EMPLOYMENT TRIBUNALS

Claimant: Mrs H Hughes

Respondents: 1. Vedamain Ltd
2. Clakim Ltd (formerly known as Cabbey Private Hire Ltd)
3. Janbar Mg Ltd (formely known as Chester Private Hire Ltd)
4. Kajoliea Ltd (formerly known as Refer Ltd)

Judgment was sent to the parties on 10 January 2023.

In the judgment, Clakim Ltd, Janbar Mg Ltd and Kajoliea Ltd were referred to as "the old Abbey companies".

Paragraph 4 of the judgment ("the employment contract decision") determined that the claimant was not employed under a contract of employment. Paragraph 6 of the judgment determined that the tribunal did not have jurisdiction to consider a complaint under regulation 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). Paragraph 8 of the judgment determined that the tribunal had no jurisdiction to consider the claim against the Old Abbey Companies. Paragraphs 6 and 8, together, are referred to as "the time limit decisions."

Written reasons ("Reasons") for the judgment were sent to the parties on 3 April 2023.

On 16 April 2023, the claimant applied for reconsideration of the judgment.

JUDGMENT

1. The claimant's application for reconsideration of the employment contract decision is refused.

2. The claimant's application for reconsideration of the time limit decisions is refused.

REASONS

Relevant law

1. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides the tribunal with a general power to reconsider any judgment "where it is necessary in the interests of justice to do so". The making of reconsideration applications is governed by rule 71.
2. Rule 72(1) states that an employment judge must consider any application made under rule 71. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application must be refused.
3. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. By rule 2, dealing with cases fairly and justly includes putting the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the complexity and importance of the issues.

The reconsideration grounds

4. The claimant's reconsideration application runs to 87 paragraphs. It is not proportionate to address each paragraph separately. I have tried to pick out what I consider to be the main points.

<u>The employment contract decision</u>

5. The main grounds advanced for reconsidering the employment contract decision appear to be these:

   5.1. Ground 1 – "Subservience" – I found (Reasons paragraph 38) that there were substantial restrictions on the claimant's work through licence conditions. I also found (Reasons paragraph 116) that those restrictions did not satisfy the test of sufficient control, because the restrictions were imposed by the licensing authority and not by the putative employer. The claimant argues that this conclusion was wrong, because there was an implied term in her agreement with the respondents that the claimant would abide by the licence conditions.

   5.2. Ground 2 – "Economic Investment" – At Reasons paragraph 118.4, I took into account that the claimant took considerable economic risk, which included investing in a fixed-price asset and paying for her own fuel. I concluded that this feature was inconsistent with a contract of service. The claimant says that this conclusion was wrong, because:

      (a) Many employees have had to invest in their own higher education to get the job in which they work;

      (b) People use their own vehicles to drive to and from work and to do work-related duties;

      (c) The claimant also had to incur expenditure other than vehicle costs; and

      (d) The claimant did not pay for her own fuel.

   5.3. Ground 3 – Treasury Guidance – The claimant asked me to consider the Treasury document entitled: *HM Treasury, Guidance for tax assurance process*

of public sector appointees July 2019. "Especially Chapter 1 subsection 1.4 and its IR35".

6. The remaining paragraphs were short points addressing factors alleged to be consistent with employment. Many of these concerned factors that I had already considered in the Reasons.

The time limit decisions

7. The reconsideration application appears to raise the following principal grounds for reconsidering the time limit decisions:

   7.1. Ground 4 – Ignorance of time limits – I found (Reasons paragraph 129) that it was reasonably practicable for the claimant to present her claim against the old Abbey companies within the statutory time limit. I rejected her argument that it was not reasonably practicable to present her claim before she knew the Supreme Court's decision in *Uber.* In her reconsideration application the claimant now advances another reason why it was not reasonably practicable to present her claim within the time limit. This was that she did not know what the time limit was for any claim except unfair dismissal, and believed that time limits would only start to run from when her employment status was confirmed in December 2022.

   7.2. Ground 5 – Ignorance of the possibility of a "stay" – At paragraph 129.3, I expressed the view that it would have been reasonably feasible for the claimant to have presented her claim and then to ask for no action to be taken on it until the Supreme Court had handed down its judgment. The claimant now argues that this conclusion was wrong, because she was a litigant in person and did not know about the possibility of a "stay".

Conclusions

8. I take each of the grounds in turn.

Ground 1

9. There is no reasonable prospect of my finding that the licence conditions amounted to control exercised by the respondents. There was no need for the licence conditions to be implied terms of the contract between the respondents and the claimant. Vedamain Ltd and the old Abbey companies could already expect a driver to want to comply with the licensing conditions. A driver would have a powerful incentive to do so, because otherwise they would be at risk of losing their licence.

Ground 2

10. My view remains that the claimant took a degree of economic risk that tended to suggest that she was not employed under a contract of employment. There is no reasonable prospect that the various arguments put forward by the claimant will persuade me otherwise.

11. In particular:

    (a) There is only limited value in comparing the cost of higher education with the cost of buying a passenger transport vehicle. Some courses, such as accountancy, are highly vocational, but many are gateways to a wide variety of different careers.

(b) The claimant cannot realistically compare herself to a commuter. There is a difference between (on the one hand) an employee who spends unpaid time and fuel driving to and from the place where they work, and (on the other hand) a person whose work consists of driving someone in their own vehicle as part of a service.

(c) The claimant also incurred other expenses regardless of the amount of paid driving she did. This would, if anything, increase the amount of economic risk she took.

(d) The claimant did pay for her own fuel. She was not entitled to claim any additional payment to reimburse her for that expense.

Ground 3

12. The *Guidance* applies to all central government departments and their arms-length bodies. Other public sector bodies are expected to observe the spirit of the guidance.

13. Paragraph 2.2 of the *Guidance* states:

> "The off-payroll working rules (commonly known as IR35) … ensure that, where an individual would have been an employee if they were providing their services directly, they pay broadly the same income tax and [national insurance contributions] as an employee would.

14. Paragraph 2.3 requires all departments to make an assessment of what the employment relationship would be between the client and the worker if an intermediary were not involved.

15. Paragraph 1.4 deprecates explicit tax avoidance measures.

16. The claimant's point is that Cheshire West and Chester Council ("the Council") was required by the *Guidance* to make an assessment of the working relationship between the claimant and the Council, and decide what the relationship would have been had no intermediary been involved. For these purposes, says the claimant, the "intermediary" was Vedamain Ltd. No such assessment was carried out. According to the claimant, the tribunal should infer from the Council's failure that the claimant was really an employee.

17. I do not think there is any reasonable prospect of this argument succeeding. The fact that the Council did not make an assessment may be consistent with the Council being wilfully blind to an off-payroll employment relationship. But the Council's omission is at least equally consistent with other possibilities. One of these is that the Council did not think Vedamain was an "intermediary" at all. Another possibility is that the Council did not think that there was any risk that the claimant might be considered to be an employee if she provided her services directly for the Council.

Ground 4

18. The claimant's main argument at the preliminary hearing was not that she did not know about time limits. Her oral closing arguments were confined to the issue of whether it was reasonably practicable to present her claim before she knew the outcome of Uber's appeal to the Supreme Court.

19. The claimant gave oral evidence about her knowledge of time limits for bringing claims. She said that she had previously brought a civil claim and that she knew

that most claims had time limits. She said that "at the time" she did not know that the time limit for an employment tribunal claim would be three months, but she was told about the three-month time limit when she contacted ACAS in October 2020. She presented her claim to the tribunal before the *Uber* Supreme Court judgment was handed down. This was because she knew that there was a three-month time limit for a complaint of unfair dismissal, and if she waited for the *Uber* judgment, her claim would be out of time.

20. I accept this evidence.

21. In the light of this evidence, I consider that there is no reasonable prospect of the time limit decisions being varied or revoked. This is because:

    21.1. I take "at the time" in the claimant's oral evidence to mean "at the time the old Abbey companies failed to pay holiday pay", and "at the time of the transfer".

    21.2. At those times, the claimant knew that most claims had time limits.

    21.3. It would have been reasonably practicable for her to do some research to find out what those time limits were. She could have got help to use the internet, as the Reasons explain. The three-month time limit would have been easy to find.

    21.4. It was reasonably practicable for the claimant to discover that time limits for claims for deductions from holiday pay run from the date that the holiday pay was deducted. It was unreasonable for the claimant to assume that the time limit would only start to run once a tribunal had determined that she was a worker. That does not make sense. If she did not bring a claim, there would be no opportunity for the tribunal to consider her case and make a ruling on it.

    21.5. In any case, the reconsideration application does not engage with paragraph 130 of the Reasons. I do not consider the further period to be reasonable for the reasons that are explained in that paragraph.

<u>Ground 5</u>

22. The claimant may well not have heard the word "stay" in connection with tribunal proceedings. The Reasons do not use that word. My finding was not that the claimant could have asked expressly for a "stay". It was that she could have asked the tribunal not to take action until the judgment was handed down.

23. Even if the claimant's argument had force, there would still not be any prospect of my varying or revoking the time limit decisions. This is because it would still have been reasonably practicable for the claimant to present her claim before the Supreme Court had handed down its *Uber* judgment. If she had no concept of a stay of proceedings, and had no idea that tribunals might delay hearings to await the decisions of higher courts, she must presumably have thought that employment tribunals would just get with hearing the cases in front of them, applying the law as it stood at the time. If that is what the claimant thought, there would have been nothing to stop her presenting a claim. The Uber drivers had already won at two different levels of appeal. She would have believed that the tribunal would apply the legal principles that had led the Uber drivers to victory.

Disposal

24. The reconsideration application is therefore refused.

Employment Judge Horne

8 June 2023

SENT TO THE PARTIES ON

8 June 2023

FOR THE TRIBUNAL OFFICE