

Case Numbers: 1800630/2021  
1800635/2021  
1800639/2021  
1800646/2021  
1800647/2021



# EMPLOYMENT TRIBUNALS

**Claimants:** (1) Ms Eileen Monaghan  
(2) Ms Josephine Davis  
(3) Mr Philip Cawley  
(4) Mr Patrick Moloney  
(5) Ms Sheridan Reay

**Respondents:** (1) HM Courts and Tribunals Service  
(2) Marstons Holdings Ltd  
(3) CDER Group Ltd

## RECORD OF A PRELIMINARY HEARING

**Heard at:** Leeds (by video link in public)      **On:** 25 November 2021

**Before:** Employment Judge R S Drake (sitting alone)

### Appearances

For the Claimant: No attendance or appearances  
For the Respondents: (R1) Mr R Jones (of Counsel)  
(R2) Mr A Fox (Solicitor)  
(R3) Mr P Harman (Solicitor)

## JUDGMENT

1. The Claimants' claims of unfair dismissal and for other alleged heads of claim under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") are ALL struck out in accordance with the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"), and specifically under Rule 37(1) of Schedule 1 on the grounds that (and upon applying and referring to the relevant paragraphs of the Rule):-

**Case Numbers: 1800630/2021  
1800635/2021  
1800639/2021  
1800646/2021  
1800647/2021**

(1)(a) - the claims (as against ALL Respondents) have no reasonable prospect of success; and -

(1)(b) - ALL the claims have been conducted vexatiously and unreasonably; and -

(1)(c) - non-compliance by the Claimants (still engaged with the claims on the dates of the Orders listed below (a schedule of Claimants is appended hereto) with Case Management Orders promulgated by EJ Buckley dated 11 October 2021, despite a “Strike Out” warning issued by EJ Deeley dated 9 November 2021; and also -

(1)(d) - the claims are not being and have not been actively pursued.

## **Reasons**

2. I refer to the Respondents as R1 to R3 respectively but to individual Claimants by name. These claims were presented as a multiple under the heading of a lead claim “Brown 1800622/2021”. They were issued for them by their Union, the Public & Commercial Services Union (the “PCSU”) naming Mr Paul Barnsley (National Officer) as their representative. They are a group of 25 past employees of R1, three of whose employments transferred to R2 and the remainder to R3 in what was accepted by all parties as a relevant transfer of a service provision from R1 to the other Respondents under and subject to the provisions of TUPE.

3. The three Claimants whose employments transferred to R2 are –

2.1 - Mr Prunty (1800640/2021)

2.2 – Mr Spence (1800626/2021)

2.3 – Mr Wishart (1800638/2021)

All the remainder were transferred to R3

4. With the representatives of all the Respondents, I reviewed the history of the progress (or otherwise) of the all the claims. I attach a schedule of the Claimants (relevant as to the costs applications made by R2 and R3) as at the start of these proceedings, listing who they are and the date of certain withdrawals and by whom, as this is also relevant. There have been a significant number of withdrawals made by the PCSU and/or solicitors acting for certain Claimants i.e., Thompsons LLP, mostly by the latter.

## **FINDINGS OF FACT**

5. The following are my findings of fact relevant to this Judgment:

**Case Numbers: 1800630/2021  
1800635/2021  
1800639/2021  
1800646/2021  
1800647/2021**

5.1 The lead claim (Brown) was presented on 27 January 2021 with a schedule of all the Claimants attached as listed in the annex hereto; The Claimants' claims were (broadly expressed) :-

5.1.1 Any purported change of terms on transfer of employment to R2 or R3 was void and that there was no meaningful consultation with the Claimants in relation to the transfer of their employments from R1 to R2 and R3; in terms they pleaded this complaint as breach of Reg 4 of TUPE;

5.1.2 Unfair dismissal "*pursuant to Sections 94 and 98 of the Employment Rights Act 1996 and the provisions set out in Hogg v Dover College [1997]*" – expressed thus;

5.1.3 Alternatively, Unfair Dismissal "*under ordinary principles of unfair dismissal*" – expressed thus;

5.2 Mr Paul Barnsley, a "National Officer" of the Trades Union PCSU, was named as Claimants' representative for all Claimants;

5.3 All three Respondents were cited from the start;

5.4 The Respondents (all separately represented) all resisted as follows:

5.4.1 R1 pleaded the claims from the start as disclosing no cause of action against them and denying dismissals; They also denied dismissal, unfair or otherwise;

5.4.2 R2 pleaded that they still employed the Claimants transferred to them (Prunty, Wishart and Jordan) and there had been no dismissals, but accepting that one (Spence) resigned 1 January 2021; Further they pleaded that whatever changes they made were not changes of contractual terms and/or such changes were for organisational changes entailing changes in their workforce and thus permissible under TUPE;

5.4.3 R3 pleaded that there had been no unlawful changes by them to the contracts of employment of those Claimants transferred to them, that there had been no unlawful dismissals contrary to TUPE, nor under Sections 94 and 98 ERA, and there had been no breach of Reg 4 of TUPE; They also pleaded that none of the Claimants transferred to them had resigned and thus could not pursue claims of constructive dismissal;

I note that all Respondents contest the reasonableness of pursuing these claims from the start of the proceedings, and thus they put the Claimants impliedly at least, and in some respects expressly,

**Case Numbers: 1800630/2021  
1800635/2021  
1800639/2021  
1800646/2021  
1800647/2021**

on notice that they pursued the claims at peril as to potential applications to strike out and thus also impliedly as to costs;

5.5 A Preliminary Hearing date was set for 25 June 2021 but was changed by the Tribunal to 11 October 2021.

5.6 On 24 September 2021 R3 applied for Further and Better Particulars of the claims against them (also for third party disclosure and witness orders) having received no responses to no fewer than three earlier requests by email dated 22 June, 5 July, and 16 September 2021 respectively;

5.7 On 11 October, EJ Buckley made Orders requiring the Claimants to provide Further Information relating to one named party by 25 October 2021, and for all of them by 8 November 2021 to clarify their claims, what remedies they sought - and, if by amendment, to apply accordingly by that same date; I record here that none of the Claimants have complied with any of these Orders and were at all material times still represented by those instructing counsel at that hearing;

5.8 I note that EJ Buckley in effect warned the Claimants that purported claims under Reg 4 of TUPE cannot be free-standing causes of action justiciable before this Tribunal, and further that any amendments might be out of time requiring the Claimants to explain why they should be granted extensions of time to validate such claims; A further preliminary hearing date was set for today's date;

5.9 R3 applied on 9 November 2021 to strike out the claims against them still extant at that time; On the same date EJ Deeley sent a "Strike Out Warning" letter to Mr Barnsley of PCSU still at that time acting for the Claimants; Accordingly following this, on 11 November EJ Davies converted the PHR to a public hearing by video link;

5.10 On 15 November 2021 Thompsons Solicitors wrote to the Tribunal to confirm they were acting for a number of the Claimants and that those Claimants sought withdrawal of their claims; I can only infer in the absence of evidence from them that they did so in response to and because of the Strike Out application and the Tribunal's Warning Letter referred to above;

5.11 On 24 November 2021, the day before today's hearing, Mr Barnsley emailed the Tribunal to give notice that PCSU were from that point no longer acting for any of the Claimants (without explanation), and for the Claimants still engaged, he merely suggested that the Tribunal make contact with them direct. He did not indicate whether he had advised them of today's hearing or of the means to login to it, and he did not supply any contact details for any of the Claimants, thus leaving the Tribunal with only the contact details of the lead Claimant Brown, who coincidentally on the same day, withdrew his claim by email himself;

5.12 I noted however that this withdrawal from representation by PCSU post-dated the date on which the hearing date was notified (11 October 2021) and the date upon which its change of mode to CVP was notified (11 November 2021) to the parties' representatives, so I feel entitled to infer that the Claimants were fixed with notice via their then representatives; Regrettably, I have no way of knowing if they were actually aware since Mr Barnsley's notice was bland and completely failed to provide this information. However, because the withdrawal post-dated the notice of the hearing, I was satisfied that I may proceed to deal with the hearing as originally scheduled.

## APPLICATION OF THE RULES

6. I considered the terms of Rule 37;

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

- (a) that it is scandalous or vexatious or has no reasonable prospect of success;*
- (b) that the manner in which the proceedings have been conducted by or on behalf of (a party) has been scandalous, unreasonable, or vexatious;*
- (c) for non-compliance with any of these Rules or with an Order of the Tribunal;*
- (d) that it has not been actively pursued;*
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or the response;*

*(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party at a hearing"*

I have underlined those parts of the Rule I consider relevant and applicable to my findings above.

7. On considering Rule 37, I make the following findings of its application to the facts as found:

7.1 The Reg 4 TUPE claims had no prospect of success since they disclosed no cause of action. Significantly this is clear from the start because the Respondents pleaded this in their respective ET3s and later EJ Buckley warned them accordingly, yet they all still proceeded; I conclude that to proceed with this head of claim was vexatious from the start; Rule 37(1)(a) applies;

**Case Numbers: 1800630/2021  
1800635/2021  
1800639/2021  
1800646/2021  
1800647/2021**

7.2 Continuing to pursue the claims in respect of dismissals when there had been none and no resignations (save for one sole exception – Mr Spence), and despite being advised and represented by a recognised national Trades Union PCSU, such commencement of claims and their continuation amounts to pursuit of claims which had no prospect of success in themselves, and were thus pursued in a manner which was unreasonable and vexatious in that the Claimants should have known or have been advised that there was no prospect of success; In addition to Rule (1)(a), (1)(b) also applies;

7.3 There was unexplained and complete failure by any of the Claimants and Mr Barnsley of PCSU to comply with EJ Buckley's Orders dated 15 October 2021, which had all been preceded by failures to respond to requests for Further Information [particularly requested by R3; Rule 37(1)(c) applies;

7.4 The failures to comply with Orders and also the preceding complete failure by all Claimants to engage with the Respondents amounts to evidence of failure to pursue the claims actively; Rule 37(1)(d) applies;

7.5 I was satisfied that the Claimants were fixed with awareness of today's hearing since the lead Claimants had so indicated in his email withdrawing this Claim the day before today's hearing and PCSU were still on record right up to the date of their withdrawal which was also the day before i.e. 24 November 2021; I had nothing before me to show that any of the Claimants, whether they had withdrawn before this week, were unaware of today's hearing or the consequences of non-attendance bearing in mind I find they were fixed with awareness of the fact they faced both strike out and costs applications;

8. I considered the Court of Appeal's finding in **Swain v Hillman [2001] 1 All ER 91** in which it was held that a Court (or Tribunal in this case) must consider whether a party " ... has a realistic as opposed to fanciful prospect of success ..." in the context of assertions as in this case that the Claimant's case had no, as opposed to little, prospect of success. In this case I have made the findings set out above based on the facts as I have found them to be on the basis of the material evidence before me. I considered the balance of prejudice facing the Claimants if I struck out the remaining cases leaving them with no further way of arguing their views, or to the Respondent if the cases were not struck out causing them to have to devote considerable time and energy to meeting claims which on what I have seen and heard today had no prospect of success. On this analysis I conclude that the balance of prejudice favours the Respondents, leading me to conclude it is right I should strike out the claims.

**Case Numbers: 1800630/2021  
1800635/2021  
1800639/2021  
1800646/2021  
1800647/2021**

9. For all the reasons set out above, I conclude paragraph (a), (b) and (c) of Rule 37(1) is engaged and empowers me to strike out the claims in accordance with rule 37. Therefore, I have no alternative but to dismiss the claims.

10. I heard applications for costs, which sound against all Claimants, and reserved any material finding or assessment. On reflection, and benefiting from reservation, though having indicated a willingness to consider such applications on the basis of the clear findings I have made above, I have recognised the necessity to take into account the provisions of Rule 84 which states as follows:

*"In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or where a wasted costs order is made, the representative's) ability to pay."*

I have underlined the parts I consider may be especially relevant in this case. I am concerned that some Claimants may genuinely not have active express as opposed to constructive knowledge of today's hearing, and so may not have been actually aware of the perils they might face if they did not attend or have a representative attend for them. I am also concerned about the lateness in these proceedings of all the withdrawals so far, and especially about the very late withdrawal from representation of PCSU.

11. Accordingly, reserving what is left of this case for further consideration by myself, I have today made Orders for a Costs Hearing which may include assessment if necessary and set out such further Case Management Orders separately.

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**Employment Judge R S Drake**

Signed 25 November 2021

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing, or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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Case Numbers: 1800630/2021  
 1800635/2021  
 1800639/2021  
 1800646/2021  
 1800647/2021

Schedule of Claimants and Withdrawals

Claim Number	Claimant	Date	By whom
1800622/2021	Mr C Brown	24/11/21	Claimant himself
1800623/2021	Ms R King	15/11/21	Thompsons
1800624/2021	Ms R Davies	15/11/21	Thompsons
1800625/2021	Ms H Kirk	24/11/21	Thompsons
1800626/2021	Mr R Spence	15/11/21	Thompsons
1800627/2021	Mr A Bartlett	15/11/21	Thompsons
1800628/2021	Mr C Stephenson	15/11/21	Thompsons
1800629/2021	Mr R Asan	25/11/21	Thompsons
1800630/2021	Ms E Monaghan		
1800631/2021	Ms D Thomasen	24/11/21	Thompsons
1800632/2021	Mr T Olds	15/11/21	Thompsons
1800633/2021	Mr M Roche	15/11/21	Thompsons
1800634/2021	Mr E Hurst	15/11/21	Thompsons
1800635/2021	Ms J Davis		
1800636/2021	Mr S Tame	15/11/21	Thompsons
1800637/2021	Ms E Birchall	15/11/21	Thompsons
1800638/2021	Mr G Wishart	15/11/21	Thompsons
1800639/2021	Mr P Cawley		
1800640/2021	Mr A Prunty	15/11/21	Thompsons
1800641/2021	Mr P Reeve	15/11/21	Thompsons
1800642/2021	Mr M Roberts	15/11/21	Thompsons
1800644/2021	Mr O Malyan	15/11/21	Thompsons
1800645/2021	Ms T Limbrick	15/11/21	Thompsons
1800646/2021	Mr P Moloney		
1800647/2021	Ms Sheridan Reay		