EMPLOYMENT TRIBUNALS

Claimant **Andrew Hemings**

Respondent **1. Charles Wares Classic Car Sales and Hire Ltd**
2. Gareth Hamer
3. Kenneth Devoy

Heard at: **Bristol (by video)** **On:** 18 April 2023

Before: **Employment Judge Hogarth**

Appearances
For the claimant: Mr Connor (lay representative) and Mr Hemings in person
For the respondent: Mr Maratos, consultant

RESERVED JUDGMENT

1. The claim for unfair dismissal is struck out.
2. The direct discrimination claims are not struck out and may continue.

REASONS

Procedural background and purpose of this preliminary hearing

1. The claimant was dismissed from his employment with Charles Ware Morris Minor Centre Ltd on 10 November 2021 on the grounds of redundancy resulting from the company entering into liquidation. Charles Ware Morris Minor Centre Limited is not a respondent in this case. I note that he claims to have been also employed at the time by the first respondent.
2. This preliminary hearing relates to claims for unfair dismissal, and direct discrimination on the grounds of age and sex, brought in a claim form presented on 19 April 2022. The unfair dismissal claim is made against the first respondent and the direct discrimination claim is made against all three respondents.
3. The claimant has been assisted by Mr Connor in preparing his claim and in the various proceedings that have ensued. Both of them are lay persons.
4. At a preliminary hearing on 18 January 2023, EJ Cuthbert listed a further preliminary hearing on 18 April 2023, to determine two preliminary issues. The first preliminary issue related to time limits and the second related to the respondents' application to strike out the claims in the following terms "(2) W*hether the claim has been brought against the correct respondents (the respondents have applied to strike it out on the basis that it has not been)*". EJ Cuthbert also sets out in his Case Summary the issues relating to the identity of the correct respondents. Issue 2.1.5 is "… *should the claimant's claims against the first respondent be struck out on the basis that it was not the claimant's employer at the relevant times or at all".*

5. The respondents' application to strike out the claims was made in an email to the Tribunal dated 8 December 2022: it refers to the claims being out of time and also refers to the first respondent never having been the claimant's employer. It refers in general terms to striking out "the claims" but it does not give specific grounds for striking out the claims against the second and third respondents, other than for being out of time.
6. The final Issue in EJ Cuthbert's list (following 5 issues relating to the position of the first respondent) is "*2.1.6 Should the discrimination claims proceed against the second and third respondents and if so on what basis?"*. In my view this is asking me to consider whether there is a legally viable claim against the second and third respondents.
7. On 18 April 2023 the parties asked me to agree to deal with the two main preliminary issues in two separate stages, first dealing with the time limits issues and giving judgment on them, before dealing separately with the other issues. I agreed to do that as it appeared to be the most efficient way of using the time available on the day. I then held two separate hearings on 18 April. After the first hearing in the morning on time issues, I gave an oral judgment extending time in favour of the claimant, so the Tribunal has jurisdiction to deal with the claims.
8. The reserved judgment above and these reasons relate only to preliminary issue (2) as set out in paragraph 4 above.

The hearing

9. The hearing was conducted by video (CVP). There were no significant connection difficulties and no requests for reasonable adjustments. I had before me an agreed Bundle of 206 pages and witness statements from the claimant and Mr Devoy (the third respondent). There was some discussion during the hearing about a "Red Book" that contains details of the sales transactions carried out at Charles Ware Morris Minor Centre Limited. This was not a document that was before me. The claimant told me he had asked for it but it had not been supplied. No applications were made to me about it. Accordingly, I have had to rely on the documents that were before me.
10. There were no preliminary or procedural matters raised by either party. I heard some evidence from the claimant and the third respondent (Mr Devoy) so that I could understand the parties' factual cases. This was mostly directed at the question whether the claimant was employed by the first respondent at the time of dismissal.
11. Mr Connor's oral submissions for the claimant also focused on that question. Mr Maratos, for the respondents, dealt with that question before moving on to the question whether the claims should continue against the second and third respondents. It soon became apparent to me that his submissions raised factual and legal issues that Mr Connor was probably unprepared for. Time was short by this stage, and I was concerned that the claimant and Mr Connor had not anticipated that that they needed to deal in any detail with the position of the second and third respondents.
12. In these circumstances, I reserved judgment and asked the parties to produce written submissions as to what should happen to the claims against the second and third respondents. I considered that was the fairest and most proportionate way of proceeding, as the claimant needed time to consider his position on the matter and time was running out. Submissions from the parties about the claims against the second and third respondents were sent to the Tribunal and forwarded to me on 19 May 2023.

13. The claimant's written submissions provide useful clarity as to the factual allegations on which he bases his direct discrimination claim against the second and third respondents. They also clarify the basis of the claim against the first respondent. I describe how the claimant frames his allegations in paragraph 16 below.

Claims

14. The unfair dismissal claim is made on the basis that the claimant had become an employee of the first respondent company before he was dismissed. If he was not an employee of that company the claim is bound to fail.
15. The direct discrimination claim was not fully particularised prior to this preliminary hearing. The claimant indicated to EJ Cuthbert at the January hearing that the claim related to the fact that (according to the claimant) another employee of Charles Ware Morris Minor Centre Ltd was retained in employment when he was not. This allegation appeared to be tied up with the allegation that the first respondent was his employer. However, the information given by the claimant in January did indicate that he was complaining that his colleague Shannon Devoy was given a role with the first respondent and that the failure to consider him for the appointment and to appoint him was direct discrimination.
16. In his written submissions about the claim against the second and third respondents, the claimant explains in more detail that his direct discrimination claim relates not to a failure by his employer (the first respondent, on his case) to retain him in employment but a failure by the first respondent to consider him for appointment and/or to appoint him to a sales role that he says was given to Shannon Devoy, another redundant employee of Charles Ware Morris Minor Centre Ltd. He accepts she was made redundant by that company, like him. He says that her appointment to a sales role was direct discrimination against him on the grounds of sex and/or age and that the discrimination arose from the actions of the second and third respondents, who controlled the first respondent and made the relevant decisions.
17. Although the written submissions relate to the position of the second and third respondents, the details given indicate that the claimant's case is that they were individually responsible for discrimination by the first respondent. This discloses a legal basis for his discrimination claim against the first respondent that does not depend on the first respondent being his actual employer. It is sufficient for the first respondent to be a prospective employer who discriminated against him in relation to the appointment of Shannon Devoy to a sales role.
18. In the light of this clarification of the discrimination claim, I will treat the claim against the first respondent as not depending on it being his actual employer. I note in this regard that as lay persons the claimant and Mr Connor may well have failed to spot that there is an alternative legal basis for the claim against the first respondent under section 39 of the Equality Act 2010 that does not depend on it being the claimant's actual employer.

Issues

19. The respondents have applied for the Tribunal to strike out all the claims against all of the respondents.

Striking out the unfair dismissal claim against the first respondent

20. The claimant bases his unfair dismissal claim against the first respondent on an assertion that at the time of his dismissal it was his employer in relation to car sales

work done by him for it. In these reasons I use the term "car sales work" to cover all activities involved in the sale, or purchase, of second-hand cars.

21. So the key question for me in relation to that claim is whether the claimant has a reasonable prospect of proving that he was the first respondent's employee at the time of his dismissal under the relevant statutory provision (section 230 of the Employment Rights Act 1996 ("ERA 1996"). The issues I have to consider in answering that question are:

    (1) Was the claimant employed by Charles Ware Morris Minor Centre Ltd. If so, did that change after the first respondent started trading in March 2020, otherwise than by virtue of the TUPE regulations?
    (2) Was there a relevant transfer under the TUPE regulations from Charles Ware Morris Minor Centre Ltd to the first respondent, consisting of either a transfer of a business or part of a business (regulation 3(1)(a)) or a "service provision change" (regulation 3(1)(b))?
    (3) If so, when did the relevant transfer take place?
    (4) Did the claimant's employment transfer from Charles Ware Morris Minor Centre Ltd to the first respondent pursuant to Regulation 4 of the TUPE regulations and, if so, when?
    (5) If not, should the claimant's claim for unfair dismissal against the first respondent be struck out on the basis that it was not the claimant's employer at the relevant times or at all.

22. The above list is based on the issues identified by EJ Cuthbert in January, taking account also of the parties' cases as explained at this preliminary hearing and in their written submissions. I am not, of course, determining issues (1) to (4) as they are the substantive issues applying to the unfair dismissal claim. In deciding whether to strike out the claim (issue (5)) I must assess the claimant's prospects of success on those issues.
23. The claimant's position on the substance of his claims against the first respondent is relatively simple: he asserts that by the time his employment terminated he was employed by the first respondent owing to the substantial car sales work he performed for it. Therefore, he says, he was unfairly dismissed by that company when Charles Ware Morris Minor Centre Ltd ceased trading. However, he does not say that he ceased to be employed by Charles Ware Morris Minor Centre Ltd. His case is that he became a part-time employee of the first respondent while remaining an employee of his original employer, presumably also on a part-time basis. He has not put forward any details as to the terms of the employment contracts (with the first respondent and his original employe) that result from the changes he alleges took place.
24. The claimant has not made specific legal submissions about the effect of the TUPE regulations in his case, but he has explained enough about his factual case for me to be able to assess the legal viability of his unfair dismissal claim and its prospects of success,
25. The respondents' position is that the claimant was always a full-time employee of Charles Ware Morris Minor Centre Ltd and that that did not change prior to his dismissal. It was not inconsistent with his employment contract with that company for him to perform car sales work for the first respondent after it started to trade (in March 2020). There is, it says, no factual basis for holding that there was any relevant transfer under the TUPE regulations. The respondents also dispute the extent of the car sales work that the claimant carried out for the first respondent after it started trading.

Direct discrimination claim

26. The issue identified by EJ Cuthbert at the hearing in January was "(6) *should the discrimination claims proceed against the second and third respondents and, if so, on what basis.*" However, as explained above, there is a possible legal basis, on the facts put forward by the claimant, for the first respondent to be liable for the direct discrimination he alleges even if it was not his employer. So I consider that the issue for me is whether the discrimination claims should proceed against all three respondents. In other words, should all or any of those claims be struck out.
27. To answer that question, I need to identify what the claimant's case is in relation to the alleged direct discrimination and then assess whether there is a legally viable claim against the three respondents. If not, it would be open to me to strike out the claim on the basis that the claimant has claimed against an incorrect respondent. I would then have to decide whether to do so. But if there is a legally viable claim against a respondent, then I would need to consider whether, nonetheless (a) there are grounds that would justify striking out the claim as having no reasonable prospect of success, and (b) if so, whether I should do so. In deciding the latter issue, I would need to consider in particular whether it is open to me to strike out the claim on any basis other than that the respondent is not a "correct respondent", given the way preliminary issue (2) was worded by EJ Cuthbert.
28. In practice, the prospects of success of any legally viable claim will turn on the chances of the claimant being able to show facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent in question discriminated against him in contravention of a provision of Part 5 of the Equality Act 2010. If he can do that, section 136 of the Equality Act 2010 provides for the burden of proof to shift to the respondent, who must then show that they did not discriminate against him.
29. The claimant's position is described in paragraphs 16 to 18 above. The respondents deny the discrimination claim against them. Specifically, they deny that the claimant was ever employed by the first respondent, and they deny he can prove the necessary facts to establish a valid direct discrimination claim against any of them. They also refer in their written submissions to the inadequacy of the information provided by the claimant as to the details of his allegations of discrimination.

The facts

30. The facts to far as relevant to the issues at the hearing are set out below. Most of the facts are not disputed. Where they are disputed, I describe the factual assertions made by the parties. Mr Connor, for the claimant, told me that the claimant accepted that Mr Devoy's oral account of the facts at the hearing was a fair summary of what happened.
31. The claimant started full-time employment with Charles Ware Morris Minor Centre Ltd on 7 October 1985. That company was a well-known classic car restoration company specialising in Morris Minor cars. From 2006 the whole business was operated from single premises in Bristol.
32. In addition to restoring cars the business also included selling (and acquiring, and occasionally hiring out) cars and the sale of parts. Some cars were acquired by the business for restoration and then sale and others were acquired for sale.
33. After some years working in the restoration side of the business, the claimant became the restoration workshop manager in 2002. In addition to that role, he also dealt with car sales work and parts sales when required, along with the then owner Mr Charles Ware and another manager Mr Tim Brennan. It appears that the identity of the staff member who dealt with any particular customer often depended on who happened to

pick up the phone or to be available to greet a "walk-in" customer. The claimant was good with people, and sometimes customers would want to deal with him.

34. The kinds of work the claimant undertook in relation to each of the three parts of the business were never fixed. His work activities varied from time to time according to the needs of the business.
35. In 2009 Mr Ware's health deteriorated and he ceased working in the business. The claimant and Mr Brennan continued to manage the business and they eventually became minority shareholders. The claimant acquired 10% of the shares.
36. Following the death of Mr Ware in 2015, his son inherited the majority shareholding and by 2018 was looking for potential purchasers for the whole business. The core business of the company (i.e. a combination of restoration, sales and parts) continued after Mr Ware's death. There were changes in the management of the business and its three component parts, and in the roles and work undertaken by the claimant and others. For a period before July 2019, the claimant acted as sales manager (and ceased to be workshop manager) when another manager gave up that role.
37. On 3 July 2019 the shares in Charles Ware Morris Minor Centre Ltd were acquired by Ecotec Partners Limited. The second and third respondents were directors of that company. The change of ownership of those shares meant the claimant ceased to be a shareholder.
38. To summarise, from 2002 until the change of ownership in July 2019 the claimant was involved in car sales work to a greater or lesser extent, depending on the needs of the business and on who else was able, or available, to do the work.
39. After the change of ownership, the claimant became General Manager of the business to ensure continuity. This role continued until his dismissal in November 2021. He still dealt with car sales work as and when that was needed. According to the claimant, nothing much changed on the ground in the way the business carried on after the ownership changed. This was not disputed.
40. In December 2019, the then restoration manager left, which meant the other managers (the claimant and Mr Blackmore) took on more duties in relation to the restoration side of the business.
41. After the change of ownership the new owners became concerned that the financial position of the original company (Charles Ware Morris Minor Centre Ltd) was not secure. They established a new sales company, Charles Ware Classic Car Sales and Hire Ltd (the first respondent). That company was incorporated on 3 July 2019, and it began trading in March 2020. The second respondent was appointed Director. Another new company, Charles Ware Parts Ltd was incorporated on 24 March 2020. Its Company Secretary was the third respondent. However, the affairs of this second new company did not feature significantly in either party's factual case as explained to me at the hearing.
42. Mr Devoy told me that the two new companies were set up because the original company had on several occasions been in financial difficulty. He understood from his accountants that its accounting systems were not satisfactory. The idea was for car sales work and parts sales to be undertaken by the new companies. The new sales company was to take on new car sales and acquisitions, while the original company wound down its existing car sales activities. This account of the intention behind the creation of the first respondent company was not disputed.
43. According to the claimant, the first respondent "took over" the car sales business from Charles Ware Morris Minor Centre Ltd. As far as I could tell from his witness statement and documents in the bundle, there is no specific factual allegation (or evidence put forward) of anything actually transferring between the original company and the new sales company (such as contracts, cars or other property or staff). The claimant's

assertion that there was a take-over of the sales business is disputed by the respondents if by it he meant that there was some sort of business transfer between the two companies (a matter I return to below). According to Mr Devoy, nothing transferred to the new company.

44. Mr Devoy said that there was in fact no clean break between the original company ceasing its car sales activities and the new sales company starting to trade. Some sales transactions continued to involve the original company as a party and were accounted for in its accounts, while others involved purchases and sales by the new sales company and were accounted for in its accounts. In other words, the car sales part of the original company's business was gradually wound down, while the new sales business of the new sales company (the first respondent) was building up. This part of the respondents' factual case was not disputed, and appeared to accord, more or less, with what the claimant told me about his use of the bank accounts of the original company and the new sales company for different transactions. He was authorised to use both accounts.
45. When the original business went into liquidation in November 2021, there were still some cars in its ownership, so its car sales activities had not ceased by then.
46. There was a proposal in early 2020 to appoint a new sales manager, but this did not happen owing to the impact of the COVID pandemic in March 2020.The third respondent appointed Shannon Devoy (a shareholder in Ecotec Partners Ltd) to join Charles Ware Morris Minor Centre Ltd as head of logistics, HR and Marketing. She became an employee of that company.
47. On 1 January 2021 Adrian Fry became sales manager. He was an employee of the original company. The idea was that over the next 6 months or so he would take over the car sales work, including the work that was being carried out by the claimant. According to Mr Devoy, in July 2021 he discovered that the claimant was still dealing with some car sales transactions and instructed him to hand the work over to Mr Fry. The claimant told me that he had no recollection of that meeting, but that it might have happened as Mr Devoy said. However, he accepted that Mr Fry's role was as described by Mr Devoy. He said it took some time for Mr Fry to get up to speed on sales as, at the start of 2021 he was better at the buying side of the car sales work.
48. In response to questions from Mr Maratos, the claimant agreed that after the first respondent started business, car sales work was not his main purpose, as he was the General Manager of the whole business of Charles Ware Morris Minor Centre Ltd. He also agreed that he was paid his salary by that company.
49. The claimant does not rely on any agreement (express or implied) that the identity of his employer would change. There was no evidence before me of any such agreement.
50. Mr Devoy told me that once the new sales company started trading, all car sales work carried out for its sale and purchase transactions was performed by employees of the original company (Charles Ware Morris Minor Centre Ltd). That company acted, through its employees, on behalf of the new sales company and was paid fees by it in respect of the work done for it. He said that Mr Fry signed his new contract to be sales manager in December 2020 but remained employed by the original company, at his choice. He required guidance and help from the claimant when he started as sales manager. The claimant did not dispute Mr Devoy's account of the arrangements made when the first respondent started trading.
51. From July 2021 onwards the original company was in serious financial difficulties, and in August Mr Devoy put £10,000 of his own money into the business to pay wages. There were difficulties in identifying the size of the company's debts. An insolvency practitioner was called in and on 9 November at 6.30 pm Mr Devoy was told the

company was insolvent and had no alternative but to stop trading. It then went into liquidation.

52. Mr Devoy said that Shannon Devoy was dismissed for redundancy by the original company (as were other employees including the claimant) and I note that the bundle includes a notice of dismissal addressed to her. It appears from the claimant's written submissions that he does not now dispute the fact of her dismissal.
53. Mr Devoy told me that Ms Devoy was subsequently employed to deal with purchasers of cars still belonging to, or under restoration by, the original company when it went into liquidation. He also said she set up her own small restoration company. The claimant's factual assertion is that she was given a sales role in the new sales company, but it is not clear to me that the parties agree as to exactly what her role or employment status was or, more generally, as to what happen to her after the original company went into liquidation. Mr Devoy did say that he had not considered the claimant for any role in the new sales company, but that was because it had not occurred to him to do so.
54. The other significant area of disagreement on the facts was the amount of car sales work the claimant carried out at different times. There was a series of questions to him about this. There was some variation in the answers, but they were sufficient to give me a reasonable indication of the claimant's factual case.
55. The claimant said that immediately prior to the sale of the shares to Ecotec Partners Ltd in July 2019, he was spending about 50% of his time on car sales work and 50% in the workshop. This figure was not accepted by Mr Maratos, although he did accept that when the claimant was sales manager prior to the share sale he would have undertaken more car sales work than previously.
56. After the share sale but before COVID struck in March 2020, the claimant said he was spending well over 10% of his time on car sales work (which was Mr Maratos' suggestion to him). He said it was more like 30% in general terms, although Mr Maratos questioned whether it was really that high.
57. After the COVID lockdowns in 2020 and early 2021, the claimant said he was still spending about 30% of his time on car sales work, as the new sales manager (Adrian Fry) was not "up to speed", but he did agree that he was gradually handing customers over to Mr Fry. He said he was doing something like 30% of the car sales work while Mr Fry did 70%, but it was not entirely clear what point in time he was referring to, given that he agreed that he was gradually reducing the amount of his car sales work as Mr Fry "got up to speed" with sales. But it is clear that his car sales work continued in 2021, not least because some existing customers preferred to deal with him.
58. There was also some dispute as to the amount of car sales work performed by the claimant immediately before, and after, the first respondent started trading in March 2020, and how much of that work was carried out on behalf of the first respondent. Mr Devoy said the claimant's car sales work had reduced to about 15-20% of the total car sales work carried out by the original company by July 2021 (and that not all of that work was carried out on behalf of the first respondent) but this was disputed.
59. For the purposes of assessing the claimant's prospects of success in establishing that the first respondent became his employer, I propose to take the factual case put forward by the claimant at its highest: which was that when the first respondent started trading (in March 2020) (a) he was spending around 30% of his time on car sales work, in addition to his other work as General Manager, (b) he was doing about 30% of the total sales work that was carried out by himself and other staff, and (c) that the great majority of the car sales work he performed was done on behalf of the first respondent. It may be that that overstates the true position, were the facts to be determined by a

Tribunal, but the claimant's factual case, taken at its highest, is a crucial factor in deciding whether to strike out his claims.

The applicable law

Striking out claims

60. Under Rule 37(1)(a) of the Employment Tribunal Procedure Rules 2013 a claim against a respondent may be struck out by the Tribunal on the ground that it "has no reasonable prospect of success". But it must be given a reasonable opportunity to make representations. The power to strike out is discretionary. It does not have to be exercised even in a case that meets the "no reasonable prospect of success" test.
61. In practice this test may be met if the Tribunal considers either that there is no legally viable basis for the claim against the respondent (for example where an unfair dismissal complaint is brought against a respondent who was not the claimant's employer) or that there is a possible legally viable basis on which the respondent could be liable, but there is no reasonable prospect of success for some other reason.
62. The key principles on use of the strike out power, derived from the reported cases on the subject, are as follows:

    (a) A decision to strike out is a draconian measure, which deprives a party of the opportunity to have their claim or defence heard. The threshold for use of the power is a high one (see *Tayside Public Transport Company Limited v Reilly [2012] IRLR 755*).

    (b) Particular caution is required when dealing with strike out of discrimination and whistleblowing claims, or other cases likely to be heavily fact-sensitive. A full examination of the facts is usually needed to make a proper determination. (see *Abertawe Bro Morgannwg University Health Board v. Ferguson 2013 ICR 1108 EAT; Anyanwu v South Bank Student Union [2001] ICR 391, HL; and Ezsias v North Glamorgan NHS Trust [2007] ICR 1126, CA*).

    (c) Particular caution should also be exercised where a party is not legally represented (see *Hassan v Tesco Stores Limited UKEAT/0098/16 and Mbuisa v Cygnet Healthcare Limited UKEAT/0109/18*).

    (d) The power to strike out on the "no reasonable prospect of success" ground is designed to weed out claims and defences (or parts of them) which are bound to fail. The issue, therefore, is whether the claim or contention has a realistic as opposed to a fanciful prospect of success.

    (d) The tribunal should not conduct a mini-trial of the facts and therefore should only exceptionally strike out where a claim has a legally viable basis, if the central or material facts are in dispute. An exceptional case might be one where factual allegations are plainly false in the light of incontrovertible evidence (preferably documentary evidence) in which case the tribunal may be able to come to a clear view on the facts (*Ezsias*, above).

    (e) Subject to that possible exception, the tribunal must take the case of a party whose claim or allegation is at risk of being struck out at its highest in terms of its factual basis and ask whether, even on that basis, it cannot succeed in law.

    (f) The fact that a given ground for striking out is established gives the tribunal a discretion. It "may" strike out the claim or allegation. The aim of the tribunal in exercising this discretion is to do justice between the parties in accordance with the overriding objective under Rule 2 of the Procedure Rules.

Unfair dismissal claims against first respondent

63. The right under section 94 of the Employment Rights Act 1996 for an employee with at least two years' service not to be unfairly dismissed only applies in relation to their employer. An unfair dismissal claim cannot succeed against a person who was not the claimant's employer at the time of dismissal.
64. It is not necessary to set out all the law about what creates an employment relationship as it is not disputed that the claimant was an employee of Charles Ware Morris Minor Centre Ltd under a normal contract of employment prior to the formation of the first respondent. The only substantive issue is whether the identity of his employer changed, as he asserts.
65. It is perfectly possible in law for an individual to become employed by two or more employers at the same time. But the question whether an individual has become employed by a particular person depends on a proper analysis of a number of potential indicators. The fact that he or she performs work for the person concerned is a possible indicator of an employment relationship, but its significance depends on all the surrounding facts. It is certainly not decisive on its own. In the claimant's case, it is agreed that the claimant was originally a full-time employee of Charles Ware Morris Minor Centre Ltd (the original company). It is commonplace for the duties of an individual employee of one employer to include performing work for the benefit of a third party. Performing that work is not, as a matter of law, inconsistent with the individual's contract of employment and it does not of itself make him or her an employee of the third party.

Direct discrimination

66. The claimant's claims against the first respondent were originally put forward on the basis that it was his employer. As explained above, the direct discrimination claim against the first respondent does not in fact depend on it being his employer. If it was not his employer then it was, on his factual case, a prospective employer.
67. If the first respondent was not the claimant's employer, the issue is whether it discriminated against him contrary to section 39(1) of the Equality Act. This provides that an employer (A) must not discriminate against a person (B) in relation to (a) the arrangements A makes for deciding to whom to offer employment, (b) the terms on which A offers B employment, or (c) by not offering B employment.
68. Section 13(1) of the Equality Act 2010 provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. In this case the protected characteristics put forward are age and sex. In the case of alleged sex discrimination, section 13(2) provides that A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
69. In relation to the second and third respondents, the first respondent would be vicariously liable for discrimination by them by virtue of section 109 of the Equality Act 2010 if they were acting as employees or agents of the first respondent. Under section 110 of that Act, if the first respondent is vicariously liable for discriminatory acts of theirs, then they are also individually liable for the discrimination.

Transfer of employment under the TUPE regulations

70. A person who is employed by one person (P1) may become employed by another person (P2) by operation of law under regulation 4 of the TUPE regulations. This is the only basis (other than by agreement) on which an employee of P1 could become an employee of P2. Regulation 4 applies to transfer the employment contract of P1 to P2 if there has been "a relevant transfer" and various conditions are met. Under regulation

2(1) "relevant transfer" means a transfer or a service provision change to which the regulations apply by virtue of regulation 3.

71. Regulations 3 and 4 (so far as relevant) provide as follows:

"3(1) These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;

(b) a service provision change, that is a situation in which—

(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or

(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

and in which the conditions set out in paragraph (3) are satisfied.

(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.

(3) The conditions referred to in paragraph (1)(b) are that—

(a) immediately before the service provision change—

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

…

(6) A relevant transfer—

(a) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor.

… ."

"4.—(1) … a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1) ... on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

…"

72. The effect of those provisions is that an employment contract may transfer under the TUPE regulations in two basic situations. One is where the whole or part of the business of the employer is transferred to a third party. The other is where there is a service provision change.
73. The case law on the TUPE regulations identifies some questions that require a positive answer before there can be a business transfer of part of a business for the purposes of the regulations. These are:
    (a) Was there a transfer to another person?
    (b) Did an economic entity (consisting of the part of the business in question) transfer?
    (c) Did the economic entity retain its identity after the transfer?
74. As for a "service provision change" the situation needs to fit within one of the scenarios spelled out in regulation 3(1)(b)(i) to (iii) and then the conditions in 3(3) must be met. The key condition is whether prior to the supposed transfer there was an "organised grouping of employees … which has as its principal purpose the carrying out of the activities concerned on behalf of the client". The employee in question has to be "assigned" to that grouping prior to the supposed transfer.
75. The wording of regulation 4(1) clearly contemplates the employee either being assigned to the relevant "grouping" or not. There is nothing to suggest that a person can be partly assigned to one grouping and also to another grouping. Similarly, there is nothing in the wording of regulation 4 to suggest that it is possible for part only of an employee's contract of employment to transfer under regulation 4. It appears to be all or nothing, and the reported cases (where someone was employed to do things for different parts of a business or group of companies) turn on whether the employee was as a matter of fact assigned to the part in question. Deciding that question requires an examination of all the relevant facts, including the proportion of time the employee spent working for the relevant "grouping".
76. I have not found any reported case in which a transfer of employment was found to have related to part only of an employment contract, so as to create, in effect, a new part-time contract with the transferee of the relevant transfer, while leaving in place part of the original contract with the original employer. If the intention behind the regulations was to cover that case, I would expect the matter to have been dealt with expressly, given the many complications that would ensue (including identifying the terms of the two contracts that would be the result of a partial transfer). Instead, regulation 4 provides for the contract of employment to be treated after the relevant transfer in question as made with the transferee, together with "all the transferor's rights, powers, duties and liabilities under or in connection with" that contract.

Conclusions relating to the unfair dismissal claim against the first respondent

77. I now consider the claimant's prospects of success in his unfair dismissal claim, taking the issues in order.

(1) *Was the claimant originally employed by Charles Ware Morris Minor Centre Ltd. If so, did that change after the first respondent started trading in March 2020, otherwise than by virtue of the TUPE regulations?*

78. There is no dispute that the claimant was initially employed from 1985 by Charles Ware Morris Minor Centre Ltd ("the original company") on a full-time basis and that that did not change before the first respondent started trading in March 2020.
79. The claimant says he became an employee of the first respondent because he carried out car sales work for it after it started business in March 2020. However, the claimant does not suggest that there was any agreement that the identity of his employer should change so that he became a part-time employee of the first respondent after it started trading.
80. Rather, his argument appears to be that his performing work for the first respondent was itself enough to make him a part-time employee of that company. He told me that he felt he had become its employee. However, in my view that argument is wholly misconceived. Performing work for another company as part of one's duties as an employee of one company does not, of itself, make an individual an employee of the other company. It is commonplace for an employee's duties to include performing work for a third party under arrangements made between the employer and the third party. The claimant did not dispute what Mr Devoy told me about the arrangements between the original company and the first respondent under which employees of the original company performed work for the first respondent. In those circumstances the performance of that work could not, and did not, create a new (part-time) employment relationship with the first respondent.
81. The impossibility of that argument succeeding was the basis of the list of issues set by EJ Cuthbert at the hearing in January and I agree with him that the question whether the first respondent became an employee of the first respondent turns on the application of the TUPE regulations.
82. For the above reasons I conclude that the claimant has no prospects of succeeding in establishing that the first respondent was his employer on the basis of the argument described in paragraph 80 above.

(2) Was there a relevant transfer under the TUPE regulations from Charles Ware Morris Minor Centre Ltd to the first respondent, consisting of <u>either</u> a transfer of a business or part of a business (regulation 3(1)(a)) <u>or</u> a "service provision change" (regulation 3(1)(b))?

(3) If so, when did the relevant transfer took place?

83. Although the claimant has asserted that there was a transfer of the sales part of the business of the original company, in the sense that the first respondent took over that part of the business, there is no evidence before me that suggests that anything transferred between the two companies. On the contrary, the uncontroverted evidence of Mr Devoy was that nothing transferred and that from March 2020 (a) new car sales work was performed for the first respondent by the original company under arrangements between the two companies, (b) that work was performed by the original company through its employees including the claimant, and (c) some car sales work continued to be carried out by the original company on its own account (again acting through its employees, including the claimant).
84. Also, under regulation 3(1)(a) of the TUPE regulations a transfer of part of a business must involve the transfer of an "economic entity" that retains its identity in the hands of the supposed transferee (the first respondent). The term "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity. I cannot see anything in the claimant's case that plausibly fits within the

definition. On the claimant's evidence, prior to the first respondent starting business he carried out car sales work for his employer as required, as did other employees, but there is no indication of the existence of any organised grouping of resources that transferred to the first respondent. Mr Devoy's uncontroverted evidence was that nothing transferred.

85. For these reasons I conclude that the claimant has no prospects of establishing that there was a business transfer between the original company and the first respondent for the purposes of regulations 3 and 4 of the TUPE regulations.
86. As for the possibility that there was a service provision change, I have considered the three scenarios set out in regulation 3(1)(b) and have been unable to identify a way in which the facts as put forward by the claimant could fit within any of them. The three scenarios relate to what is sometimes referred to as "contracting out", whereby an undertaking ("A") arranges for another person (a "contractor") to carry out activities on its behalf. In each scenario there needs to be a particular kind of "change", which is then treated by regulation 3 as a relevant transfer.
87. The first scenario (regulation 3(1)(b)(i) is where the contractor takes over the carrying out of activities previously carried out for itself by A. The facts of the claimant's case do not fit this scenario. It appears to be common ground between the parties that after the first respondent started business, the claimant (and other employees of the original company) performed car sales work for it by agreement between the two companies. That is a contracting out arrangement. But the claimant does not rely on that arrangement changing. Instead, he seems to be relying on the fact that before the first respondent contracted out car sales work to his original employer (Charles Ware Morris Minor Centre Ltd) he was carrying out car sales work for his employer as part of his employer's business. So there was a change of sorts after the first respondent started business, but it is not a change that falls within the scenario described in regulation 3(1)(b)(i).
88. The second scenario (regulation 3(1)(b)(ii)) is where A has contracted out the performance of activities to a contractor, and then changes the arrangements so that a different contractor takes over the performance of the same activities. The third scenario (regulation 3(1)(b)(iii) is where A has contracted out the performance of activities to a contractor, and then changes the arrangements so that A takes back the performance of the activities. There is no suggestion in this case that there was any change of either of those kinds.
89. For the above reasons my conclusion is that the claimant has no prospects of establishing that there was a service provision change.
90. It follows from my conclusions in paragraphs 85 and 89 above that the claimant has no prospects of establishing that there was a relevant transfer under the TUPE regulations. In those circumstances, issue (3), the date of any relevant transfer, does not arise.

(4) Did the claimant's employment transfer from Charles Ware Morris Minor Centre Ltd to the first respondent pursuant to Regulation 4 of the TUPE regulations and, if so, when?

91. My conclusion that the claimant has no prospects of success in establishing that there was a relevant transfer is sufficient to enable me to strike out the unfair dismissal claims against the first respondent. But there are other fundamental difficulties with the claimant's case, which I summarise below for completeness.

92. The claimant does not claim that the whole of his employment contract transferred to the first respondent. That is a realistic position – he was the General Manager of the original company and carrying out car sales work for the first respondent never accounted, on his factual case, for much more than 30% of his time. Instead, he says that he became, in effect, a part-time employee of the first respondent and so remained employed by the original company as well. If that happened, his full-time employment with the original company must have changed to a part-time one. He does not explain what the terms of those two new contracts were.
93. The difficulty with this argument is that it depends on the TUPE regulations applying to transfer part of the claimant's employment contract to the first respondent. However, in my view he has no reasonable prospects of success in arguing that the regulations can have that effect. There is nothing in regulations 3 and 4 that suggests that anything other than the whole of a person's employment contract can transfer to the transferee under a relevant transfer, if all the conditions set out in the regulations are met. Regulation 4 simply provides for the existing employment contract of a transferring employee to be transferred as a whole.
94. A further difficulty for the claimant is whether the condition in regulation 4(1) is met in his case, which requires him to have been "assigned to the organised grouping of resources or employees that is subject to the relevant transfer". There is nothing in the factual case put forward by the claimant to suggest that he was assigned to such a grouping. He was the General Manager of the whole business of the original company at all material times before and after the first respondent starting trading in March 2020. He has no reasonable prospects of establishing that he was, despite being General Manager of the whole business, assigned to work for an organised grouping of employees or resources devoted to car sales work.

    (5) If not, should the claimant's claim for unfair dismissal against the first respondent be struck out on the basis that it was not the claimant's employer at the relevant times or at all.
95. For all the reasons set out above I conclude that the claimant's claim to have been an employee of the first respondent prior to his dismissal on 10 November 2021 is bound to fail. Accordingly, it is open to me to strike out the unfair dismissal claim. I have not identified any reason not to exercise the strike out power in relation to the unfair dismissal claim against the first respondent. The unfair dismissal claim is struck out.

Conclusions relating to the direct discrimination claims against the first, second and third respondents

96. I describe the claimant's allegation of direct discrimination in paragraph 16 above.
97. My conclusion that the claimant has no prospects of success in his claim that the first respondent was his employer in relation to the unfair dismissal claim applies equally to any argument that it was his employer in relation to his direct discrimination claim. This is not a case where anything turns on the wider definition of "employee" in Part 5 of the Equality Act 2010 (in relation to discrimination claims) as compared with the definition in section 230 of the Employment Rights Act 1996 (in relation to an unfair dismissal claim). That is because it is agreed that the claimant was an employee under an ordinary contract of employment.
98. This means that the only live allegation of direct discrimination is that the first respondent failed to consider the claimant for, or to appoint the claimant to, a sales role that it gave to Shannon Devoy, that that was direct discrimination against him by the

first respondent on the grounds of age and/or sex, and that the second and third respondents were employees or agents of the first respondent whose actions constituted the alleged discrimination. This allegation does not require the first respondent to have been his employer.

99. In my view this allegation gives rise to a legally viable discrimination claim in the sense that if the claimant can prove the necessary facts (at least to the point of the burden of proof shifting under section 136 of the Equality Act 2010) the respondents would be potentially liable to him for direct discrimination. In the case of the first respondent that is a claim for a contravention of section 39(1) of that Act, for which the second and third respondents are also potentially liable as a result of sections 109 and 110 read together.

100. In considering whether it is open to me to strike out the direct discrimination claim against all or any of the respondents, I have considered the documents in the bundle, the parties' witness statements and oral evidence, and their written submissions.

101. The direct discrimination claim gives rise to a number of legal and factual issues for determination by the Tribunal and the claimant would need to succeed on all of them. Among other things, that includes being able to show that there was a sales role for which he should have been considered in addition to Ms Devoy, or to which he should have been appointed instead of her, and that any unfavourable treatment was "because of a protected characteristic" (as required by section 13(1) of the Equality Act 2010). In the case of the individual respondents, he would have to be able to show that they were agents or employees of the first respondent and that they did things for which their principal or employer (the first respondent was vicariously liable) and resulted in a contravention by it of section 39(1). However, this substantial task for the claimant is relieved to some extent by section 136 of that Act, under which the burden of proof on discrimination would shift to the respondents if he can show facts from which the tribunal could decide, in the absence of any other explanation, that they contravened the Act.

102. Mr Devoy's oral account suggested that Ms Devoy was employed by the first respondent to carry out a specific task in relation to the original company's stock of cars under restoration or for sale. The role he described may have been quite limited. However, it appears that this account was not accepted by the claimant. The claimant's position appears to be that there was a sales role to which Ms Devoy was appointed and that he should have been appointed to it, or at least considered for it, as he was more experienced. He asserts that the failure to do that was discrimination on the grounds of age or sex, and that the employer (the first respondent) and the two individual respondents were responsible for that discrimination.

103. The respondents' position is in effect that he has no or insufficient evidence to establish his claim to the standard required by section 136 of the Equality Act 2010 and that it is therefore too weak (on the facts) to be allowed to proceed against any of the respondents. They also say that the claimant had the chance to particularise his claim (following a request from the respondents in their Response) and failed to do so. I note, though, that he has never been ordered by the Tribunal to provide further particulars of the direct discrimination claim.

104. However, the difficulty with the respondents' position is that it invites me to enter into an assessment of the facts and evidence, which is the very exercise that the EAT and Court of Appeal have said is usually inappropriate in a strike out case where there is a dispute as to the central facts in a discrimination claim (see paragraph 62(b) above). .

105. The fact the claimant and Mr Connor are lay persons is another factor against strike out in this case: the legal issues before me at the hearing were complicated and it is not surprising that they may not have fully understood all the ramifications of the prospects of success or failure on particular issues. In my view their articulation of the precise allegation of direct discrimination was not presenting a wholly new claim; rather, it was relying on and clarifying matters already pleaded.
106. I have not identified any grounds for concluding that the discrimination claim against any of the respondents is bound to fail on the facts, taking the claimant's factual assertions at their highest.
107. My conclusion is that in these circumstances it is not open to me to strike out the direct discrimination claims on the basis that they are not "correct respondents" in the sense used in preliminary issue (2). Accordingly, I do not strike out the direct discrimination claims at this stage and they may continue.
108. This decision should not be read by the parties as expressing views on the strength of their respective cases, other than in relation to the narrow question of whether the test for strike-out of the discrimination claim has been met.

Next steps

109. The parties' factual cases in relation to the surviving discrimination claim against the three respondents have been clarified in the course of this preliminary hearing. In the light of the striking out of the unfair dismissal claim and the new information now available the parties should reconsider their positions. In particular, the claimant should consider whether, following the striking out of the unfair dismissal claim, he wishes to continue with his direct discrimination claims against all three respondents. That is entirely a matter for him to decide.
110. Accordingly, I propose in separate case management orders, a) to direct the claimant to write to the Tribunal and the respondents and state whether he wishes to continue with his direct discrimination claim against all of the respondents, b) to permit the respondent to file an amended Response and c) to list the case for a final hearing, based on the information available to me.

Employment Judge Hogarth
Dated: 17 April 2023

Sent to the parties on
01 September 2023 By Mr J McCormick

For the Tribunal