EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms M Chisholm	**v**	**KGB Cleaning & Support Services Ltd**

Heard at: Watford **On**: 20 April 2023

Before: Employment Judge Andrew Clarke KC

Appearances
For the Claimant: Mr A Reid and Mr G Gibson (McKenzie Friends from BLAS Services)
For the Respondent: Mr P Collins (Senior Litigation Consultant, Peninsula Services)

JUDGMENT

1. The claims for race discrimination, unfair dismissal and a redundancy payment are struck out pursuant to Rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 on the basis that none of those claims has any reasonable prospect of success.

REASONS

1. I have before me today a strike out application. I have to consider whether the claims should be struck out under Rule 37 of the Rules of Procedure on the ground that they, some, or one of them has no reasonable prospect of success. The two potential bases for the strike out identified by Employment Judge Lewis, who ordered this hearing to take place are, firstly, that the claims were presented outside the primary limitation period and, secondly, that the claims relate to a contract of employment which was transferred under TUPE from the respondent to Haringey Borough Council.

2. At the beginning of the hearing and having read the available documentation I indicated to the respondent's representative, Mr Collins, that I did not consider that I had sufficient material before me to enable me to find that there was no reasonable prospect of the claims succeeding because there had been a TUPE transfer. In order to consider that aspect of the matter I

would have needed further documentation and witness evidence on that point. Mr Collins did not, in the circumstances, press that I should consider that aspect of the strike out application and, hence, I have not done so.

3. I then turn to consider the strike out on the basis that the claims were not presented in time. I emphasise that, in accordance with the order of Employment Judge Lewis, I am considering this on the basis of a strike out application rather than on the basis of determining the issue of whether the claims were presented in time. However, in the circumstances of this case, I do not consider that there is any material distinction between the two approaches. This is because I have heard the relevant oral evidence and (as I am satisfied) having seen sufficient of the material documentation and because the material facts on this aspect of the application are not in significant dispute.

4. This claim was presented to the tribunal on 21 May 2022 following a period of early conciliation commenced by a notification on 4 May 2022 and concluded by the issue of a certificate on 9 May 2022. In order to determine the effective date of termination and, hence, the date of expiry of the primary limitation period for these claims, it is necessary for me to set out the relevant sequence of events having first considered the nature of the claims being made and the nature of the claimant's employment.

5. The claimant was employed by the respondent as a Cleaner at two sites. These I shall refer to as "New River" and "Edmonton". At New River the claimant worked seven hours per week, at Edmonton she worked four hours per week. Her contract of employment (and, possibly, both contracts if there were two, one for each site) was terminated by the respondent in circumstances which I shall detail below.

6. Both of the sites were run by an organisation known as Fusion Lifestyle. The respondent had a contract for the provision of cleaning services to Fusion Lifestyle at those and other sites.

7. The claimant brings a claim for race discrimination, unfair dismissal and a redundancy payment.

8. In July 2021 the respondent was informed by Fusion Lifestyle that its services would no longer required at any site in the near future. It appears that this was said with a view to specific notice being given on a site by site basis in due course.

9. On 15 July 2021 the respondent was told that Fusion would cease work at the New River site from 29 August of that year. And on 3 August Fusion confirmed in writing that Haringey was taking New River "back in house".

10. On 4 August the respondent began the TUPE information and consultation process with impacted employees regarding the New River site. This included the claimant. I have seen the documentation which demonstrates that the respondent complied with its obligations, assuming that there was a

TUPE transfer, both as regards impacted employees and as regards Haringey.

11. On 16 August 2021 the respondent sent to the claimant a detailed letter giving the relevant TUPE information.

12. On 20 August 2021 the respondent sent a detailed letter to the claimant and other affected employees who worked on its Fusion Lifestyle contracts informing them of anticipated redundancy of all staff employed at the Fusion sites following Fusion having informed the respondent of its intention to terminate all of those contracts. A consultation process then followed which included the election of appropriate representatives. That process was followed through by way of the provision of information and the holding of meetings, relevant letter and notes relating to which I have seen.

13. From 29 August onwards the respondent ceased to provide any services at New River. From the correspondence it is clear that it anticipated that, as TUPE applied, the claimant would commence work for Haringey on that date. However, this did not happen.

14. On 21 September 2021 Fusion served a formal notice to the respondent to terminate the Edmonton contract.

15. On 4 October 2021 the claimant was dismissed by the respondent by reason of redundancy. She was given a redundancy payment relevant to her work at Edmonton. There was no equivalent payment provided in respect of her work at New River because it was the respondent's contention that this work continued, albeit that she had been TUPE transferred to Haringey. She was told that her effective date of termination would be 12 November 2021 and that she remained an employee and would be paid up to that date.

16. As it became clear that Haringey were not intending to employ the claimant both the claimant and the respondent wrote to Haringey with regard to the situation. It appears from the documentation which I have seen that Haringey was initially unresponsive. Eventually, the claimant spoke to a lady in the Haringey HR Department who told her that Haringey did not consider that a TUPE transfer had taken place. On 19 October that lady sent an email to the claimant to say that she could help her no further and suggested that the claimant seek advice from a CAB or a law centre.

17. I have seen correspondence copied to the claimant between the respondent and Haringey, up to and beyond this point in time, in which the respondent was bringing the claimant's circumstances before Haringey and urging them to regard her as having been transferred to them under TUPE. Eventually, Haringey responded by saying that TUPE did not apply because there was no contract between the respondent and Haringey and, in any event, it would not apply because the claimant was not employed immediately prior to the transfer because Fusion Lifestyle had terminated its contract with the respondent in March 2021. The respondent disputed both points but, given that the claimant says that she never became employed by

Haringey, I can assume that Haringey did not change its position. I have not seen any subsequent correspondence dating beyond late October 2021.

18. I have seen some exchanges between a Mr O'Shea of the respondent and the claimant. These show that the claimant recognised that the respondent was doing all that it could to contact Haringey and to persuade Haringey of the correctness of its assertion with regard to TUPE.

19. On the basis that the claimant's effective date of termination was 12 November 2021, any claims such as those which she now brings ought to have been commenced prior to 12 February 2022.

20. It was accepted by those representing the claimant that if there was no TUPE transfer then the exchanges between the claimant and the respondent up to those giving notice in October 2021 were effective to bring her contract of employment (relating both to New River and Edmonton) to a close. In the claim form it was suggested that if there was no TUPE transfer then the contract of employment between the claimant and the respondent, in so far as it related to New River, still continued and she remained employed by the respondent. It having been pointed out that in those circumstances no claim for unfair dismissal or a redundancy payment could arise, the claimant's position was clarified. It was agreed (as I have already noted) that if there was no TUPE transfer then her contract of employment relating to both sites terminated on 12 November 2021. The documentation I have seen is consistent with that. The respondent was proposing to make redundant all of its staff employed on Fusion Lifestyle contracts, save where there was alternative employment available and save where they had ceased (or would cease) to be the respondent's employees due to a TUPE transfer.

21. Against that background I turn to consider first the claim for race discrimination. As expressed in four paragraphs of the claim form it appears to me that the claim for race discrimination does no more than reflect the fact that the claimant felt aggrieved that she had not been transferred to Haringey and, in some unspecified way, associated that with her race. That was clarified on her behalf. It was suggested to me that she intended to rely upon a hypothetical comparator in a direct race discrimination claim on the basis that her employer had seen her job as one of low status and that, as a black female, they had regarded it as beneath them to deal appropriately with her. It was said that they had not given her proper information and had left her to deal with the unresolved TUPE situation all by herself. It was suggested that this would not have happened had she not been black.

22. Having looked at the contemporaneous correspondence, including the claimant's own contemporaneous statements therein with regard to the actions of the respondent, I am satisfied that this claim has no reasonable prospect of success. It is clear to me that the respondent acted as it thought fit and appropriate when faced by what it considered (on reasonable grounds) to be a TUPE situation. It did provide the claimant with appropriate information. It copied its correspondence with Haringey to her item by item and supported her as best it could, including advising her to involve her local

councillor (which she did) and to seek advice. Whether or not this was a TUPE transfer situation is not something I could resolve on the evidence before me, but it is clear to me that there were reasonable grounds for the respondent to consider that such was the case and to behave accordingly. I consider that they were supportive and no specific details were given of what additional information or support the claimant could have been provided with.

23. I then turn to consider the claims for unfair dismissal and for a redundancy payment.

24. As she and her representatives accepted, well before the effective date of termination the claimant knew the following:

    24.1 All of the work provided to the respondent by Fusion was ceasing.

    24.2 The respondent had no suitable alternative employment to offer to the claimant or (as it turned out) any other of those affected.

    24.3 The respondent believed that TUPE applied to the New River element of the claimant's work for the respondent, but Haringey disputed this.

    24.4 The claimant had been told both by the respondent and by Haringey to get legal advice.

    24.5 To use her own words in evidence, that either she had been TUPE transferred or she was entitled to a redundancy payment in respect of the New River contract just as she was to had receive a redundancy payment in respect of the Edmonton element of the contract.

25. No claim was made within the primary limitation period. I have to consider whether I am satisfied that it was not reasonably practicable to make a claim on behalf of the claimant within that period. That is the test applicable in respect of these two surviving elements of the claim. It is suggested in the clam form that the test applicable to all elements of the claim would be that of justice and equity. That is not the case and I proceed on the basis that it is for the claimant to satisfy me that it was not reasonably practicable to make a claim within the primary limitation period and, if I am so satisfied, to persuade me that the claim was made within a reasonable period after that primary limitation period expired.

26. I begin by considering why no claim was made within the primary limitation period. The claimant was aware that she was either entitled to her continuing employment rights as against Haringey or to a redundancy payment from the respondent. She did approach the local CAB. They referred her to a solicitor. It appears that this solicitor wished to charge for his services. She then approached another solicitor who, in March 2022 referred her to BLAS Services being the organisation from which Mr Reid and Mr Gibson attend before the tribunal.

27. In cross examination the claimant was asked a number of questions designed to enable the respondent to understand why she had not conducted further research herself in order to understand what her rights were in so far as it might be said that she did not have a sufficient understanding. Having heard her evidence I am satisfied that if her understanding, which I have set out above, was insufficient to enable her to make a claim to the tribunal, a limited amount of research on the internet (which was available to her) would have enabled her to see that she could make a claim to an employment tribunal and to make that claim. Alternatively, she could have done more, in my view, rapidly to obtain advice from a solicitor either under a free advice scheme or on the basis of something like a no-win, no-fee arrangement. It seems to me having heard her evidence that the claimant in fact did very little to progress the matter, or her understanding of her rights, until she was referred to BLAS sometime in early 2022. I accept that BLAS first took a step in the matter on her behalf by writing to the respondent some time in late March 2022, but it is unclear to me precisely when they were first instructed by the claimant.

28. BLAS told me that they were aware of time limit issues from their experience in dealing with previous employment maters. Whilst not legally qualified, both of the gentlemen appearing before me have considerable experience of dealing with potential and actual claims to the employment tribunal, including (in one case) as an experienced trade union lay official of many years' standing.

29. I am satisfied that they were aware that there was a very real risk that the claim would not be allowed to proceed unless it was proceeded with very quickly after they were first instructed. I am satisfied having heard their submissions that they recognised that one possible basis for analysing the case would be to see the claimant as having been dismissed on 12 November 2021 following the analysis set out above. That they accept is the correct analysis (assuming that there was no TUPE transfer). Hence, I consider that they, on behalf of the claimant, needed to progress matters very rapidly once they were instructed. In fact, one can see that having been instructed in March they did not notify Acas under the early conciliation procedure until 4 May and having received a certificate on 9 May, they then delayed until 21 May to present the claim to the tribunal.

30. I am not persuaded by the claimant's submissions to the effect that it was not reasonably practicable to bring a claim within the primary limitation period. In my view, the claimant had sufficient knowledge herself to research what needed to be done and to make a claim. If that is wrong and it was not reasonably practicable to make a claim within the primary limitation period, then I consider that the time taken once BLAS had been instructed was far too long.

31. Looking at the period as a whole, I consider that once they were instructed the early conciliation procedure should have been triggered almost immediately. One can see that in this case the certificate followed some five days after the notification. Hence, in my view, once instructed and having had an opportunity, which should not have taken long, to assimilate and

analyse the case, I consider that a reasonable period of bringing the claim would have been a week after the receipt of the early conciliation certificate which, assuming that it was applied for at the end of March or on the first of April, would have expired in mid-April.

32. Even if that is wrong, my view is that it must have been clear, because an early conciliation certificate was sought, that a claim needed to be made when the notification was issued on 4 May. That being so, I consider that a reasonable extension would have been for a week after the certificate was received on 9 May. Indeed, it might reasonably be said that the claim could and should have been prepared whilst waiting for the certificate to be issued.

33. Hence, it is my view that a reasonable period of extension, assuming one gets to this point in the analysis (which I do not, save as a secondary piece of reasoning) the reasonable period would have expired on 16 May 2022 which is before the presentation of the claim on 21 May.

34. For all of those reasons I consider that there is no reasonable prospect of this claim succeeding, because there is no reasonable prospect of a tribunal being persuaded that it was not reasonably practicable to bring the claims for unfair dismissal and a redundancy payment within the primary limitation period. I emphasise that even if I was wrong on that, I consider the claim was not brought within a reasonable period after the expiry of the primary limitation period. Hence, all of the claims must be, and are, struck out.

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Employment Judge Andrew Clarke KC

Date: 3 May 2023

Sent to the parties on: 22 May 2023

GDJ
For the Tribunal Office