



EMPLOYMENT TRIBUNALS

Claimant: Ms M Okunola

Respondents: TwentyAi (1)
Titan Wealth Holdings Ltd (2)
Qdos Broker & Underwriting Services Ltd (3)

RECORD OF A PRELIMINARY HEARING

Heard at: London Central (in private; by video) **On:** 16 February 2023

Before: Employment Judge Emery

Appearances

For the claimant: In person
For the respondents: 1 - Mr. G Bacon (counsel)
2 - Ms. G Churchhouse (counsel)
3 – Mr. S Foote (in-house counsel)

JUDGMENT

- 1. The application to amend the claim to include a claim for direct race discrimination is refused as it duplicates the claimant's 2nd case - 2210731/2022**
- 2. The claims against the 1st respondent and the 3rd respondent including the notice pay claim against the 1st respondent because the Employment Tribunal has no jurisdiction to hear claims against them**
- 3. The issue of employment status shall be struck out as it duplicates an issue in 2210731/2022.**

Reasons

1. This hearing was listed as a Case Management Discussion, and to determine whether the claimant should be allowed to amend her claim to include allegations of race discrimination (EJ Glennie's Order dated 3 February 2023). The 3rd respondent made an application on 3 February 2023 for the claim against it to be struck-out, on the basis that the Employment Tribunals have no jurisdiction to consider the claims against it. On 13 February 2023 the 1st respondent had made an application to strike-out her claim on similar grounds. In its case management agenda, the 2nd respondent applied to strike-out the claim against it. The claimant responded to the 2nd respondent's application.
2. During our initial discussions about the case in the hearing, I concluded that it was possible that the claims against all respondents may have jurisdictional issues, and I informed the claimant that the hearing would consider whether her claims should be struck-out. I heard arguments from all parties on the issues set out below.

The claim form

3. The claimant says in her claim form she was employed from 3 August 2022 to 25 November 2022, she clarified that this means she was employed by the 2nd respondent during this period. She contends that she was undertaking a role within the 2nd respondent for the whole of this period alongside an employee of the 2nd respondent, in a 'handover period', this employee's notice period. The claimant worked in the 2nd respondent's offices on a full-time basis during the handover period.
4. During the period 3 August 2022 to 13 November 2022 the contractual relationship was as follows. The claimant's personal services company (which I abbreviate to MAO Ltd) contracted with the 1st respondent on 02 August 2022. The 1st respondent entered into a contract with the 2nd respondent to provide MAO Ltd services to the 2nd respondent. MAO Ltd supplied invoices to the 1st respondent for work undertaken.
5. The claimant contends that she should be classed as an employee or a worker of the 2nd respondent from 3 August 2022, that the self-employed relationship was a sham.
6. The claim form box at 8.1 states that the claimant's "IR35 determination was incorrect – should have been inside IR35". The claimant confirmed that her allegation is that she was an employee/worker of the 2nd respondent. I accepted that her claim is alleging that she was an employee of the 2nd respondent from 3 August 2022.
7. The claimant argues that she challenged her status at the time, arguing that her IR35 determination was incorrect. The 3rd respondent was engaged by the 1st

respondent to determine her status, and she argues that it wrongly concluded she was a self-employed contractor for the 2nd respondent.

8. It is accepted that the claimant was formally engaged as an employee of the 2nd respondent on 14 November 2022. She submitted a grievance on the same day. She was suspended from work a few days later, the 2nd respondent says this was because of her conduct during a client meeting and other issues at work. Her employment was terminated without notice and she was paid one week's pay in lieu of notice, the 2nd respondent relying on clause 1.2 of her employment contract, an entitlement to one week's notice during the 3-month (extendable) probationary period.
9. The claimant argued at the hearing that her notice pay claim is against the 1st respondent which did not pay her contractual notice entitlement. Alternatively, she claims notice pay off the 2nd respondent. Against the 2nd respondent, she states that because her IR35 status was not correctly determined, she was not paid a month's notice pay by the 2nd respondent, which she would have been entitled to if her employment had started on 3 August 2022.

The claimant's application to amend her claim

10. The claimant has applied to amend her claim to include an allegation of race discrimination. She argues that the 2nd respondent discriminated against her on grounds of her race by failing to change her status to employee or worker during the handover period, and then discriminated against her during her secondment and during her employment, and in dismissing her.
11. The claimant argues that the 1st respondent is liable for the acts of the 2nd respondent as it facilitated this arrangement, "*the 1st respondent concealed my status*". She argues that it was known by the 1st respondent that she was not undertaking work originally proposed to her, that it facilitated what the claimant contends is "*disguised employment*" with the 2nd respondent.
12. The claimant argues that the 3rd respondent is also responsible for acts of discrimination because it also facilitated the discrimination by the 2nd respondent and acted in a discriminatory way by failing to change her independent contractor status when it was asked to make its determination.
13. The 1st respondent argues that during the 'handover period' the claimant was a director/ employee of MAO Ltd, that the relationship was one of self-employed contractor. Genuine self-employment, which this clearly is, is excluded from the Equality Act discrimination provisions, and there is no jurisdiction to hear a claim against it.
14. The 1st respondent argues that there is no realistic cause of action against the 1st respondent during the handover period, as it dealt with the dispute over the claimant's status by seeking the opinion of the 3rd respondent, and this act can't be discriminatory, whatever the claimant's actual status.

15. The 1st respondent also argues it cannot be liable for acts of discrimination during the claimant's employment with the 2nd respondent as it was not involved with this employment or with the claimant during this period.
16. The 2nd respondent argues that whatever the potential merits of a discrimination claim against it, the amendment application amounts to an abuse of process, because the claimant has submitted two further employment tribunal claims, one of which is a race discrimination claim against it in almost identical language to this application to amend, claim number 2210731/2022 (the 2nd claim). It argued that the claimant cannot duplicate the 2nd claim in the 1st claim. The fact that the 1st respondent is included as a party in the 1st claim but not the 2nd claim is irrelevant.
17. The 3rd respondent argues that it is an independent insurance and advisory service contracted by the 1st respondent to produce a 'contractor status report', whether in its opinion the claimant was inside or outside IR35. It has no contractual relationship with the claimant, and it cannot be liable for acts alleged by the claimant. The claim (pre-amendment application) is about IR35 status – and the claimant now says in her amendment application that this relates to a claim of discrimination against the 2nd respondent. There is no argument that the 3rd respondent could have facilitated discrimination, as the amendment application relates only to the 2nd respondent's conduct.
18. In response, the claimant argued that there are parts of the 1st claim which are not duplicated in the 2nd claim. Also, the 2nd claim contains a claim against a respondent not in this claim. The 2nd claim does not include the 1st respondent as a party, and it is important to address the allegations against it.
19. The claimant argues that the respondents discriminated against her, and the conduct of the 2nd respondent shows this. She said that similarity bias between and amongst the respondents' played a large factor in the decision not to give her employee status during the handover period, that this was a "*big part in the relationships between the respondents*". She argues that there are comparators who she can show were treated more favourably than she was treated, some with less qualifications and experience.

The Law

20. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

Striking out 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 the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
- (c) ...

(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.

Strike-out – case law

21. Strike out is an exceptional course of action. It is only possible where a tribunal concludes a claim is scandalous or vexatious or has no reasonable prospect of success.
22. The power to strike out a claim under r 37(1) should only be exercised in rare circumstances; see *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* (2012) IRLR 755, (paragraph 30).
23. As a general principle, cases should not be struck out under Rule 37 when the central facts are in dispute; see *Ezsias v North Glamorgan NHS Trust* (2007) ICR1126.
24. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances; see *Anyanwu v South Bank Students' Union* (2001) IRLR 305, HL. "... discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases...
25. The approach for Employment Tribunals was set out in *Mechkarov v Citibank NA* (2016) ICR 1121 (paragraph 14):
 - "(1) only in the clearest case should a discrimination claim be struck out;
 - (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
 - (3) the Claimant's case must ordinarily be taken at its highest;
 - (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and
 - (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."
26. Even if one or more of the five grounds in r 37(1) is made out, the tribunal must also consider whether to exercise their discretion or make an alternative order; see *HM Prison Service v Dolby* (2003) IRLR 694, EAT (paragraph 15). The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim or response (or part thereof), order the claim or response (or relevant part) to be amended, or order a deposit to be paid.

27. A relevant issue in this case, where a claimant makes a second claim arising from the same issues as an existing claim that has not been adjudicated upon, was considered in *Lynch v East Dunbartonshire Council* UKEATS/39/09, [2010] ICR 1094. In that case it was determined that the Tribunal has the discretion to take steps including a stay of a case, or by striking it out under Rule 37(1).

Conclusions on submissions and the law

Application to amend the claim

28. I refused the application to amend the claim to include a race discrimination claim against the respondents.

29. The principal reason is that the claimant has alleged in this amendment application the same facts and allegations she has made in her 2nd claim. It is an abuse of the legal process to duplicate claims. A claimant has one opportunity to bring a claim, and she has brought the claim of race discrimination in the 2nd claim.

30. The application to amend the claim (page 245 bundle) refers to the 2nd respondent only. The claimant alleges she should have been afforded employee status from August 2022. I accept that employee or worker status has potential relevance to a claim for discrimination, as the claimant cannot otherwise bring proceedings for the discrimination she alleges occurred prior to 14 August 2022. If it is relevant it is an issue for the 2nd respondent alone.

31. The claimant says that the 1st and 3rd respondents facilitated discrimination, and that these amendments should be allowed. But the claimant has no contractual relationship with the 2nd and 3rd respondents which give rise to a claim for which the Employment Tribunal has jurisdiction. Even if there was a relevant contractual relationship, dealing with this issue in this case would still lead to two Employment Tribunals considering the same facts, and this remains an abuse of process.

32. For these reasons, the application to amend the claim is refused.

The 1st claim

33. The 1st claim is a claim for notice pay. The claimant stated at the hearing that this claim is against the 1st respondent. But this was a contract between the 1st respondent and MAO Ltd. The claimant does not argue she was an employee or worker of the 1st respondent. This was a company to company contract, the claimant does not contend that she was an employee or worker of the 1st respondent. The Tribunal does not have jurisdiction to hear this claim, and it is struck-out.

34. The claimant also argued that as an employee of the 2nd respondent from 3 August 2022 she is entitled to one month's notice pay from the 2nd respondent.

As argued by the claimant in her application to amend (245), this will require her employment status and length of employment to be determined.

35. The claim for payment in lieu of notice is claim for breach of contract. The parties' respective positions on length of service and probation period are set out above.
36. A claim for breach of contract is a free-standing claim in the employment tribunal. But the claimant's claim that the 2nd respondent breached her contract requires her to prove that she should have gained employment status at an earlier date, and if so that she would have gained enough continuous service to gain entitlement to a month's notice period.
37. The issue of employment status appears to be a significant issue in claim 2210731/2022, as the claimant alleges that a failure to give her employment/worker status was an act of discrimination, and she argues that she was discriminated against during the disputed period. It follows that the factual issue of employment status is duplicated in the two claims.
38. This again is an abuse of process; to allow the claim for notice pay to proceed in this claim means that two employment tribunals would be asked to adjudicate on the same issue – employment status.
39. Given my conclusions, I considered that this was a case where one of the grounds of Rule 37(1) were met. It is an abuse of process – scandalous and vexatious – to bring a claim for notice pay where her entitlement rests on a significant disputed issue, when did she become an employee or worker, in case 2210731/2022.
40. I next considered whether an alternative Order, for example a deposit order, should be made. I concluded no, as this would present exactly the jurisdictional issue – abuse of process – should the claim proceed to a final hearing. The only possible outcome is strike-out on the grounds above.

The claimant's application for a review

41. The claimant applied for a review of this judgment before this judgment was given. The claimant may amend her application to take account of the findings in this judgment if she so wishes.

EJ Emery
6 March 2023

Sent to the parties on:

06/03/2023
For the Tribunal Office: