prospects of success and I will make deposit orders in respect of the 2 claims identified at paragraphs 7(vi) above and the 1 claim identified at paragraph 7(iv).

Consideration of the claimant's means and the amount of the deposit orders

24 The claimant did not provide any documents in respect of his means. He said that he had started a new job and that he was 5 weeks into a 3 month trial. The claimant, therefore, appears to have been out of work for possibly 2-months. He said that he was worried about his probationary period. The claimant had worked for the first respondent since 2003 (and 2009 as an employee) so this implies that he is a good worker and a valuable asset to any business. That said, the claimant is working as a carpenter and employment in the post-covid economy as well as construction industry may well be precarious. The claimant informed me that has a net income of around £2,400 per month and his housing and core bills are in the region of £700 per month. His partner works although the claimant (and his partner) has a small child. I do not believe the claimant has any significant savings. I proceed on the basis that the claimant is not impecunious, but I am mindful that the deposit order will need to be paid within 28 days from the date that this decision is promulgated, and I do not want to put the claimant under any unjustifiable financial strain to meet this obligation.

25 I do not accept any contention that just because the claimant may be able to afford the maximum deposit order, therefore I should therefore make deposit orders in the sum of £1,000. I explained to the claimant carefully, and repeatedly, that he was at risk of being ordered to pay the respondent's legal costs if he were to pay the deposit and continue the 3 claims against the respondents that I identified above. I explained that the possible cost consequences of this could be significant, even for a proportion of the overall legal costs (which might be deemed reasonable). I am satisfied that the relatively modest amount I make for the deposits does not diminish respect for the cost consequences of making the deposit order.

26 I regard deposit orders for £400 appropriate to the allegations made and proportionate to his overall means. I advised him of the costs consequences if he loses the TUPE-related claims and that if in doubt he should seek independent legal advice. I regard the possible total of £1,200 (i.e. 3 x £400 deposit order) to be proportionate also and within the overriding objective.

27 If the claimant pays some of the deposit orders only then he will need to identify which deposits he has paid.

Further case management orders

28 The claimant advised me that he has not yet received a case number for the (second) claim which was presented by his union solicitors a few weeks ago. As he was able to quote a reference number, it would appear that this claim was submitted electronically. Ms Meenan advised that the respondent has not had sight of this claim yet. The claimant informed me that the second claim made reference to these proceedings and requested consolidation.

29 As the new proceedings are likely to be joined with these proceedings and as the claimant will need time to think about whether or not to pay the deposit, I decline to make further case management orders at this stage. The second respondent might not be a party to the case preparatory obligations in any event. Once the Response to the new claim is received, the Tribunal can order a further case management hearing for both sets of proceedings. In the interim, Ms Meenan will clarify whether or not the first respondent contends that they dismissed the claimant and if so, the basis of the dismissal and on what date it occurred.

_____

Employment Judge G Tobin
Dated: 21 October 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
02 November 2021

FOR THE TRIBUNAL OFFICE