EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr R Carr **The London Community Rehabilitation Company (R1)**
Sanctuary Personnel Limited (R3)

PRELIMINARY HEARING

Heard at: **London South Employment Tribunal**

On: **14 September 2021**

Before: **EJ Webster**

Appearances
For the Claimant: **Mr McKetty (Employment Law consultant)**

For the Respondent: **Ms Bann (R1) – Solicitor**
Ms Goodman (R3) - Counsel

JUDGMENT

1. The Claimant's claim for whistleblowing detriment under s47 Employment Rights Act is dismissed upon withdrawal.

2. The Claimant's claim for detriment pursuant to s44 Employment Rights Act 1996 is dismissed as it is out of time.

3. In the alternative, the Tribunal went on to find that the claim pursuant to s 44 ERA is dismissed because the claimant was not an employee and has no standing to bring the claim. Further ,in the alternative it is dismissed because the claim was misconceived and has no prospects of success.

4. The Claimant is ordered to pay costs of £600 to the First Respondent and £600 to the Third Respondent.

The Hearing

5. Oral reasons were given at the hearing and the claimant's representative requested written reasons.

6. This was a preliminary hearing listed by EJ Harrington on 14 July 2020. At that hearing EJ Harrington made orders that the claimant provide further and better particulars regarding his claim under s44 ERA. The claimant also indicated that he wished to make an application to amend his claim to contain a whistleblowing claim. EJ Harrington ordered that he should set out any such application in writing.

7. The claimant provided further and better particulars on 1 October 2020. Those have been accepted by REJ Freer as being amendments to the claimant's s44 claim.

8. Mr McKetty did not make any application to amend the claim further and at today's hearing Mr McKetty indicated that he did not intend to make any such application. Mr Mcketty also stated on behalf of the claimant that he wished to withdraw the whistleblowing claim under s 47 ERA altogether.

9. Since the hearing before EJ Harrington the claimant has withdrawn his claim against the second respondent.

10. The hearing today therefore was solely to consider the respondents' applications which were as follows:

    (i) The tribunal has no jurisdiction to hear the claims as it is out of time
    (ii) The claimant has no standing to bring the claim because he is not an employee for either respondent
    (iii) The claim should be struck out as it has no prospects of success

11. I have therefore considered the respondent's applications solely with regard to the original ET1 and the Further and Better Particulars dated 1 October 2020 which REJ Freer accepted as being amendments to the claimant' s 44 claim.

Facts

12. The claimant worked as a Work Project Supervisor from 16 March 2019. On 15 June 2019 he was sadly attacked whilst at work by a service user. Subsequently he did not return to work. That is not in dispute and the case is currently going through criminal proceedings.

13. The claimant's contractual position was not straightforward. He had a contract with the third respondent (R3) who was an employment agency. R3 found the claimant work with R1 but an intermediary company (Umbrella Works) was responsible for paying the claimant and the claimant signed a contract of

employment with that intermediary company. There was also a contract between R1 and R3.

14. The claimant states that prior to the attack on 15 June he had raised concerns on 12 June that he had health and safety concerns. He also says that he raised these again on 15 June prior to the attack. The concerns were apparently about the service user himself. He subsequently raised a grievance on 13 September 2019 about the incident and his health and safety.

15. Both the pleadings and Mr Mcketty's representations to the tribunal were somewhat confused as to what the detriment relied upon was. It was clear that the main detriment relied upon was the attack itself. When pushed on whether there were other detriments, Mr Mcketty said that the failure by the respondent was the failure to provide a safe place of work. The time frame for that failure was not clear.

16. Despite this lack of clarity or any specificity of how either of the respondents failed to provide the claimant with a safe place of work beyond the events of the attack itself I have considered what was written in the pleadings and at all times when reaching my conclusions in this case, taken what I believe to be the claimant's claim at its highest.

17. Therefore I considered the references in the pleadings themselves:

    (i) At paragraph 9 of the grounds of claim it is stated that the respondent has failed to act and provide assurances that this kind of event would not happen again pursuant to s47B of the ERA1996.
    (ii) At paragraph 31 he states that he received no assurances that the attack would happen again and
    (iii) Paragraph 34 he states that the claimant was not provided with full payment up until the end of the medical certificates that he had obtained.
    (iv) There is also reference to the fact that the emergency help device was defective.
    (v) In the further and better particulars, the claim states at paragraph 17 that the detrimental impact upon the claimant was being placed in the position of having to physically protect himself and others.
    (vi) Subsequently at paragraph 27 it is stated that the respondent failed to give assurances that this would not happen again and therefore the claimant refused to work in such an environment
    (vii) That failure led to the claimant suffering a financial detriment and caused the claimant mental distress.

18. No dates were given regarding any of the above matters. Mr Mcketty stated that the union representative advising the claimant at the time had considered that the situation was an ongoing one and he had treated the grievance as the date from which the limitation clock started ticking.

<u>Time Point</u>

The Law

S44 ERA

(1)An employee 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—

….

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work, or

(e) in circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.

S48(3) ERA 1996-
ET shall not consider a complaint under detriment section of ERA unless it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or where that act or failure to act is part of a series of similar acts or failures, the last of them, or b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
(4) For the purposes of subsection (3)— (a)where an act extends over a period, the “date of the act” means the last day of that period, and (b)a deliberate failure to act shall be treated as done when it was decided on ;and, in the absence of evidence establishing the contrary, an employer a temporary work agency or a hirer] shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done

207B Extension of time limits to facilitate conciliation before institution of proceedings:

(1)This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).

(2)In this section—
(a)Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b)Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3)In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
(4)If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
(5)Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section

19. The claimant submitted a grievance on 13 September 2019 raising his concerns about the situation. The claimant was assisted by his Unite union representative in drafting this grievance.
That grievance states:

"I would like to raise the following grievances against London CRC/MTC Group and Sanctuary Personnel".

- *As my employer failed to provide me with a safe working environment on the 15 June 2018*
- *Following the incident of the 15 June 2018 my employer failed to take adequate steps to provide a safe working environment to enable me to return to work*
- *My employer discriminated against me by treating me less favourably than permanent employees.*
- *My employer LCRC/MTC has failed to respond to my requests for information of my logged serious incident report outcomes/recommendations and actions since 15 June 2019 and in particular to my data subject request dated 14 August 2019 and my request dated 14 August 2019 for SP's health and safety policies and procedures and work Handbook*

I would like the following outcomes;

- *Provision of all previously requested information*
- *Formulation and implementation of policies and procedures that would prevent the recurrence of incidents similar to that of the 15 June 2019 as part of policies and procedures designed to provide a safe place of work for me and my colleagues.*
- *Sick pay to be provided until I am able to return to work.*

20. The above clearly raises failures around providing a safe place of work and chimes entirely with the narrative that is in the claim form and that Mr Mcketty gave me today – namely that the claimant's concerns are that he was not

working in a safe place and that he had been attacked as a result. He says nothing about the fact that the respondent treated him badly because of the actions he took on the day of the attack in leaving the workplace or using force to defend himself and his colleague.

21. The references to the failures by the respondent subsequent to 15 June 2019 are vague and without dates. They refer to negative consequences suffered by the claimant but nothing provided suggests that they occurred because the claimant had either had to leave his place of work in circumstances of danger or because he had taken steps to protect himself or others in circumstances of danger.

22. The claimant and his representative were given clear instructions by EJ Harrington that he had to set those out clearly and despite being represented, he has not done so. The only clear detriment he identifies is that he was attacked. Throughout his representations before today Mr McKetty insisted that it was the attack that was the failure by the respondents. He said that the failure occurred because the claimant had complained about health and safety breaches on 12 June and on the day of the attack itself. The essence of the claimant's case is that the failure of the respondents to deal with those concerns led to him being attacked. Following the attack they continued with those alleged failures.

23. I conclude that the only detriment properly pleaded and actually relied upon by the claimant is the incident on 15 June. This is based on the information provided to me today including the submissions by Mr Mcketty.

24. On that basis I find that the claims are out of time. The deadline by which the claim ought to have been submitted was 14 September 2019. There is no ACAS EC extension to be considered as the claimant did not contact ACAS until after 14 September. With regard to the first respondent the ACAS EC period ran from 3 December 2019 to 17 January 2020 and with regard to the third respondent it ran from 28 November to 11 January 2020. The claim against all three then respondents was then submitted on 16 February 2020.

25. No submissions were made by the claimant's representative that it was not reasonably practicable for the claimant to submit his claim in time. I note that he had the assistance of a trade union representative at the time that he submitted the grievance which was submitted before the end of the limitation period. Mr Mcketty said that the union representative had told the claimant that the time ran from the grievance but we heard no evidence from the claimant to that effect (or at all).

26. Even if the claimant was able to establish that it was not reasonably practicable to submit the claim in time due to negligent advice, no evidence has been provided to suggest that the claim was then submitted within such time as was reasonable. The claimant knew enough to contact ACAS and engaged in that process for some time with each respondent. The claimant also appears to have been represented by Mr Mcketty at the time that he submitted the ET1 on 16 February 2020.

27. In conclusion, I find that the claim was submitted outside the limitation period in s48(3) ErA and that it was reasonably practicable for the claimant to have submitted the claim within the relevant deadline. Even if it was not reasonably practicable, the claimant was not submitted within such further time as was reasonable The tribunal does not therefore have jurisdiction to hear the claimant's claim.

Employment status

28. If I am wrong in that I have nevertheless determined the other applications by the respondents. .

29. I am grateful to Ms Goodman's submissions which sets out the law in respect of s44 which I copy below:

For the purpose of a s.44 claim the Claimant would need to be an employee of R3. For the purpose of a whistleblowing detriment claim the Claimant would need to be a worker under the extended definition contained in s.43K ERA.

S44 ERA: employee not worker

On 31 May 2021, ss.44(1)(d) and (e) were deleted by virtue of the Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 SI 2021/618 ("the 2021 Order"). By Article 3 of the 2021 Order, these sections were replaced by the new s.44(1A) ERA. The new s.44(1A) extends health and safety detriment protection to all workers and not only employees.

By Article 7 of the 2021 Order workers will not be regarded as having been subjected to a detriment if the date of the relevant act or failure to act, or the last of a series of similar relevant acts or failures to act, occurred before commencement day, which was 31 May 2021:

Article 7 of the 2021 Order
(1) A worker is not to be regarded as having been subjected to a detriment in contravention of section 44(1A) of the Employment Rights Act 1996 if the date of the relevant act or failure to act, or the last of a series of similar relevant acts or failures to act, occurred before commencement day.
[…]
(3) The repeal by this Order of section 44(1)(d) and (e) does not prevent a complaint under section 48 that an employee has been subjected to detriment in contravention of section 44(1)(d) or (e) from being presented or continued on or after commencement day if the date of the relevant act or failure to act, or the last of a series of similar relevant acts or failures to act, occurred before commencement day.

(4) In this paragraph—
"commencement day" means the day on which this Order comes into force;
[…]

(5) Section 48(4) of the Employment Rights Act 1996 applies to paragraphs (1), (2) and (3) as it
applies to section 48(3) of that Act

As provided in Article 7(3) of the 2021 Order, in respect of relevant alleged acts that occurred before 31 May 2021 the Claimant can still bring a complaint under the old section 44(1)(d) or (e).

Therefore, in order to bring a claim, the Claimant must be an employee of R3. Under section 230(1) ERA, an employee is defined as: "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment". Under section 230(2) ERA, a contract of employment means: "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

30. It is clear therefore that the claimant must be an employee in order to have the relevant standing to bring a claim under s44 ERA as his claim predates 31 May 2021.

31. The claimant worked for the First respondent through a series of contracts. I was provided with the following:

(i) A contract of employment between the claimant and Exceed Umbrella Ltd
(ii) A candidate booking confirmation form between the third respondent and the First respondent with the claimant named as the worker and the first respondent named as the client
(iii) A candidate contract between the third respondent and Exceed Umbrella Ltd

32. The third respondent is a recruitment agency. They recruited the claimant to work at the First Respondent. It was not clearly explained to me what role Exceed Umbrella played other than that it was an intermediary company and paid the claimant's wages. Who was responsible for bringing them into the picture was not clear. Ms Goodman suggested it was the claimant which Mr Mcketty refuted. When I asked Ms Bann whether the first respondent worked with others through Exceed Umbrella she did not know. I find it very unlikely that the claimant chose to work via the intermediary – nevertheless he clearly agreed to do so and from the outset of his assignment.

33. It was accepted that R1 set the terms under which the claimant worked and it was in control of the claimant's workplace. I find that it is more likely than not that it had control over what the claimant did on a day to day basis when he was at work.

34. I was provided with no other information whatsoever by the claimant. He did not dispute that he was employed by Exceed Umbrella. There were documents in the bundle that showed that Mr Mcketty tried to get Exceed Umbrella joined as a respondent earlier in the proceedings because they believed that it was the

employer. It is not clear as to why the proceedings have been withdrawn against them though

35. Under *section 230(1)* of the *Employment Rights Act 1996* (ERA 1996) an employee is defined as "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment". Under section 230(2) of ERA 1996, a contract of employment means "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

36. I must look at the reality of the situation and the reality of what happened to the employee whilst at work. The test of employment concerns those set out in Ready Mixed Concrete.

"A contract of service exists if these three conditions are fulfilled.
(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
(iv) The other provisions of the contract are consistent with it being a contract of service".

37. Since *Ready Mixed Concrete*, case law has established that the three areas are the main issues to be considered when determining whether an employment relationship exists.

- *Personal service and substitution rights*.
- *Other factors*.
- *Control*.

These factors are now commonly referred to as "the irreducible minimum". The concept was first introduced in *Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612*, and subsequently endorsed by the House of Lords in *Carmichael*.

- The Court of Appeal in James v Greenwich looked at the circumstances as to when it will be necessary to imply a contract of employment between an agency worker and client. A key point is whether the implication of a contract between the worker and client is necessary.
- Is the way in which the contract is performed consistent with the agency arrangements or is it only consistent with an implied contract between the worker and the client?
- If there was no purported agency relationship regulating the position of these parties, would the implication of a contract between the worker and end user be inevitable?
- In a genuine tripartite agency relationship, the client is not paying directly for work done by the worker, but for the services supplied by the employment business in accordance with its specification and the other contractual documents.

- Another key feature of a genuine tripartite agency relationship is that the client cannot insist on the employment business providing a particular worker.

38. The relationship between the claimant and the third respondent was nothing more than that R3 found work opportunities for the claimant which he was free to accept or not. Once he accepted that work, his relationship with R3 effectively ceased until another assignment was sought. There was clearly no mutuality of obligation. The claimant could turn down the work. R3 had no obligation to offer him the work. The fact that there was a separate contractual relationship between R1 and R3 does not undermine the lack of obligation between the claimant and R3.

39. Mr Mcketty argued that the contract between R1 and R3 meant that at the point that R1 failed to properly look after the claimant R3 was contractually obliged to step in and take responsibility (pg 108). It was not clear what responsibility that was or how that pertained to creating an employment relationship between the claimant and any of the respondents. I accept that employment agencies can sometimes act as employers but it is clear here that responsibility for all aspects of the claimant's actual work were sent to the R1 and R2.

40. I have considerable sympathy for the claimant regarding his relationship with R1 and Exceed Umbrella. There does seem to be an element of creating a paper trail to obfuscate the possibility of an employment relationship given that nobody sought to argue that Exceed Umbrella did anything other than sign the employment contract and pay the claimant. They did nothing else that could constitute an employment relationship that I can determine from the information I have been provided with.

41. However that concern is not sufficient to determine that there was an employment relationship between the claimant and R1 as a result. I heard very little if any submissions on these three points from any party. The respondents both rely upon the written contracts that exist and did not address me as to to the day to day reality of who told the claimant was to do whilst he was at work. I suspect that had the test been concerning whether the claimant was a worker or not then I may well have determined that he was a worker for R1.

42. The thrust of Mr Mcketty's submissions were that one of the two remaining respondents must have been responsible for the health and safety of the claimant at work. I accept that it is likely that R1 did have those responsibilities as they were in control of the workplace at the relevant time - but that does not automatically confer employment status on the claimant. The claimant had signed a contract of employment with R2 who paid him and agreed with R3 that he would be placed with R1 to perform certain duties. There is no evidence of a further relationship between the claimant and R1 and whilst I suspect that I may have been able to accept that the claimant was a worker for R1 I do not consider that the claimant has provided me with any evidence to suggest that there was any mutuality of obligation between R1 and himself regarding his obligation to perform work and R1's to provide it. He knew that he was being

placed at R1 by R3. He provided no evidence to suggest that he believed that R1 was his employer or that he had any direct conversations with them regarding his pay or any other terms and conditions. He also gave me no evidence that they controlled him whilst he was at work, that he had any obligation to them to accept work from them on a day to day basis or that there were any other factors which pointed to him being an employee. I was told that he was paid 4 weeks sick pay by R1 through Exceed Umbrella as a gesture of goodwill following the accident. I accept that this was all it was rather than there being any obligation by R1 to pay the claimant sick pay.

43. Therefore, the only evidence I had was that there existed an agency relationship which was identical to many tripartite agency arrangements with the complicating factor of an intermediary. There is no necessity to imply a contract between the claimant and either R1 or R3. There existed, at least on paper, an employment relationship with Exceed Umbrella and the claimant has chosen not to pursue a claim against them.

44. I therefore find that the claimant was not an employee for either R1 or R3 and the claimant therefore cannot bring a claim pursuant to s44 against either respondent.

Strike Out Application

45. Finally, if I am wrong in that I turn my attentions to the strike out applications made by both respondents on the same basis, namely that the claim had no prospects of success.

46. The power to strike out a claim at a preliminary stage before a final hearing is found in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and in particular in rule 37 the material parts of which read as follows:

"(1) At any stage of the proceedings, either on its own initiative or on the application of the party, a Tribunal may strike out all or part of the claim or response on any of the following grounds –

(a) that it is scandalous or vexatious or has no reasonable prospect of success……"

47. The power to strike out a claim under Rule 37(1)(a) on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] IRLR 755, at para 30.

48. It will generally not be appropriate to strike out a claim where the central facts necessary to prove the case are in dispute. It is not the function of a tribunal such an application to conduct a mini trial. The proper approach is to take the Claimant's case at its highest as it appears from his (or her) ET1 unless there are exceptional circumstances *North Glamorgan NHS Trust v Ezsias* [2007] IRLR 603. Such exceptional circumstances could include the fact that the Claimant's case is contradicted by undisputed contemporaneous documents or

some other means of demonstrating that 'it is instantly demonstrable that the central facts in the claim are untrue' *Tayside*.

49. The statements of principle derived from the cases referred to above do not in any way fetter the discretion of a tribunal to strike out a case where it is appropriate to do so *Jaffrey v Department of the Environment, Transport and the Regions* [2002] IRLR 688 at para 41.

50. In summary, both respondents' submissions are that the claimant's remaining s44 claim is fundamentally misconceived. The claimant's claim, even taken at its highest is that the respondents failed to protect his health and safety at work because they did not heed his concerns raised on 12 January and 15 January. Then, subsequent to the attack, they did not provide him with sufficient guarantee that they would provide him with a safe place of work.

51. In summary however, a claim under s44 ERA must be that he has been subject to a detriment because he left his place of work when he was in danger or because he took appropriate steps to protect himself when in a position of danger.

52. Nobody disputed that the claimant had been in danger and that he had acted appropriately in the difficult circumstances he found himself in. However, the claimant and his representative have at no point either before me today or in the written pleadings set out how they say the attack on 15 June and any of the vague subsequent failures regarding providing a safe place to work were caused by him either leaving the work place or protecting himself and a colleague.

53. At no point has Mr Mcketty been able to articulate how the claimant's decision to leave the work place and/or protect himself has led to any of the apparent detriments even taking his claim at its very highest. He states that the detriments were:

    (i) The attack itself on 15 June
    (ii) The respondents' failure afterwards to provide him with a safe place of work
    (iii) The respondents' failure to provide safe equipment
    (iv) Not paying him properly

54. The attack was brought by a service user not by one of the respondents and cannot therefore have been either an act or a deliberate failure to act by one of the respondents. Further it was the cause of the claimant protecting himself and leaving the premises, it did not happen because he did those things.

55. Mr Mcketty could not answer any of my questions regarding how he said that the attack was done by the Respondents because of the claimant's actions as set out in s44 ERA. He said that it was caused by the R1 not having a safe system of work and not listening to the claimant's concerns raised on 12 June and 15 June. That is very different to a s44 claim.

56. This fundamental misunderstanding of s44 and what needed to be established to bring any such claim ran through the entirety of Mr Mcketty's submissions to me. He was unable to give me any information on this save to repeat that what happened to the claimant was awful and someone must have been responsible for it and then responsible for not promising him that he had a safe place of work to return to. He provided no causative link between the claimant's actions in response ot the attack when he was in danger and the events that followed. He refused to accept that he needed to.

57. It is this fundamental misunderstanding of s44 ERA and, (despite my repeated questioning enabling Mr Mcketty to provide information that could have enabled me to consider whether there was the possibility of a claim under s44 ERA) a complete lack of a causative link being argued between the claimant's behaviour at the incident and anything that happened afterwards, that I consider that the claim has no prospects of success and that it ought to be struck out under Rule 37.

Costs

58. Under Rule 76(1) the tribunal has the discretion to make an order for costs. It is a two stage process, we have a duty to consider making an order where the respondent has made out that the claim has no reasonable prospects of success.

59. Both respondent's made applications for their entire costs in defending this matter.

60. I accept Mr McKetty's submissions that the position regarding the claimant's employment status and possibly the time point given the vague references to subsequent detriments, were ones that needed careful consideration. However I am concerned by Mr Mcketty's continued fundamental misunderstanding of s44 and the possible claims. During submissions on this point Mr Mcketty continued to describe the claimant's claim essentially as one of whistleblowing detriment or something similar. Despite repeatedly being referred to the exact wording in s44 and the requirements of that section, he, holding himself out as a legal representative attached to a law firm, appears to have misunderstood the basis for a s44 claim and continues to describe it as something like a whistleblowing claim whereby the claimant was attacked following him having apparently raised his health and safety concerns prior to the attack. Even then he has not been able to articulate how he says the respondents themselves carried out the attack or colluded with the service user to carry out the attack. He simply says that they failed to protect the claimant – something that may be correct, but is not the basis for a s44 ERA claim.

61. The claimant and Mr Mcketty have been given several opportunities to clarify the exact basis of the claim and the detriments relied upon or their alleged causation and have not done so. The further and better particulars relied upon do not provide the information requested by EJ Harrington in her order. The fact that they were accepted by REJ Freer as an amendment to that claim does not signify merit in of itself.

62. I was provided with a copy of a costs warning letter written on behalf of all three respondents. Whilst such a letter does not necessarily mean that where a claimant 'loses' costs ought to follow, far from it. The existence of the letter does not have to affect my decision. However, in this case, the letter sets out, very clearly, what the problem is with the s44 claim is even without the issues around employment status and time. Despite having this clear advice in writing, the claimant and Mr Mcketty have proceeded with that claim.

63. For those reasons I think that this is one of the exceptional cases where costs are appropriate because the case is so misconceived and despite this being pointed out, the claimant has continued with the claim. However, I think that given that the misconceived element of the claim was mixed into another claim (which has now been withdrawn) that could have required careful consideration and the fact that I consider that the time point and the employee status point were not on the face of it completely unmeritorious, I do not think it is appropriate to award costs beyond the costs of today's hearing.

64. The respondent's costs for today were :

    R1 - Costs of £1,300 plus VAT which is £1560.
    R2 - Costs Total £1,095 - £912.50 plus VAT.

65. I have considered the claimant's means when deciding how much of the above costs it is appropriate for the claimant to bear. The claimant is working and earning £1,300 gross per month but he has sole responsibility for his daughter and has considerable outgoings in terms of a mortgage and other bills. For those reasons it is not appropriate for me to award the entirety of today's costs against him. I therefore conclude that it is appropriate for him to pay £600 to the First Respondent and £600 to the Second Respondent.

Employment Judge Webster

Date: 15 September 2021