EMPLOYMENT TRIBUNALS

Claimant: Mr Kapirial

Respondent: St George's University Hospitals NHS Foundation Trust

PRELIMINARY HEARING

HELD AT: London South (CVP) **ON:** 8 August 2022

BEFORE: Employment Judge Hart

REPRESENTATION:

Claimant: Mr Kapirial, in person

Respondent: Ms Snocken, counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The respondent's application to strike out the claimant's claim on the grounds that it has 'no reasonable prospect of success' does not succeed.

2. The respondent's application for a deposit order on the grounds that the claimant's claim has 'little prospect of success' does not succeed.

REASONS

Introduction

1. From 19 June 2017 the claimant was employed by the respondent as a Cancer Database Systems Manager (first contract). He resigned on notice; the notice was due to expire on 30 November 2021. The claimant claims breach of contract in relation to work carried out between 24 and 30 November 2021, which he says should have been paid in addition to his usual salary as an employee (second contract). He says the amount outstanding is £11,000.

2. The respondent says the work carried out between 24 and 30 November 2021 was done under the first contract, it being agreed that he would do this work instead of taking annual leave. The claimant would be paid for accrued leave on termination of his contract on 30 November 2021.

3. The respondent has applied for the claimant's claim to be struck out on the grounds that the claim has no reasonable prospects of success under Rule 37(1)(a), or alternatively for a deposit order on the grounds that the claim has little reasonable prospect of success under Rule 39. This was on the basis that the Tribunal has no jurisdiction, or alternatively the claim has no or little prospect of success on the facts.

Background of proceedings

4. ACAS Early Conciliation was begun on 10 January 2022, the certificate was issued on 20 February 2022. The claimant's claim form was presented to the Tribunal on the 17 March 2022. The respondent's response form was submitted to the Tribunal on the 14 June 2022. By letter dated the 8 July 2022 the respondent applied for the case to be struck out without recourse to a hearing.

5. On 22 July 2022, Employment Judge Dyal converted the final hearing listed for 8 August 2022 to an open preliminary hearing to discuss the respondent's application to strike out.

The hearing

6. The parties attended by CVP.

7. The claimant requested a reasonable adjustment to the hearing, consisting of extra time to read due to dyslexia. This was granted.

8. The Tribunal was provided with the following documents:
    a. Hearing bundle of 31 pages, the page references in this judgment are those in the bundle.
    b. A skeleton argument submitted on behalf of the respondent and accompanying bundle of authorities.

9. Both parties made oral submissions, and the Tribunal is grateful for their assistance.

10. The Tribunal made enquiries into the claimant's ability to pay a deposit, should it be ordered.

11. Judgement was reserved. Provisional case management orders were agreed with the parties (provided in a separate document).

The Facts

12. The respondent at the outset stated that it was not asking the Tribunal to make any factual finding; its application was purely based on the claimant's case as pleaded, the Tribunal was invited to assume those facts and determine jurisdiction on that basis. The Tribunal's conclusions set out below refer to the relevant parts of the pleaded facts.

The Law

Jurisdiction

13. An employment tribunal only has jurisdiction to determine a breach of contract claim if it is a claim that falls within Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ('the 1994 Order'). Article 3 states:

'3. Extension of jurisdiction

Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-

(a) the claim is one to which section 131(2) of the 1978 Act [now section 3(2) of the Employment Tribunals Act 1996] applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment.'

The Tribunal notes that a claim can only be brought by an employee. This means that if the claimant was employed as a worker or independent contractor, then he can only bring a claim in the civil (county) court.

14. Section 3(2) of the Employment Tribunals Act 1996 ('the 1996 Act') states that

'3.— Power to confer further jurisdiction on [employment tribunals]

(1) ….

(2) Subject to subsection (3) [which excludes claims for personal injury], this section applies to—

(a) a claim for damages for breach of a contract of employment or other contract connected with employment,

(b) a claim for a sum due under such a contract, and

(c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

if the claim is such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.'

The Tribunal notes that all three conditions (a), (b) and (c) have to be satisfied in order for a tribunal to have jurisdiction to determine a breach of contract claim.

15. The jurisdiction conferred by the 1996 Act runs concurrently with the civil courts. This means that an employee has a choice as to whether or not to bring a claim in the employment tribunal or a civil court.

16. The Tribunal accepts the respondent's submission that a restrictive interpretation is to be applied to these provisions, **Oni v Unison Trade Union 2018 ICR 1111** and **Miller Bros & FP Butler Ltd v Johnston 2002 ICR 744.**

Strike out

17. Rule 37(1) provides that an ET 'may' strike out a claim on specific grounds including 'that it is scandalous or vexatious or has no reasonable prospect of success.' This is a two-stage test requiring a tribunal to consider:
(a) Whether one of the specified grounds has been established?
(b) Whether or not to use its discretion taking into account the overriding objective?

18. Striking out a claim is a draconian measure and should only be taken in exceptional circumstances. There is considerable caselaw cautioning against doing so on grounds of 'no reasonable prospect of success' where there are central facts in dispute, see for example **Anyanwu v South Bank Students' Union 2001 UKHL 14,** and **Glamorgan NHS Trust v Ezsias 2007 IRLR 603.** Whilst these are discrimination and whistleblowing cases, and public interest issues are not at play in money claims, nevertheless caution should still be exercised. On the other hand, tribunals should not be deterred from striking out a claim, where it is appropriate to do so.

19. The Tribunal notes that the EAT has urged particular caution where a claim has been pleaded by a litigant in person, see for example **Mbuisa v Cygnet**

Healthcare Ltd 2019 UKEAT 119/18 WLUK 652, **Malik v Birmingham City Council 2019 UKEAT 27/19**, and **Cox v Adecoo 2021 ICR 1307**. The EAT in **Cox** at paragraphs 24-25, referred to the guidance for considering claims brought by litigants in person in the Equal Treatment Bench Book, and in particular the difficulties that they may face in relation to pleading their case. At paragraph 28, the EAT sets out the following general propositions which emerge from the caselaw:

'(1) No one gains by truly hopeless cases being pursued to a hearing.

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.

(3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.

(4) The claimant's case must ordinarily be taken at its highest.

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing.

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer.

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.'

Deposit Order

20. Rule 39(1) provides that a Tribunal may make a deposit order not exceeding £1000 where any specific allegation or argument in a claim has 'little reasonable prospect of success'. This is a discretionary power and even if an allegation / argument has 'little reasonable prospect of success', in the exercise of its discretion a tribunal should apply the overriding objective to deal with cases justly and fairly. It is therefore a two-stage test requiring a tribunal to consider:
    (a) Whether the ET has power to make an order?
    (b) Whether or not to use its discretion taking into account the overriding objective?

21. Prior to making a deposit order the Tribunal is required to make reasonable inquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

22. Deposit orders should not be used as a backdoor route to make it difficult to access justice or to effect a strike out: **Hemdan v Ishmail 2017 ICR 486 (EAT).** It is noted that the test of 'little reasonable prospect of success' is not as rigorous as that required for a strike out order, and that tribunals have greater leeway when considering whether to order a deposit. However an ET must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response: **Jansen Van Rensburg v Royal Borough of Kingston-upon-Thames 2007 EAT 0096/07**.

23. Where there are deficiencies in the pleadings tribunals have also been cautioned against using deposit orders as a substitute for more appropriate case management orders aimed at clarifying the facts and issues: **Tree v South East Coastal Ambulance NHS Foundation Trust 2017 EAT 0043/17.**

Conclusions

24. The respondent in its written submission identifies a number of issues and the Tribunal adopts the same structure, dealing with each question in turn.

25. The first question is whether the claimant is bringing the claim as an employee. If he is not then the Tribunal simply has no jurisdiction to determine his claim. The respondent's case is based on what the claimant has pleaded. The claim form states that the claimant was 'to be paid for as a contractor' and that an 'invoice' would be issued for the work done (**p. 10**). The claimant then issued an invoice for £11,000.

26. The respondent may well be correct that the claimant's status in relation to the second contract was not that of employee, but the Tribunal is wary of relying on pleadings drafted by a litigant in person, who may not be fully aware of the labels he has used and what they signify. The Tribunal notes that employment status is a complex issue and is often fact-sensitive. Further, the respondent does not dispute that the claimant was an employee under the first contract, a contract which on one analysis continued alongside the second contract. The Tribunal has not been provided with any evidence, documentary or oral, in order to determine this issue. The Tribunal concludes that it is not able to determine this issue on the pleadings alone; particularly taking into account that they were drafted by a litigant in person.

27. The second question is whether there was a contract. The respondent asserts that the basic requirement for formation of a contract has not been met because on the claimant's pleaded case there was no agreement as to the remuneration. The claimant merely pleaded that it was agreed he was to be paid as a contractor, send invoices and that 'the rates was not an issue' for the respondent (**p. 10**). The respondent properly concedes that this was not fatal to the claimant's claim with reference to the case of **Stack v Ajar-Tec Ltd 2015 IRLR 474**. However, the respondent also relies on the lack of detail in the pleaded case as to the work that would be carried out and when the invoices would be paid, and argues that there was no contract at all.

28. The Tribunal accepts that if there was no contract, then there can be no claim for breach of contract. The claimant may have a different type of claim e.g. quantum meruit (unjust enrichment), but it would not be a claim that the tribunal has jurisdiction to determine under the 1994 Order. The problem facing the Tribunal at this stage in the proceedings is that the lack of detail in the claim form relied upon by the respondent could just be a pleading issue by a litigant in person. The Tribunal has seen no documents, and heard no evidence. In his response to the respondent's submissions, the claimant referred to discussions he had with Mr Taylor, (the respondent's Interim Chief Information Officer) and that he submitted invoices on a daily basis. There may be other factual details that the claimant has not included on the claim form. Further, the Tribunal notes that the respondent has not disputed that the claimant did do additional work between 24-30 November 2021. The respondent's case is that the claimant was due to be on annual leave during this period but agreed to work in return to being paid for the accrued annual leave on termination of his contract (**p. 27**). The Tribunal is of the view that before it can conclude that there was no contract at all, an unrepresented claimant should be given the opportunity to properly plead his case and the Tribunal provided with evidence, documentary or oral, as to what in fact was agreed between the parties.

29. The third question is whether, if there was a contract, it is a contract of employment or other contract connected with employment as required by section 3(2) of the 1996 Act. The respondent concedes in its skeleton argument that determination of this issue was likely to depend on a factual determination as to whether, in particular, the second contract was connected with the claimant's employment under the first contract. The Tribunal agrees that this is a matter that will require findings of fact. (The respondent's submission that the contract was not connected due to the second contract only being entered into after the first contract had ended is dealt with in answer to the fifth question below, since it is essentially the same point).

30. The fourth question is whether the claim was for breach of contract or sum due under such a contract. The respondent concedes that the claimant has reasonable prospects of establishing this point.

31. The fifth question is whether the claim arises or is outstanding on the termination of the claimant's employment. The respondent argues that on the claimant's pleaded case the second contract was entered into after the termination of the first contract. The respondent relies on the claimant's case as set out in his claim form in box 8.2. (**p. 10**). The claimant stated that his last day in the office was 22 November 2022 with the respondent agreeing to pay unused annual leave in his November 2021 pay packet. He then stated that 'after leaving employment' with the respondent he was contracted by Mr Taylor to work between 24 to 30 November 2022. However the Tribunal notes that claimant has also stated in box 5.1 that his employment ended on the 30 November 2021 (**p. 7**). If so the contract was entered into during his employment with the respondent and not after. Given the central importance of the date of termination in determining this issue, and the discrepancy in the claimant's own case, the Tribunal is of the view it should exercise caution. The pleadings were drafted by a litigant in person, and this is a point that requires clarification, which can be obtained through case management.

32. The respondent makes a further point, that even if there was a contract that existed at the time of termination, it was one for a contingent payment (i.e. a payment for an amount which had yet to be determined). If so, payment was not outstanding on termination of employment and therefore the Tribunal would have no jurisdiction: **Peninsula Business Services Ltd v Sweeney 2004 IRLR 49.** The respondent relies on the claimant's case that once the work had been completed there was a meeting with Mr Taylor to discuss the invoices, and that this meeting concluded with an agreement that the invoices would be processed once the claimant had provided details of the work carried out; this information being provided on the 2 December 2021 (**p.10**). It seems to the Tribunal that in order to form a view as to whether or not the payment was contingent on post termination matters it will need to make findings of fact as to what were the terms of the contract that was entered into, i.e. the issues raised by question 2. It may also be prudent to receive / hear evidence as to the nature of the post-termination discussions and what was agreed before determining this issue.

33. The Tribunal accepts that jurisdiction remains an issue in this case and will need to be determined at the final hearing. The respondent raises a number of points that the claimant will need to address in order for his claim to succeed. However the Tribunal is of the view that it is simply not possible on the claimant's pleadings alone, to find that the claim has no or little reasonable prospect of success. A safer course is to issue case management orders to give the claimant an opportunity to address the points raised by the respondent, and to list this case for a final hearing (see accompanying case management orders).

Employment Judge Hart

Date: 31 August 2022