EMPLOYMENT TRIBUNALS

Claimant: **Ms Bilyana Stoyanova**

Respondent: **NYS Collection UK Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **14 June 2022**

Before: **Employment Judge Barrett**

Representation

Claimant: Mr Max Lansman, Counsel

Respondent: Did not attend and was not represented

JUDGMENT having been sent to the parties on 16 June 2022 and written reasons having been subsequently requested, the following reasons are provided:

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was by videoconference (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Introduction

1. On 23 April 2021 the Claimant presented an ET1 form bringing claims for automatic unfair dismissal and an unauthorised deduction from wages against NYS Stratford Limited (t/a NYS Collection). Following a hearing on 13 October 2021, the claims were upheld by a reserved judgment sent to the parties on 14 February 2022. A remedy hearing was listed for 14 June 2022.

2. On 9 June 2022, the Claimant made an application pursuant to rule 34 of the Employment Tribunals Rules of Procedure 2013 for NYS Stratford Limited (t/a NYS Collection) to be substituted as the Respondent to the claim by NYS Collection UK Limited.

3. At the remedy hearing on 14 June 2022, the Claimant's application was granted and NYS Collection UK Limited was substituted as the Respondent to the claim.

4. Following evidence and submissions by and behalf on the Claimant, judgment was entered on remedy in the sum of £5,905.77.

5. Written reasons for the case management decision to substitute the Respondent and the remedy judgment are provided below.

Application to amend

The law

6. Rule 34 provides:

> **Addition, substitution and removal of parties**
>
> **34. The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included.**

7. Case law on predecessor provisions under previous iterations of the Employment Tribunal rules provides relevant guidance.

   7.1. The case of *Selkent Bus Co Ltd v Moore* [1996] ICR 836 sets out the ordinary approach to any application to amend. The Tribunal must take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Relevant circumstances include: the nature of the amendment; the applicability of statutory time limits; and the timing and manner of the application.

   7.2. Applying *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650, where the amendment sought is substitution of the respondent, the applicant claimant must satisfy the Tribunal that a genuine mistake had been made as to the employer's identity and the mistake was not misleading or such as to cause reasonable doubt as to the identity of a party to the proceedings.

   7.3. In *Drinkwater Sabey Ltd v Burnett and Kent CC* [1995] ICR 328 the EAT held that there is no time-bar on the Tribunal's discretionary power to substitute a respondent.

   7.4. In *Watts v Seven Kings Motor Co* [1983] ICR 135, an application to correct a mistake as to the employer's identity was granted on appeal, after judgment on liability had been entered.

   7.5. In *Milestone School of English v Leakey* [1981] IRLR 3, a claimant reached a settlement with a named respondent who ceased trading without paying the settlement sum. The Tribunal permitted the name of the Respondent to be amended to include another company. The EAT upheld this decision,

because the claimant wished to claim against his "employers", whose exact identity was unknown through no fault of his own.

8. When tasked with ascertaining the identity of a claimant's true employer, the approach for the Tribunal to take is set out in the EAT's judgment in *Clark v Harney Westwood and Riegels* [2021] IRLR 528 at §52:

> **a. Where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law.**
>
> **b. However, where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the relevant evidence.**
>
> **c. Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties.**
>
> **d. If the written agreement reflecting the true intentions of the parties points to B as the employer, then any assertion that C was the employer will require consideration of whether there was a change from B to C at any point, and if so how. Was there, for example, a novation of the agreement resulting in C (or C and B) becoming the employer?**
>
> **e. In determining whether B or C was the employer, it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed.**

9. This approach follows well-established case law including *Autoclenz Ltd v Belcher* [2011] ICR 1157 as applied in *Dynasystems for Trade and General Consulting v Moseley* UKEAT/0091/17/BA, which allows the Tribunal to look beyond the terms of the initial written agreement in order to ascertain what was agreed as a matter of reality.

The facts

10. The application to amend had not been responded to by NYS Stratford Limited (t/a NYS Collection) or by NYS Collection UK Limited, despite both companies and the co-directors, Mrs Talia Myers and Mr Asif Oren, having been provided with adequate notice of the application and the opportunity to attend the hearing.

11. The Claimant provided a witness statement in support of her application to amend. However, other than the updating information regarding the insolvency of NYS Stratford Limited, I only needed to look at the facts found, and documents admitted, during the liability hearing in order to reach a decision.

12. NYS Stratford Limited (t/a NYS Collection) is a subsidiary company wholly owned by NYS Collection UK Limited. At the time of the Claimant's application, it had entered into voluntary liquidation. NYS Collection UK Limited operates two retail kiosks selling sunglasses, one in Westfield Stratford City shopping centre and one in Westfield London shopping centre. NYS Stratford Limited (t/a NYS Collection) was, prior to entering voluntary liquidation, involved in the operation of the Stratford kiosk. Mrs Myers was General Manager and Director of both companies. In her witness evidence at the liability stage, she referred to her role at the Respondent being to run both kiosks with her business partner, Mr Oren.

13. The Claimant commenced employment on 1 July 2020. She signed a written agreement on that date headed "*Annex A – Bilyana Stoyanova – Sales Assistant"*, setting out terms of her employment. The written agreement bore a logo at the top, *"NYS Collection Eyewear".* The signature page was signed by the Claimant and by Ms Myers, Managing Director, "*For on and on the behalf of NYS STRATFORD LTD*". The Claimant worked at the Stratford kiosk.

14. The Claimant went through early conciliation between 4 and 17 March 2021, and presented her ET1 claim form on 23 April 2021, naming her employer as "*NYS STRATFORD LTD. (t/a NYS Collection)*". Accordingly, the subsidiary company was the Respondent to the claim.

15. The Respondent defended the claim and submitted Grounds of Resistance. The Grounds of Resistance at paragraph 2 referred to the Claimant's employer as "*an international fashion sunglasses and eyewear brand with two retail kiosk units in London. One kiosk unit is in Westfield Stratford City shopping centre and the second kiosk unit is in Westfield London shopping centre*". Paragraph 3 refers to the Respondent's business being severely affected by the Covid-19 pandemic, meaning that it had to close both kiosks. Paragraph 4 says that the Respondent employed six employees across both kiosks, three employees at each kiosk.

16. In practice, staff could be deployed interchangeably between the Stratford and West London sites. In the liability judgment, it was noted that this occurred in September 2020. This was pleaded at paragraph 15 of the Grounds of Resistance.

17. On 30 October 2020, Mrs Myers wrote a 'To Whom It May Concern' letter setting out the details of the Claimant's employment to support her application to rent a property. It stated, "*This letter is to confirm Bilyana Stoyanova's employment with NYS Collection*", and bore the *"NYS Collection Eyewear"* logo, although it was signed by Mrs Myers "*For and on behalf of NYS Stratford Ltd*".

18. Correspondence dated February 2021 reviewed at the liability hearing shows that the Payroll Department of NYS Collection UK Limited dealt with the Claimant's payroll matters.

Submissions

19. Mr Lansman submitted on behalf of the Claimant that a wider inquiry into the facts was necessary because the written agreement did not reflect the reality of the relationship. In reality, Mrs Myers and Mr Oren ran the two kiosks as a single business, moving staff and goods between then and treating employees as part of the business as a whole. This reality was reflected by the Grounds of Resistance which referred to the Respondent as having two kiosks and six

members of staff, who could be moved between the kiosks. Mr Lansman contended that the Grounds of Resistance must have referred to the parent company NYS Collection UK Limited as the employer, because the West London kiosk did not fall under the subsidiary NYS Stratford Limited. Therefore, all employees were treated as employees of the parent company. The witness evidence at the liability stage reflected this and was not challenged.

20. Further, it was submitted that the Claimant's mistake in naming the subsidiary rather than the parent company as her employer on her ET1 was genuine and reasonable, as she was looking at the signature page of the written agreement. She only had reason to investigate the identity of her employer when NYS Stratford Limited entered voluntary liquidation following the liability judgment. She believed the kiosk remained operational, and therefore looked more closely at the documentation and realised that her employer was in fact NYS Collection UK Limited.

21. In relation to the *Selkent* factors, Mr Lansman acknowledged this was a substantive amendment but submitted that to allow it would cause no hardship to the Respondent. The personnel involved in both the parent and the subsidiary companies were the same. Mrs Myers and Mr Oren had given evidence at the liability hearing. They had been able to give the same instructions as they would have if the parent company had been correctly named from the outset. By contrast, the Claimant would be put to hardship if denied an effective remedy for her claims, which the Tribunal had found to be meritorious.

Conclusions

22. On the basis of the facts found, I concluded that the parties seamlessly and consistently acted throughout the relationship as if NYS Collection UK Limited was the Claimant's employer. While the written agreement was the starting point, it did not truly reflect the intentions of the parties. The written agreement was not consistent with the fact that all employees, including the Claimant, were able to be deployed across both the Stratford and West London kiosks if necessary to benefit the business. Other than the signature page on the written agreement, there were no countervailing facts which could only be consistent with NYS Stratford Limited being the employer. The Grounds of Resistance and witness evidence at the liability stage reflected an understanding that the parent company was the true employer. The parties' intention, objectively ascertained, was that from the inception of the employment relationship, NYS Collection UK Limited was the employer with control over the Claimant's employment.

23. The issue then was whether the Claimant should be permitted to amend her claim to substitute NYS Collection UK Limited, the correct employer, as the Respondent to the claim. I considered the following factors:

    23.1. This was a substantive amendment but not one that altered the cause of action. Other than the identity of the employer, the factual matrix remained the same.

    23.2. There was no time bar, as the claim itself had been brought in time.

    23.3. The application had been made very late, but the Claimant had only been prompted to investigate the matter when she learned that NYS Stratford Limited had entered voluntary liquidation. I accepted that prior to that time,

she genuinely and reasonably believed NYS Stratford Limited was her employer because it was the company named on the written agreement which she signed at the commencement of her employment.

23.4. The mistake was not misleading or such as to cause doubt as to the identity of a party; on the facts found, it was possible to identify NYS Collection UK Limited as the true employer.

23.5. The prejudice to the Claimant if the application were not to be granted would be severe in that she would be unable to enforce rights which the Tribunal had found to have been infringed.

23.6. The prejudice to the current and proposed substitute Respondent if the application were to be granted would be limited; the same witnesses would have given evidence and the same documentary evidence and arguments would have been advanced at the liability stage, had the mistake been corrected earlier.

24. Taking the above factors into account, I concluded that the balance of prejudice favoured granting the amendment and therefore substituted NYS Collection UK Limited as the Respondent to the claim.

Remedy judgment

25. The Claimant provided an updated schedule of loss and a witness statement dealing with remedy issues. The Respondent was not present or represented and therefore the Claimant was not cross-examined on her remedy evidence.

26. Mr Lansman made submissions on remedy which are noted as relevant to each head of loss addressed below.

27. The Claimant was previously awarded compensation for an unauthorised deduction from wages in the sum of £74.25 in the liability judgment.

28. The Claimant was not eligible to claim a basic award because she lacked two years' service at the time of her dismissal.

Loss of earnings

29. Section 123(1) of the Employment Rights Act 1996 provides that the compensatory award shall be:

> **'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'**

30. The Claimant's loss of earnings attributable to her unfair dismissal ended on 7 October 2021, when she commenced new permanent employment. The Respondent did not challenge the figures in the Claimant's schedule of loss. The same figures had been advanced by the Claimant previously when NYS Stratford Limited had solicitors on the record. I therefore awarded the figure for loss of earnings set out in the schedule of loss, namely £4,195.08.

Loss of pension contributions

31. Mr Lansman submitted it would be just and equitable to award the Claimant compensation for loss of pension contributions, as an approximation of her loss of pension. I agreed this was the proportionate and appropriate measure in the circumstances. There being no challenge to the figures, I awarded the amount in the schedule of loss, namely £305.28.

Loss of statutory rights

32. The schedule of loss did not include compensation for loss of statutory rights because the Claimant had not accrued sufficient length of service to be protected against 'ordinary' unfair dismissal at the point she was dismissed. However, Mr Lansman argued at the hearing that a sum should be awarded to reflect the fact that the Claimant had been obliged to re-start the two-year accrual period for unfair dismissal rights, and service eligibility for notice pay, from scratch. Accepting that submission, I awarded the sum of £150.

ACAS uplift

33. The Claimant sought an uplift of 25% on her compensatory award to reflect the Respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

34. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides in relation to certain claims including unfair dismissal, that where an employer has failed to comply with an applicable ACAS Code relating to the resolution of the dispute, and that failure was unreasonable, "*the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%*."

35. Mr Lansman submitted that the ACAS Code of Practice on Disciplinary and Grievance Procedures applied because NYS Stratford Limited had argued at the liability stage that the Claimant had been selected for redundancy due to conduct-related reasons. He cited *Holmes v Qinetiq Ltd* [2016] ICR 1016*,* in which the EAT held that the ACAS Code of Practice on Disciplinary and Grievance Procedures "*is intended to apply to any situation in which an employee faces a complaint or allegation that may lead to a disciplinary situation or to disciplinary action*" (§12) and that disciplinary situations "*include misconduct or poor performance but may extend beyond that, and are likely to be concerned with the correction or punishment of culpable behaviour of some form or another*" (§15).

36. At the liability stage, NYS Stratford Limited argued that the Claimant was selected for redundancy because she was the poorest performing employee at the Stratford kiosk and because of concerns about her difficult attitude, lack of commitment, and misconduct in taking unauthorised leave. I considered that in these circumstances, a disciplinary situation arose and the ACAS Code of Practice on Disciplinary and Grievance Procedures did apply, even though the Tribunal had subsequently found the true reason for dismissal was because the Claimant alleged the infringement of a statutory right.

37. The Respondent failed to comply with the ACAS Code of Practice, in that it did not follow any sort of procedure, give the Claimant notice of any disciplinary or performance concerns, communicate with the Claimant that she was at risk of

dismissal, hear from her before taking the decision to dismiss, or consider her appeal against dismissal. In the circumstances, I considered that a full 25% uplift was merited.

Mitigation

38. The burden of proving that the Claimant unreasonably failed to take reasonable steps to mitigate her losses lay with the Respondent: *Fyfe v Scientific Furnishing Ltd* [1989] IRLR 331.

39. Within the hearing bundle prepared for the liability stage, NYS Stratford Limited had compiled advertisements for job vacancies available following the Claimant's dismissal. However, it had not been put to the Claimant that she had failed to apply for any vacancy, or that such failure was unreasonable.

40. The Claimant had provided documentary and witness evidence demonstrating that she did take reasonable steps to find alternative employment.

41. In the circumstances, there was no basis for reducing the Claimant's compensation in respect of mitigation.

Polkey

42. Under the principle in *Polkey v AE Dayton Services Ltd* [1987] IRLR 50, the Tribunal must consider whether to make a reduction in any award for losses following dismissal to reflect the chance that the individual would have been dismissed fairly in any event.

43. In this case, there was no proper basis for making a *Polkey* deduction. Arguments that the Claimant had performed and conducted herself poorly had been rejected at the liability stage. Findings were made at the liability stage that the Stratford kiosk reopened following lockdown on 12 April 2021 and the remaining staff members returned to work. A third member of staff was recruited in June 2021. In the circumstances, there was insufficient evidence on which to speculate that the Claimant could have been fairly dismissed for redundancy.

Recoupment

44. The total award came to £5,905.77, namely the figure of £5,718.27 taken from the Claimant's schedule of loss, plus £187.50 in respect of her loss of statutory rights (£150 with a 25% ACAS uplift).

45. The prescribed period was the period from dismissal on 31 January 2021 to the date on which the Claimant's loss of earnings ceased, namely 7 October 2021 (*Homan v AI Bacon Co Ltd* [1996] ICR 721).

46. The balance of the award was £1,710.66**,** being the difference between the total award and the prescribed element. This part of the award was immediately payable by the Respondent to the Claimant.

47. The effect of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 was discussed at the hearing an

explanation was provided in an annex to the remedy judgment sent to the parties on 16 June 2022.

Employment Judge Barrett
Date: 5 September 2022