



EMPLOYMENT TRIBUNALS

Claimant: Mr M Benham

Respondents: (1) OCS Group UK Limited
(2) Rentokil Initial UK Limited

Heard on: 11th February 2022

Before: Employment Judge Pritchard

Representation

Claimant: No appearance
Respondent: Mr A Burgess, litigation executive

JUDGMENT UPON A PRELIMINARY HEARING

1. The Claimant did not apply to amend his claim to include a disability discrimination claim against the Second Respondent on or around 11 July 2017.
2. Even if it could be said that the Claimant applied to amend his claim to include a disability discrimination against the Second Respondent on or around 11 July 2017, that application was refused.
3. The Claimant applied on or around 11 July 2017 to amend his claim to include constructive unfair dismissal against the Second Respondent. That application was refused.
4. The Claimant was informed by letter dated 27 July 2017.
5. There is no disability discrimination or constructive unfair dismissal claim before the Tribunal under this case number.
6. Save for the effect, if any, of paragraph 3 of the Judgment of Employment Judge Baron dated 30 January 2018, proceedings under this case number are concluded.

REASONS

1. The Claimant did not attend this preliminary hearing and I gave instructions for enquiries to be made. I was informed by my clerk that the Claimant thought the preliminary hearing was to take place in May, he was at work and unable to attend. My clerk confirmed that the correct hearing date had been properly communicated to the Claimant. I took the decision to proceed with the hearing in the Claimant's absence under Rule 47 of the Employment Tribunals Rules of Procedure 2013.

Issues

2. It is the Claimant's contention that on or around 11 July 2017 he had applied to amend his claim to include claims of disability discrimination and constructive unfair dismissal against the Second Respondent. The question as to whether such an application had been made and, if so, what happened to it, were issues which came before Employment Judge Nash for determination at a preliminary hearing on 5 May 2020. Employment Judge Nash, working remotely, did not have sufficient file documents before her and it was not possible for her ascertain what had happened to any such application.
3. At paragraph 6 of her case management order, Employment Judge Nash set out the preliminary issues (agreed by consent) to be decided at a further preliminary hearing as follows:
 - 3.1. Did the Claimant apply to amend to include a disability discrimination and/or unfair dismissal claim against the Second Respondent on or around 11 July 2017?
 - 3.2. If so, did the Tribunal make a decision on that application?
 - 3.3. If the Tribunal rejected the application, how and when did it inform the parties?
 - 3.4. If the Tribunal granted that application, was the amended claim served on the Second Respondent and is the Second Respondent out of time to respond?
 - 3.5. If the Tribunal granted the application but did not serve the application on the Second Respondent, the amended claim will be served on the Second Respondent.
4. By letter dated 17 September 2021, Employment Judge Dyal apologised to the parties on behalf of the Tribunal Service that the matter had not come before a Judge since May 2020. He also noted the following:

I have considered the file and the position remains confused and confusing. The best course is to have a further hearing for the parties to make representations and for a judge to decide the issues at paragraph 6 of Employment Judges Nash's order of 30th May 2021. A two hour open preliminary hearing will be listed

5. Having had regard to a considerable number of documents held on the Tribunal file (which includes correspondence to and from the parties) and having heard representations from Mr Burgess, I find as follows.

Procedural history

6. On 18 January 2017, the Claimant's employment transferred from the First Respondent to the Second Respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Having complied with the ACAS Early Conciliation procedure, the Claimant presented an ET1 on 10 May 2017 alleging that the First Respondent (the only respondent to the proceedings at the time) had failed to comply with its information and consultation obligations under TUPE.
7. Although he did not tick the box at section 8.1 to confirm that he was also making a disability discrimination claim, he did state in section 8.2:

I have a recognised disability (dyslexia) which makes it extremely difficult for me to read, process and act on a large amount of information in a very short space of time (a few hours of 18 January) and in addition have high blood pressure which has been exacerbated by this situation. A proper consultation period, outlining all the terms and conditions under the TUPE regulations could have eased this process but none of the workers were given the opportunity by OCS

8. In its ET3, the First Respondent resisted the TUPE claim and added:

It is not clear from the Claimant's ET1 whether he is alleging disability discrimination. If alleged, the Claimant has not particularised the grounds for any discrimination claim. For the avoidance of doubt, it is denied that the Claimant was discriminated against by the Respondent, as alleged or at all.

9. It appears that the Claimant was employed by the Second Respondent for a short period until his resignation on 30 June 2017.
10. On 11 July 2017, the Claimant sent an email to the Tribunal, said to be commentary on the First Respondent's ET3, but also particularising matters of complaint against Rentokil Initial UK Limited, the transferee. He applied to add Rentokil as a Respondent to his claim.
11. In response to the Claimant's email, Employment Judge Baron gave instructions for a letter to be sent to the Claimant. The letter dated 27 July 2017 from the Tribunal to the Claimant states as follows:
 - (1) *You are complaining against OCS about a lack of consultation as being a breach of the transfer of undertakings protection of employment regulations 2006. Further you are saying that there was also a breach of the Equality Act 2010 based upon the protected characteristics of disability. Is that correct? If so, the judge will consider the most convenient case management arrangements.*

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(2) *You wish to add Rentokil Initial UK Limited as the second respondent in these proceedings and make a claim arising out of your resignation. The judge has refused that application as such resignation is an entirely different course of action, and against a different company. Any such claim should be the subject of a separate claim form ET1 naming Rentokil Initial UK Limited as the Respondent.*

Please reply to point numbered 1 in his letter as soon possible and in any event by 11 August 2017

12. By email dated 28 July 2017, the Claimant replied:

In reply to the correspondence received from the case worker... on 27 July, I can confirm that query 1 is correct.

13. Employment Judge Baron gave instructions for a guidance note to be sent to the Claimant and required the Claimant to particularise his disability discrimination claim.

14. By email dated 19 August 2017, the Claimant provided particulars of his disability discrimination claim.

15. The Claimant's claim of failure to inform and consult under TUPE was joined with a number of other claims (a multiple claim). The lead Claimant was a Mr Reeves.

16. On 20 October 2017, Employment Judge Baron issued an order which included the following:

*That the application on behalf of the Claimants to add Rentokil Initial UK Limited (Rentokil) as a further Respondent be granted in **respect of the lead claim by Mr Reeves case number 2600712/2017** [emphasis added]*

17. The reasons for the order make it clear that Rentokil was being added for the purposes of the multiple TUPE claim.

18. Following a hearing before a full tribunal on 29 and 30 January 2018, chaired by Employment Judge Baron, judgment was issued in the Claimants' favour against the First Respondent which was ordered to pay to the Claimants compensation amounting to thirteen weeks' pay. The judgment noted that the Second Respondent was jointly and severally liable for the award.

19. Paragraph 3 of the judgment also recorded the following:

(3) The Tribunal orders that the complaint of a failure to comply with regulation 13(6) of the 2006 Regulations is stayed until further order

20. On 28 January 2020, the Claimant informed the Tribunal:

I am writing to withdraw the above claim against the First Respondent (OCS Group UK Limited) in its entirety.

This letter is notification of my withdrawal of the claim.

I understand that the proceedings will be dismissed following the withdrawal of the claim and I do not object to this.

21. On 6 March 2020, Acting Regional Employment Judge Davies issued a judgment dismissing proceedings against the First Respondent following withdrawal by the Claimant. The judgment also records:

For the avoidance of doubt, the claim continues against the Second Respondent.

Conclusion

22. It does not appear that the Claimant's correspondence of 11 July 2017 was an application to amend his claim to allege disability discrimination against the Second Respondent.
23. To the extent that the Claimant's correspondence of 11 July 2017 might be considered such an application, it was expressly refused by Employment Judge Baron as set out at paragraph 2 of the Tribunal's letter dated 27 July 2017.
24. Although that same correspondence could be construed as an application to amend to include a claim of constructive unfair dismissal, that application was expressly refused by Employment Judge Baron as set out at paragraph 2 of the Tribunal's letter dated 27 July 2017.
25. In particular, Employment Judge Baron refused to join the Second Respondent to the claim for the purposes of claims of disability discrimination and constructive unfair dismissal.
26. Although the Claimant appears to have made a claim of disability discrimination against the First Respondent, it was effectively dismissed upon withdrawal by the Claimant as the judgment of Acting Regional Judge Davies dated 6 March 2020 makes clear.
27. That judgment states that the claim continues against the Second Respondent but, since there was no subsisting claim of disability discrimination or constructive dismissal against the Second Respondent, that statement can only relate to paragraph 3 of the judgment of the Tribunal dated 30 January 2018.

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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Employment Judge Pritchard

Date: **11th February 2022**

JUDGMENT AND REASONS SENT TO THE PARTIES ON
Date: **2nd March 2022**

FOR THE TRIBUNAL OFFICE