



EMPLOYMENT TRIBUNALS

Claimant: Mr R Newlyn-Jones

Respondent: Herongrange Manpower Direct Limited
(Previously called Herongrange Security and Systems Limited)

Heard at: Cambridge Employment Tribunal

On: 8 and 9 March 2023

Before: Employment Judge Hutchings
Mrs L Davies (Tribunal member)
Mr K Rose (Tribunal member)

Representation

Claimant: Mr Bignell of Counsel

Respondent: Mr Kane (8 March 2023 only)

LIABILITY JUDGMENT having been given at the hearing on 8 March 2022 and reasons being requested at that hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by Herongrange Limited as a Production Manager from 1 October 2006. He reduced his hours and began working part-time in or around August 2018. He was dismissed without notice on 10 December 2019.
2. By an ET1 claim form and Particulars of Complaint dated 17 March 2020 the claimant claimed unfair dismissal (whether automatically under Regulation 7(1) of TUPE or pursuant to section 98 of the Employment Rights Act 1998) against the respondent. He also claimed direct age discrimination and unlawful deduction from wages.
3. The respondent provides a range of security services throughout the UK. The claimant's employment contract and all the respondent's liabilities under it were transferred to the respondent by TUPE transfer on or around 10 December

2019. The respondent contests the claims, stating that it purchased a selection of contracts and denied employing the claimant.

Evidence

4. At the hearing we had the following evidence:
 - 4.1. A hearing file of 264 pages;
 - 4.2. A second witness statement from the claimant;
 - 4.3. A skeleton argument from Mr Bignell; and
 - 4.4. The claimant's schedule of loss.

Preliminary issues

5. The claimant brought claims against 4 respondents. He has withdrawn his claim against the First, Third and Fourth respondents, and liability judgments were issued by this Tribunal to record the written withdrawal. At the hearing the claimant withdrew his claim of unlawful deduction from wages. This Tribunal has issued a judgment in part to record this withdrawal.
6. At the hearing the claims of unfair dismissal and direct age discrimination proceed against the respondent.
7. Mr Bignell informed the Tribunal that the name of the Respondent was changed on 15 February 2023 from Herongrange Security Services Limited to Herongrange Manpower Direct Limited and requested that the claim details be amended accordingly. The Tribunal has seen copies of the change of name certificate for the respondent and confirms that the name of the respondent in these proceedings is amended to Herongrange Manpower Direct Limited.

Application for strike out of the response

8. At the hearing the claimant applied to strike out the response on the following grounds pursuant to Rule 37(1)(a) to (c) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the 'Rules'):
 - 8.1. The response has no reasonable prospect of success; and/or
 - 8.2. The proceedings have been conducted unreasonably by the respondent; and/or
 - 8.3. The respondent has failed to comply with the Order Employment Judge Tynan dated 11 July 2022.
9. Mr Bignell informed us that, in the event that judgment is obtained against the respondent, the claimant will also seek a costs order on the basis that the respondent acted unreasonably in the way it conducted the proceedings after receiving the Judgment on 3 August 2022 (Rule 76(1)(a)) knowing that there was no basis for resisting the claims and the response had no reasonable prospects of success (Rule 76(1)(b)).

Findings of fact

10. At the Preliminary Hearing on 11 July 2022, Employment Judge Tynan determined the Claimant's employment had transferred to the Respondent by virtue of regulation 4(2)(a) Transfer of Undertakings (Protection of

Employment) Regulations 2006 (TUPE Regulations 2006) on or around 10 December 2019.

11. The respondent's case is that it had never employed the Claimant, supported by a witness statement from a Mr Withers dated 27 June 2021, a director of the respondent. As at the date of the hearing this is the only defence the respondent has placed before the Tribunal. It has not made any application to amend its response, nor has it provided any evidence for this hearing.
12. On 1 December 2019 Herongrange Limited entered into an Asset Purchase Agreement (the Agreement) with the respondent which transferred the business of Herongrange Limited to the respondent in full.
13. Clause 5.1.1 of the Agreement provided for the TUPE transfer of all employment contracts from Herongrange Limited to the Respondent with the exception of Mr Adkins, Mr Napper, Mr Fitzpatrick and the Claimant, ostensibly on the basis they had all objected to the TUPE transfer. It is a finding of the Employment Tribunal, in the Judgment of Employment Judge Ord date 17 June 2021, that one of the men in this list did not object. We find that the circumstances surrounding that individual mirror that of the claimant. We find that the claimant did not object to the TUPE transfer. Schedule 4 of the Agreement listed 17 employees to be TUPE transferred to the Respondent. The list included Mr Petrescu, a Production Manager in his thirties who had the same role as the claimant; indeed, the claimant had trained him.
14. On 10 December 2019, Mr Pell and Ms Baxter verbally informed the claimant that his employment had been terminated and escorted him off the premises. Ms Baxter confirmed the dismissal in writing on the same day in the following terms.

"It is with deep regret that due to our biggest client going bust on us last week, we are forced to make cuts to the business with immediate effect. I am truly sorry to say that your position is one of those."

15. There is no evidence before this Tribunal of a client going bust. Indeed, this is not a defence pleaded by the respondent in its ET3. Indeed, an email of the respondent dated 8 January 2020 states that existing client contracts at Herongrange Limited would be transferred to the respondent and remarked *"there is of course intentions to expand the business going forward"*. On 16 December 2019, the claimant wrote to Ms Baxter to appeal his dismissal. He did not receive a reply. It is a finding of the Employment Tribunal that the respondent gave a false reason at time of dismissal (judgment of EJ Ord dated 17 June 2021).

16. The respondent's defence in its ET 3 states:

"We brought a collection of contracts from Herongrange Ltd. We were unaware of Mr Newlyn-Jones. Further investigation has found he remained with Herongrange nad was terminated at a later date"

17. This statement is factually incorrect. The respondent has provided no evidence to support this statement or to show that the principal reason for the dismissal was not the TUPE transfer or that it can invoke the ETO defence. Quite simply we find that there is no defence to the claim of unfair dismissal. Similarly, the respondent has not addressed the claim for direct age discrimination either in

its ET3 or in the evidence it has placed before the Tribunal (which is skeletal) since March 2020. On the evidence before us we conclude that the respondent does not have a pleaded defence or evidence in response to the claims of automatic unfair dismissal and direct age discrimination despite having known about claims since March 2020.

18. In a case management order dated 11 July 2022, Employment Judge Tynan ordered the respondent to do the following in preparation for this hearing:

18.1. Provide a list of additional documents by 15 August 2022 (Order 5). It has not done so.

18.2. Prepare the hearing file (Order 6) by 5 September 2022. It has not done so. Further in an email dated 3 March 2023 it misled the Tribunal as to the status of the hearing file to request an adjournment to this hearing, we find to frustrate these proceedings.

18.3. Prepare and send to the Tribunal and claimant witness statements by 15 February 2023. It has not done so.

19. Mr Kane attended the hearing on 11 July 2022 at which these dates were confirmed. The written order was sent to the respondent on 3 August 2022.

20. Mr Kane represented the respondent at the hearing. He told the Tribunal he had no knowledge of the issues in this claim. We find that statement false. We address the detail of how Mr Kane misled the Tribunal in our reasons for the Tribunal's remedy Judgment.

Issues for the Tribunal to determine

Application to strike out the response

21. First, we must determine whether to strike out the response for one or more of the following reasons:

21.1. The response has no reasonable prospect of success; and/or

21.2. The proceedings have been conducted unreasonably by the respondent; and/or

21.3. The respondent has failed to comply with the Order Employment Judge Tynan dated 11 July 2022.

22. If we strike out the response, we do not need to determine the substantive issues in this case. If we do strike out the response, we must consider the claims of unfair dismissal and direct age discrimination.

Automatic unfair dismissal

23. Was the reason or principal reason for dismissal a TUPE transfer? If so, the claimant will be regarded as unfairly dismissed.

Direct age, disability discrimination (Equality Act 2010 section 13)

24. The claimant compares himself with Mr Petresecu, a production manager with the same role and skills at the same site as the claimant.

- 24.1. Did the respondent dismiss the claimant?
- 24.2. Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than Mr Petresecu. There must be no material difference between their circumstances and the claimant's.
- 24.3. If so, was it because of age?
- 24.4. Was the treatment a proportionate means of achieving a legitimate aim?

The Law

25. We set out below the law to which the Tribunal was referred at the hearing.

Striking out

26. Rule 37 provides:

—(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) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(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.

(a) Word substituted by the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2014 (S.I. 2014/271).

(b) OJ L 174, 27.6.01, p.1. 17

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Automatic/Ordinary Unfair Dismissal

27. Regulation 7(1) Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE Regulations 2006) provides that the dismissal of an employee will be automatically unfair if the sole or principal reason for the dismissal is a TUPE transfer. This is a question of fact requiring a close examination of the circumstances of the dismissal: Page v Lakeside Collection Limited t/a Lavender Hotels UKEAT/0296/10.

28. When the respondent relies on a potentially fair reason for the dismissal and the claimant positively asserts the TUPE transfer is the real reason, the claimant must produce some evidence supporting his case. Once that evidence is produced, it is for that respondent to show that the sole or principal reason for the dismissal was not the TUPE transfer: *Marshall v Game Retail Ltd* UK/EAT/0276/13 at [22] to [23].
29. Strong evidence in the claimant's favour includes proximity of the dismissal to the transfer, the giving of a false reason for termination at the time of the dismissal and/or the giving of a reason that does not explain why the claimant was not dismissed earlier than the time proximate to the transfer: *Hare Wines Ltd v Kaur & Anor* [2019] IRLR 555 at [16] to [24].
30. If the respondent can show the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in its workforce before or after the transfer, the dismissal will not be automatically unfair (the ETO defence): regulation 7(2) TUPE Regulations 2006; *Dynamex Friction Ltd & Ors v AMICUS & Ors* [2008] IRLR 515 at [59].
31. The primary rule is that an ETO reason entailing changes in the business must relate to the conduct of the business going forward. If the reason for the dismissal is motivated by a desire to achieve a sale or an enhanced price for the business, this will not amount to a valid ETO reason: *Wheeler v Patel* [1987] IRLR 211 at [21].
32. The ETO defence may be available where changes in the workforce are entailed by a reduction in the number of employees induced by a genuine redundancy situation, or a significant change in job functions performed by employees or a change in the location of the business within the scope of section 139 Employment Rights Act 1996 (ERA 1996): regulation 7(3A) TUPE Regulations 2006; *London Metropolitan University v Sackur* UKEAT/0286/06 at [28]; *Miles v Insitu Cleaning Co Ltd* UKEAT/0157/12 at [26].
33. If the respondent establishes the ETO defence, it will have a potentially fair reason for dismissal consisting either of redundancy (if the respondent can show the requirements in section 139 ERA 1996 are met) or some other substantial reason: regulation 7(3) TUPE Regulations 2006.
34. The fairness of the dismissal then falls to be determined in accordance with the well-established principles applicable in cases of redundancy related dismissals, including giving as much warning as possible of impending redundancies, consulting over selection criteria, selecting fairly in accordance with objective criteria and exploring alternative employment: *Williams & Ors v Compair Maxam Ltd* [1982] IRLR 83.

Direct Age Discrimination

35. An employee is subject to direct age discrimination when his employer treats him less favourably than it treats or would treat others because of his age: sections 5, 13 & 39 Equality Act 2010 (EQA 2010). An employer must not discriminate against an employee by dismissing him: section 39(2) EQA 2010.
36. The claimant must show that he has been treated less favourably than a real or hypothetical comparator whose circumstances were not materially different to his own, save for age. The material circumstances are those which were relevant to the way the claimant was treated, with the exception of age: section

23(1) EQA 2010; Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 at [49].

37. The claimant must establish that his age was a conscious or unconscious reason for less favourable treatment by the respondent: Amnesty International v Ahmed [2009] IRLR 884 at [34]. However, age need not be the sole or even principal reason for the respondent's treatment. It need only be an effective cause of that treatment: Nagarajan v London Regional Transport [1999] IRLR 572 at [19].
38. The burden of proof on the claimant is not onerous. He only needs to show a prima facie case that there has been direct age discrimination. That is to say he must show facts from which a reasonable tribunal could properly conclude from all the evidence before it that the respondent committed (or was otherwise liable for) such unlawful discrimination: Madarassy v Nomura International plc [2007] IRLR 246 (CA) at [57].
39. If the claimant can show a prima facie case, the respondent must then provide a sufficient explanation to show that it did not discriminate. That is to say the respondent is required to show a non-discriminatory explanation for the primary facts on which the prima facie case is based: Zafar v Glasgow City Council [1998] IRLR 36 at [9].
40. The respondent can justify direct age discrimination by showing that its treatment of the claimant was a proportionate means of achieving a legitimate aim: section 13(2) EQA 2010. An aim is not legitimate if it is not a social policy objective of a public interest nature. Treatment is only proportionate if it is appropriate to the aim and goes no further than is reasonably necessary to accomplish it: Seldon v Clarkson Wright & Jakes (a partnership) [2012] IRLR 590 at [50].

Conclusions

41. First, we must determine whether to strike out the response. For the following reasons we conclude that the response has no reasonable prospect of success;
 - 41.1. A finding of the Tribunal that the defence statement in the ET3 is plainly false.
 - 41.2. That the claimant has discharged his burden to establish a claim for automatic unfair dismissal; the transfer of the business has been found by the Tribunal to be a TUPE transfer and the timing of the dismissal is proximate (the same day) as the transfer.
 - 41.3. The respondent has not discharged its burden to establish an ETO defence.
42. We conclude the proceedings have been conducted unreasonably by the respondent. It has not engaged with the process, attempted to adjourn the hearing on 8 and 9 March 2023, misleading the Tribunal with the reason given and its representative, Mr Kane, has misled the Tribunal at the hearing on 8 March 2022 as to the position, role and knowledge.
43. We conclude that the respondent has repeatedly failed to comply with Orders of the Tribunal, in particular the Order Employment Judge Tynan dated 11 July

2022, despite a bold warning in the same warning it of the consequences of continuing not to engage with the process and to ignore legal orders. Its failings are egregious.

44. We consider that the claim has a strong prospect of success. We strike out the response as it has not reasonable prospect of success and for the respondent's unreasonable conduct of these proceedings and for non-compliance with any of these Rules or with an order of the Tribunal.

45. As we have struck out the response, we do not need to determine the substantive issues of unfair dismissal and direct age discrimination. in this case.

Remedy

46. Remedy will be determined at the hearing on 9 March 2023.

Employment Judge Hutchings

Date: 13 March 2023

REASONS SENT TO THE PARTIES ON

21 April 2023

FOR THE TRIBUNAL OFFICE