EMPLOYMENT TRIBUNALS

Claimant: Mrs H Hughes

Respondent: Vedamain Ltd

Heard at: Liverpool **On:** 5 June 2023

Before: Employment Judge Horne

Representatives
For the claimant: in person
For Vedamain Ltd: Mr M Ramsbottom, consultant

Judgment was sent to the parties on 8 June 2023. The claimant has requested written reasons for that judgment in accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013. The following reasons are therefore provided:

REASONS

Scope of these reasons

1. At a preliminary hearing on 5 June 2023, I made a number of disputed decisions. These decisions were recorded in three separate documents sent to the parties on 8 June 2023. One of these documents was a judgment to which I will refer as "the TUPE judgment".
2. As with previous judgments and orders, the TUPE judgment used various terms of shorthand. Clakim Ltd, Janbar Mg Ltd and Kajoliea Ltd were referred to collectively as "the old Abbey companies"; and "TUPE" was used to mean the Transfer of Undertakings (Protection of Employment) Regulations 2006.
3. The TUPE judgment read as follows:

> "
>
> 1. The claimant was not an employee of the old Abbey companies within the meaning of regulation 2 of TUPE.
> 2. There was a relevant transfer from the old Abbey companies to Vedamain Ltd as defined in regulation 3(1)(a) of TUPE.
> 3. If the old Abbey companies had any liability to the claimant in respect of unlawfully-deducted wages, that liability did not transfer to

> Vedamain Ltd under regulation 4 of TUPE, because the claimant was not an employee of the old Abbey companies.
>
> 4. The tribunal therefore **dismisses** the complaint against Vedamain Ltd that it is liable for unlawful deductions from wages allegedly made by the old Abbey companies."

4. Paragraph 5 of the TUPE judgment recorded various conclusions that I would have reached on other issues had I found that the claimant was an employee of the old Abbey companies. All those conclusions were in the claimant's favour. They included a decision that, if the claimant had been an employee of the old Abbey companies, she would have been assigned to the transferring undertaking immediately before the transfer.

5. The claimant has asked for written reasons for the TUPE judgment. It is not clear whether or not she also wanted written reasons for paragraph 5, which records the decisions that would have been favourable to her. In any case, I have decided to prioritise writing the reasons for paragraphs 1 to 4. Those were the decisions on which the claimant was unsuccessful, and which resulted in part of her claim being dismissed. It helps to achieve the overriding objective for a party to know quickly why they have lost. It is not as important for a party to know quickly why they would otherwise have won. If a party wants written reasons for the conclusions recorded at paragraph 5, they have a further 14 days in which to make a request in writing.

Issues

6. To understand the issues for decision in the TUPE judgment, it is helpful to know something of the factual background and the procedural history of the case.

7. I have already found that the claimant was a worker for Vedamain Ltd, but that she was not employed by Vedamain Ltd under a contract of employment. Judgment to that effect was sent to the parties on 10 January 2023. Written reasons for that judgment were sent to the parties on 3 April 2023. I will refer to them as "the April reasons".

8. I did not determine, and have not determined, whether the claimant was a worker for the old Abbey companies.

9. In paragraph 1 of the April reasons, I summarised the factual background in this way:

> "The claimant is a taxi driver. Vedamain Ltd is a taxi company. It operates in the Chester area under the names, "Abbey Taxis" and "KingKabs". It took over the Abbey Taxis business following a sale in December 2019. Prior to the sale, there were three companies trading as Abbey Taxis. I refer to these companies as "the old Abbey companies". Each of the old Abbey companies was directed by Mr M Williams. The claimant drove a taxi for the old Abbey companies. Following the business sale, the claimant drove her taxi for Vedamain Ltd. The claimant's case is that her employment transferred to Vedamain Ltd under [TUPE]."

10. It was important to the claimant's case for her to establish that her employment had transferred under TUPE from the old Abbey companies to Vedamain Ltd. I

explained the significance of the issue, and the way it unfolded, at paragraphs 15 to 23 of the April reasons. Relevantly, those paragraphs stated:

> 15. The claimant confirmed… that her claim included a complaint that the old Abbey companies had made unauthorised deductions from her wages and that their liability in respect of that complaint had transferred to Vedamain Ltd under regulation 4 of TUPE.
>
> …
>
> 18. If the claimant was a worker for one of the old Abbey companies, and they had made an unauthorised deduction from her wages, there would then be an issue about whether the old Abbey companies' liability in respect of that deduction transferred to Vedamain. That dispute [had not previously been identified] as one of the preliminary issues.
>
> 19. It was accepted by both Vedamain Ltd and the old Abbey companies that an undertaking (namely the Abbey taxis business) had transferred from the old Abbey companies to Vedamain Ltd in December 2019. This was a relevant transfer within the meaning of regulation 3(1)(a) of TUPE.
>
> 20. Regulation 4 of TUPE operates where a person is employed by the transferor immediately prior to the transfer and assigned to the organised grouping of resources that transfers.
>
> 21. As I will record more fully under the heading of the relevant law, a "employee", for the purposes of TUPE, means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services.
>
> 22. Unfortunately, the parties did not make any submissions about what kind of employment status was required in order for the claimant to have been "employed" within the meaning of regulation 4. Nor did they address the question of whether the claimant had the requisite status. The parties' written and oral submissions on employment status were confined to the questions of whether the claimant was a "worker" or an employee under a contract of employment…
>
> 23. I did not announce a judgment directly on the question of whether liability had transferred to Vedamain Ltd. Likewise, the judgment sent to the parties did not expressly address it. On the other hand, whilst explaining my reasons orally, I did make an observation that I did not think that liability had transferred. I made that comment shortly after concluding that the claimant was not employed under a contract of employment. The impression that I may have determined that question would have been supported by the case management order, which I caused to be sent to the parties separately on 10 January 2023 ("my CMO"). My CMO did not list any issues that would enable the tribunal to determine whether liability had transferred under regulation 4 or not.

11. At paragraphs 134 to 138 of the April reasons, I catered for the possibility that I might have determined the question of whether the claimant was employed within the meaning of regulation 4 of TUPE. As those paragraphs explain, my view was

that, if there had been such a determination, it should be reconsidered, so that the parties could make submissions on the correct legal test.

12. I formulated the essential issue for decision at paragraph 139:

> "Was the claimant employed by the old Abbey companies under a contract that was not a contract for services immediately before the transfer of the undertaking from the old Abbey companies to Vedamain Ltd?"

13. For the purposes of these reasons, this issue is capable of being further refined. This is because the only issue on which the claimant lost was whether the claimant was *ever* employed by the old Abbey companies under a contract that was not a contract for services. As paragraph 5 of the TUPE judgment records, had the claimant been employed (within the meaning of TUPE) by the old Abbey companies at any time, I would have found that she was still so employed immediately before the transfer.

14. The issue, then, is:

> **"Was the claimant at any time employed by the old Abbey companies under a contract that was not a contract for services?"**

15. Paragraph 1 of the TUPE judgment is my decision on that issue. As should now hopefully be clear, paragraph 2 of the TUPE judgment was not in dispute, and paragraphs 3 and 4 of the TUPE judgment were simply the logical consequence of my decision at paragraph 1.

Evidence

16. I heard evidence from witnesses. I do not need to say who they were. The witnesses' evidence was relevant to the findings I made at paragraph 5 of the TUPE judgment. These reasons relate only to the issue stated above. I did not need to rely on any of their evidence to reach a conclusion about that.

Facts

17. The relevant facts are set out in the April reasons.

Relevant law

18. Regulation 2 of TUPE contains the following definitions, amongst others:

> "
>
> "contract of employment" means any agreement between an employee and his employer determining the terms and conditions of his employment;
>
> ….
>
> "employee" means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services and references to a person's employer shall be construed accordingly"

19. TUPE is the domestic implementation of EU Council Directive 2001/23/EC, known as the Acquired Rights Directive.

20. Article 2 of the Directive states, relevantly:

> "1. For the purposes of this Directive-
>
> …
>
> (d) "employee" shall mean any person who, in the Member State concerned, is protected as an employee under national employment law.
>
> 2. This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship,…"

(Article 2 goes on, essentially, to bring part-time and fixed-term employees within the scope of the Directive and prohibits national laws that would exclude them.)

21. It is therefore for the law of England and Wales to define who is an employee for the purposes of TUPE, provided that the definition does not erode the rights of part-time and fixed-term employees.

22. TUPE's statutory predecessor was the Transfer of Undertakings (Protection of Employment) Regulations 1981. It defined "employee" in the same way. An equity partner was held to have been working under a contract for services and not under a contract of service, within the meaning of that predecessor regulation: *Cowell v. Quilter Goodison Co Ltd* [1989] IRLR 392, CA.

23. The regulation 2 definition is different from employment status definitions in other, more recent, statutory provisions. Most notably, section 230 of the Employment Rights Act 1996 ("ERA"), relevantly provides:

> "(1) in this Act, "employee" means an individual who has entered into or works under…a contract of employment.
>
> (2) In this Act, "contract of employment" means a contract of service or apprenticeship…
>
> (3) In this Act "worker"… means an individual who has entered into or works under…(a) a contract of employment, or (b) any other contract… whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

24. In regulation 2 of TUPE, the phrase, "contract for services" is not separately defined. It is, however, a phrase used repeatedly in the common law. In my view, the legislator would have intended it to have its common law meaning.

25. The common law has long recognised a binary distinction between a "contract of service" and a "contract for services". See, for example, *Market Investigations Ltd v. Minister of Social Security* [1969] 2 QB 173, 184-185, approved by the Privy Council in *Lee Ting Sang v. Chung Chi-Keung* [1990] ICR 409, *Express & Echo Publications Ltd v. Tanton* [1999] ICR 693. This tends to support the view that a "contract for services", within in regulation 2, was intended to mean an employment relationship that is not a contract of service.

26. Since the 1981 Regulations were drafted, the law has come to recognise intermediate categories of worker. One is known to employment lawyers as the "limb (b)" worker. The nickname comes from the definition in section 230(3)(b) of ERA (see above). Another category is the wider definition of "employee" in equality legislation, mandated by the European Court of Justice in *Allonby v. Accrington &*

Rossendale College [2004] ICR 1328, and now found in section 83 of the Equality Act 2010. Recent decisions have confirmed that there is no practical difference between these two types of employment status. See, for example, *Bates van Winkelhof v. Clyde & Co LLP* [2014] UKSC 32.

27. In my view, the emergence of the "limb (b)" worker does not alter the interpretation of regulation 2. A person may at the same time be employed under a contract for services and be a limb (b) worker within the meaning of section 230(3) of ERA. This is apparent from section 230(3)(b) itself. Subject to the business undertaking exception, an individual comes within the definition by undertaking personally to perform "work or services".

28. There is a counter-argument that I ought to address. Regulation 2 of TUPE contains the words, "or otherwise". Those words suggest that a person might be considered under regulation 2 to be an employee, even if their contract was not a contract of service or apprenticeship.

29. This argument needs to be taken seriously. It underpinned the view taken by a differently-constituted employment tribunal that regulation 2 encompasses a wider definition than employees under a contract of employment. (See *Dewhurst v Revisecatch Ltd* ET Case No 2201909/2018). During the hearing, I asked Mr Ramsbottom if he could think of someone who was neither a limb (b) worker nor a person in a contract of employment, whom regulation 2 was intended to protect. He could not answer.

30. Despite this forensic moment, I remain of the view that it is the narrow interpretation of regulation 2 that should prevail. To come within the definition of "employee" it is not enough to be a limb (b) worker. If the words, "or otherwise" in regulation 2 were intended to widen the definition, it would only be to a very limited extent. In my view, if those words had a purpose, it was to cover people whose relationship with their employer is truly akin to a contract of employment, but who do not technically come within the definition. Persons in Crown employment might be an example.

31. I am reinforced in my view by the wording of regulation 7 of TUPE. It provides that, where any employee of the transferor or transferee is dismissed, "that employee is to be treated for the purposes of Part 10 of [ERA] (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer". This regulation appears to have been drafted on the assumption that an "employee" is a person to whom Part 10 of ERA applies. Part 10 of ERA applies only to employees under contracts of employment. If it had been the legislator's intention that "employee" in regulation 2 should have a wider definition than that, I would have expected regulation 7 to have been drafted differently. Regulation 7 would need to make clear that the only employees to be treated as unfairly dismissed were those employees to whom Part 10 of ERA applied.

Conclusions

32. The starting point for my conclusions is my finding that the claimant was not an employee of Vedamain under a contract of employment.

33. I explained why I had reached that finding in the April reasons:

> "115. …I start from the agreed position. There was a contract by which the claimant agreed to do regular driving work on a school run in return for

remuneration to be paid by Vedamain Ltd. The parties remained mutually bound by those obligations, subject to the claimant's entitlement to terminate a regular school run by giving notice to Vedamain Ltd. The notice period was equivalent to what Vedamain Ltd had to give to the local authority. The first requirement of the *Ready Mixed Concrete* test is therefore satisfied.

116. The next requirement is for there to be a sufficient degree of control. In my view, that requirement was not met. It is true that Vedamain Ltd restricted the claimant's ability to advertise and to drive for competitors. But restricting competition is only aspect of the kinds of control that employers typically exert over employees. Vedamain Ltd gave the claimant considerable freedom to decide how to provide transport for students. She decided what vehicle to buy. She could choose the route... The claimant had considerable influence (albeit not the final word) over Vedamain Ltd's choice of Passenger Assistant. There were controls on the claimant's work, for example, vehicle maintenance requirements, but as I have already explained … this control was exercised by the local authority rather than Vedamain Ltd.

117. I have considered what the position would be if my conclusions about the sufficiency of control are held to have been wrong. In that case, I would have to decide whether the other features of the relationship were consistent with there being contract of employment.

118. I take into account the claimant's relatively weak bargaining power in the relationship. She had no say in the amount of settle she paid, or the driver's fee for a school journey. Nevertheless, my decision would be that, looking at the picture as a whole, the claimant was not an employee. Features I have taken into account in coming to that conclusion include the following:

118.1 The claimant did not pay PAYE tax or employees' national insurance contributions. That tax arrangement would undoubtedly have been beneficial for her, because she would only have to pay tax on her profits, rather than on her remuneration from Vedamain. This would mean, for example, that the cost of owning and running her vehicle would be wholly or mainly tax-free. The claimant's submissions on this point have been directed to the question of whether the tribunal should withhold a remedy on the ground of the parties' tax evasion. That is a different point entirely. To my mind, the significance of the tax arrangements is not that they were unlawful, but that they shed some light on the true nature of the relationship.

118.2 The claimant was consistently described as self-employed. She never suggested that she was an employee.

118.3 She was not paid sick leave or holiday pay.

118.4 The claimant took the economic risk of investing in a fixed-price asset and paying a fixed amount of settle. She paid for her own fuel. If fuel prices went up, she made less profit; if they went down, she made more profit. These features were inconsistent with a contract of service.

119. The claimant did not therefore have a contract of employment within the meaning of section 230(1) of ERA."

34. That conclusion, of course, was only about the claimant's employment relationship with Vedamain Ltd. I can now express my conclusion that the claimant did not have a contract of employment with the old Abbey companies either. There were no facts that would enable me to conclude that the claimant was any closer to being an employee when she drove her taxi for the old Abbey companies than she was when she drove for Vedamain Ltd. The claimant did not suggest that there were any such facts. The features of the relationship after December 2019 that led me to the conclusion that she was not an employee of Vedamain Ltd are all features that existed prior to the transfer.

35. In my view, these features also mean that the claimant was not an employee of the old Abbey companies within the meaning of regulation 2 of TUPE. The claimant was working under a contract for services. She was not employed under a contract of employment. It is not enough that she was a limb (b) worker. As I have stated, my view of the law is that the regulation 2 definition of "employee", if not strictly confined to employees under contracts of service or apprenticeship, is limited to other relationships that are truly akin to contracts of employment. The claimant's work for the old Abbey companies did not satisfy that test.

36. Once I had reached that decision, it inevitably followed that regulation 4 of TUPE did not have the effect of transferring the claimant's employment from the old Abbey companies to Vedamain Ltd. Nor could that regulation cause a transfer to Vedamain Ltd of any liabilities that the old Abbey companies might have had towards the claimant. The claim against Vedamain Ltd for inherited liability of the old Abbey companies therefore had to be dismissed.

Employment Judge Horne
13 July 2023

SENT TO THE PARTIES ON
21 July 2023

FOR THE TRIBUNAL OFFICE