EMPLOYMENT TRIBUNALS

BETWEEN

Mr Raja Anwar (Claimant)	**and**	**1. Brit Sec Staff Services Ltd 2. Independent Contractor Security Ltd (Respondents)**

Held at: **Birmingham**

On: **6 November 2019**

Before: **Employment Judge T Coghlin QC**

Representation:

Claimant: **Mr R Rixon, consultant**

Respondent: **Mr T Cockfroft, commercial director**

JUDGMENT

The claim against the second respondent, Independent Contractor Security Ltd, is rejected pursuant to rule 12(2) of the Employment Tribunal Rules of Procedure 2013.

REASONS

1. By an ET1 dated 27 November 2018 the claimant brought claims against the two respondents, to whom I shall refer as Brit Sec and ICS.

2. The facts are well set out in the Particulars of Claim attached to the ET1 and I do not repeat them here (though I note a typographical error in the first line of paragraph 10, where the names of the first and second respondents have been transposed, and it emerged before me today that there is some uncertainty about whether the claimant has been working for 36 or 24 hours on the Stafford contract for ICS).

3. Brit Sec has presented no response to the ET1. Accordingly as stated in the tribunal's letter dated 8 May 2019, under rule 21 of the ET Rules 2013, Brit Sec may only participate in any hearing to the extent permitted by the employment judge who hears the case. Brit Sec played no part in today's hearing.

4. The claimant commenced early conciliation (EC) against Brit Sec on 28 September 2018 and an EC certificate was issued on 28 October 2018. He did not however initiate EC against ICS. The ET1 stated that the claimant did not have an EC certificate in relation to ICS because one of the relevant statutory exceptions applied, namely that "my employer has already been in touch with ACAS." Mr Rixon, who represented the claimant before me and who completed that ET1 form, accepts that this was not correct, that in fact no relevant exception applies, and that the claim should have been rejected.

5. The tribunal gave directions given on 3 December 2018 including that the claimant should provide the EC certificate in respect of ICS by 10 December 2018. Mr Rixon replied on 7 December 2018 to say that there was no such certificate and that accordingly the claimant wished to apply for ICS now to be added as a second respondent. He explained (as he explained to me) that at the time when he entered into EC the claimant did not realise that there may have been a TUPE transfer or that ICS might be liable.

6. That is the application to amend which was before me today. It was opposed by ICS.

7. In circumstances where the claim against ICS has never been rejected, the position in my view (with which Mr Rixon agreed) is that there was in reality no coherent application to amend, since what the claimant was seeking to amend into his claim was already there. The position, as Mr Rixon also readily agreed, was that the claim should have been rejected under rule 12(1)(d) of the ET Rules 2013, which would then allow the claimant to seek a reconsideration under rule 13.

8. And so, without objection by Mr Rixon, I decided to reject the claim against ICS pursuant to rule 12(2) of the ET Rules 2013. I consider that it is open to me to make a decision under rule 12(2) now; I can see nothing in the ET Rules prohibiting such a determination being made at this stage of proceedings. Even if it could be said that the tribunal's directions on 3 December 2018 represented an express or implied decision not to reject that claim, I would vary that decision as it is in the interests of justice to do so[1] bearing in mind all the circumstances of the case including that it has subsequently become clear that there had been an error in the ET1 in relying on the relevant exception which it is now accepted did not apply. While it would alternatively be open to me to strike out the claim, I preferred to adopt the rule 12 approach since it would allow the claimant the procedural route of rectifying matters as provided by rule 13.

9. Mr Rixon then said that the claimant would now wish to pursue claims against Brit Sec only. He said that it was clear that on a proper analysis there was no relevant transfer under TUPE, bearing in mind among other things the question of fragmentation. He explained that such claim would be for unfair dismissal only.

[1] See the helpful analysis in **Al-Mashaqbeh v BBC** 2201199/2014.

10. I considered that an amendment would be required, and that such amendment should be done by way of written redrafted particulars of claim. I gave directions for this, and for the further progress of the claim, which are set out in a separate case management order.

Employment Judge Coghlin QC
6 November 2019

Judgment and Reasons sent to Parties on: 08/11/19

FOR THE TRIBUNAL