



EMPLOYMENT TRIBUNALS

Claimant: Mr Omoluyi Longe

Respondent: Kier Highways Limited

JUDGMENT

UPON APPLICATION made by letter dated 8 August 2022 to reconsider the Judgment dated 15 June 2022 under rule 71 of the Employment Tribunals Rules of Procedure 2013, and without a Hearing, the Claimant's application for Reconsideration is successful, in that his claims of unfair dismissal and breach of contract are not struck out on the grounds that they have no reasonable prospect of success.

The claims of unfair dismissal and breach of contract may proceed.

The Claimant has made an application to amend his claims to add complaints of automatic unfair dismissal and detriment for reasons related to health and safety. This application will be determined at a forthcoming preliminary hearing.

REASONS

1. The Tribunal determined in a Judgment dated 15 June 2022 that the Claimant had no reasonable prospect of being able to establish that he was an employee of the Respondent within the meaning set down in s230 Employment Rights Act 1996. It was therefore the case that his unfair dismissal and breach of contract claims had no reasonable prospect of success, as the Tribunal would have no jurisdiction to hear them if the Claimant was not able to establish that he was an "employee" within the meaning in s230 ERA.
2. The Tribunal did not find that the Claimant had no reasonable prospect of establishing that he was an "employee" of the Respondent within the meaning in s83 Equality Act 2010, nor that this had little reasonable prospect of success. The Tribunal refused the Respondent's application for strike out and a deposit order respectively in relation to the Claimant's race discrimination claims.
3. The Tribunal's view that the Claimant had no reasonable prospect of establishing that he was an "employee" within the definition set out in s230 was for a number of reasons as set out in the judgment dated 15 June 2022, including that the claimant had a high hurdle to overcome to establish that the contractual arrangements he entered did not reflect the reality of his engagement with the respondent. This was felt to be particularly difficult for the claimant to overcome as he personally had no direct contractual relationship with the respondent, nor with the agency that engaged him on their behalf, as he was supplied via his personal service company to the agency and then from the agency to the respondent.

4. He provided insufficiently persuasive reasons as to why the Tribunal would be able to find that his relationship with the respondent was not reflected in their contractual arrangements. This was found to be the case both at the hearing itself and in subsequent submissions. The Tribunal therefore agreed with the respondent's proposition that the unfair dismissal and breach of contract claims had no reasonable prospect of success.
5. The claimant has made submissions to the Tribunal a number of times since the original hearing on 28 April 2022, including but not limited to his request for reconsideration. These submissions have been detailed. He clearly feels very strongly about the events that took place during his time with the respondent and argues extensively in favour of his version of events. He has responded in detail to submissions of the respondent or comments of the Tribunal that he considers do not support his case, even if no further submissions were requested. He also takes personal offence at points made in legal submission and has responded to these.
6. The claimant is reminded of the overriding objective in Rule 2 of the Employment Tribunals Rules of Procedure 2013, which requires (amongst other issues) Tribunals to deal with matters in a way that is proportionate and requires parties to assist the Tribunal in achieving this objective. He is requested, as far as he is able in future, to listen to direction given by the Tribunal and to respond in a manner as concise and objective as possible, to assist the Tribunal.
7. The claimant submits that he will be able to demonstrate that his relationship was one of employee with the respondent on the basis of their conduct towards him alone. It has been explained to him that this is a high hurdle to overcome and that of itself, the alleged poor behaviour does not demonstrate an employee/employer relationship. The difference between "employee" status and "worker" status was also explained to him at the initial video hearing on 28 April 2022. It is also noted that the claimant's original ET1 claim form makes no reference in his pleadings to being an employee of the respondent.
8. The Tribunal indicated in a letter dated 13 September 2022 that, having considered the claimant's application, the Tribunal's provisional view was that the application should nevertheless succeed. The reasons given were as follows:

"... the issue of the claimant's status as an employee of the respondent is fact-sensitive and as such ought to be considered along with the other claims at a final hearing. Furthermore, the claimant indicates that there is evidence available to suggest that the respondent insisted on the agency providing him in particular to the respondent, which James v London Borough of Greenwich [2007] IRLR 168 EAT highlights is a key consideration. Furthermore, account is taken of the fact that the claimant is a litigant in person and the arrangements for the preliminary hearing were not those which the parties may expect, in that there was insufficient time available for matters to be discussed in person, the issues were legally complex, and the issues were subsequently dealt with in writing."

9. The respondent objected to the Tribunal's provisional view, noting that the claimant had extensive opportunity to make written submissions and had done so at length. The respondent also noted that the claimant did not raise the issue of the nature of the contractual relations between the parties at the preliminary hearing, and that the claimant was still able to proceed with his claims on the basis of his whistleblowing and discrimination claims. They also noted the additional burden on them were these two additional claims to proceed. The claimant responded to the respondent's submissions with further points of his own.

10. Taking all matters into consideration and having considered the claimant's initial submissions and those of the respondent and the additional points in the claimant's further submissions, it is the Tribunal's view that these are matters that, in the interests of justice, should be considered on all the evidence at a final hearing. They are fact-sensitive matters and the claimant's case will turn on the Tribunal's assessment of whether the parties' conduct during his tenure with the respondent was such that the chain of contractual relations was not representative of the reality of the situation. The submissions provided as part of the reconsideration application suggest that the claimant may have more than no reasonable prospect of establishing this at a final hearing. Furthermore, a number of these issues will already be before the Tribunal as a result of the claimant pursuing the allegation (as he has been permitted to do) that he was an "employee" as per s83 Equality Act 2010, such that the additional resources required for the respondent to address s230 ERA are not as burdensome as they may otherwise have been.
11. The Tribunal was originally asked by the respondent to consider whether, in the alternative, a deposit order should be made on the basis that the claimant has little reasonable prospect of establishing that he is an "employee" of the respondent. No determination has been made of this application, as before this can be properly considered the claimant's claims need to be clarified in an agreed List of Issues. The issues in this case have unfolded piecemeal across a number of separate submissions by the claimant. The List of Issues should include all the grounds on which the claimant asserts that he is an employee, so that they are contained in one agreed and final list. If the respondent wishes to apply for an order that the claimant pay a deposit, they may do so after the production of this List.
12. **A Preliminary Hearing with an estimated duration of 3 hours will be listed in due course on a date to be communicated to the Parties**, to agree a List of Issues, determine the application to amend, and set down case management orders for the good future conduct of the proceedings.

Employment Judge Barker
14 October 2022