EMPLOYMENT TRIBUNALS

Claimant: Mr A Paraskeva

Respondents:

1. **Muller UK & Ireland Group LLP**
2. **Workforce Staffing Ltd**
3. **Mierthzeal Ltd**
4. **JI Dillon Ltd**
5. **Next Ness Ltd**
6. **Dorsington Ltd**

Heard at: Bristol (by video) **On: 24 August 2023**

Before: Employment Judge Oliver

Appearances
For the Claimant: Representing himself
For the respondents:

1. Muller UK & Ireland LLP – Mr Bruce Frew, counsel
2. Workforce Staffing Ltd – Mr Graeme Lomas, tribunal advocate
3. Mierthzeal Ltd, no attendance
4. JI Dillon Ltd, no attendance
5. Next Ness Ltd, no attendance
6. Dorsington Ltd, no attendance

JUDGMENT having been given orally at the hearing on 24 August 2023 and written reasons having been requested at the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. I heard applications from both the First and Second Respondents to strike out some of the claims, or in the alternative for a deposit order in relation to some of the claims.

Applicable law

2. The applications for strike out are made under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

> *(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success…*

3. In accordance with ***Cox v Adecco and others*** UKEAT/0339/19 I have made a reasonable attempt to identify the claims and issues, and I have taken the Claimant's case in relation to each claim at its highest.

4. Case law makes it clear that a discrimination claim should not be struck out except in the plainest and most obvious cases (***Anyanwu and another v South Bank Students' Union and South Bank University*** [2001] IRLR 305, HL). Where core issues of fact turn to any extent on oral evidence, these should not be decided without hearing the oral evidence (***Mechkarov v Citibank NA*** [2016] ICR 1121, EAT).

5. The same principles apply for whistleblowing claims. Where there are facts in dispute, it would only be "very exceptionally" that a case should be struck out without the evidence being considered (***Ezsias v North Glamorgan NHS Trust*** [2007] EWCA Civ 330, CA).

6. The applications for a deposit order are made under Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

> *(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

7. Deposit order applications involve greater leeway than strike out applications, and the Tribunal can make a provisional assessment of the credibility of a party's case. This still requires a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence (see paragraph 12 in ***Hemdan v Ishmail*** UKEAT/0021/16).

The First Respondent's applications

8. The First Respondent made a clear written application and I also heard submissions from their representative Mr Frew. I do not repeat all these submissions here but I have read and considered them.

Direct age discrimination

9. ***Strike out.*** The First Respondent applies for strike-out of the age discrimination claims. The First Respondent says there is a lack of a prima facie

case, as there is only one brief reference in the ET1 about passing for "55 when shaven". They say it is unclear why the cutoff has been given as 60 years of age. The chosen comparator is 58 and therefore it is implausible that any age discrimination would be involved. Mr Frew described this claim as a "stab in the dark".

10. The Claimant explained his case as being based on the fact that he was close to retirement age, 63, which the First Respondent did not realise until it was discussed after he started work. He believes he was hired because he looks under 60. He says he was told that other workers were old and coming up to retirement. His comparator was not due to retire for 8 years.

11. I note the following paragraph in the ET1: the Claimant says he was told during his interview with the First Respondent that "*the current team were all long-term employees, older and set in their ways, what he wanted was someone who does not sit around all day and can highlight and fix management issues*".

12. If this was said, it is prima facie evidence that there may have been age discrimination. This prevents the Claimant's case from being simply a stab in the dark. This is a matter of evidence that needs to be considered at a full hearing. Taking the claim at its highest, and taking into account the caselaw on not striking out discrimination claims expect in the plainest and most obvious cases, it would not be appropriate to strike the claim out on this basis.

13. In relation to the comparator being 58, I agree that it would be unusual to have such a small age gap in an age discrimination claim. However, this is based on the Claimant's point about his proximity to retirement age. I have looked at this in the context of the comment set out in ET1. Again, this turns largely on the evidence about whether this comment was made. On that basis I do not find that the claim has no reasonable prospect of success.

14. ***Deposit order.*** The First Respondent applied in the alternative for a deposit order. I have considered the application for a deposit order carefully. There is a small age difference between the Claimant and his comparator. I have considered whether the claim is sufficiently implausible for it to have little reasonable prospect of success. I find that it is not. This is on the basis of how the claim was put in the ET1 in relation to the comment the Claimant says was made to him, and his explanation today about his proximity to retirement age. Again, this is an evidential issue in relation to whether this comment was said to the Claimant. Although the bar is lower than for strike out, I do not have a proper basis for finding on the material before me today that the Claimant is unlikely to establish these facts. This means it is not appropriate for me to decide today that this claim has little reasonable prospect of success.

15. ***Time limits.*** The First Respondent makes the point that the Claimant is relying on two incidents which are separated in time. They say that the first incident is out of time and does not form part of a continuing act, and should be struck out for this reason. The Claimant's position is that the claims are linked.

16. I find that the issue of time limits should be decided at the final hearing. It is necessary to hear evidence to determine if one or both of these incidents were age discrimination, and if so whether they can be linked as continuing acts. In the circumstances it is not appropriate today to make a decision to either strike the

claim out or make a deposit order.

Whistleblowing claims

17. Firstly, the First Respondent's position is that some of the whistleblowing claims are out of time. This might be the case - depending on which claims succeed, whether any of those that do are within time, and whether there is a series of similar acts. However, as with the age discrimination claim, it is an issue of evidence whether some or all of the acts were detriments for whistleblowing, and if so whether they form part of a series of similar acts which ended within time. This is an issue which should be decided at the final hearing.

18. Secondly, the First Respondent says that there is a lack of a prima facie case in relation to whistleblowing. I have considered their written application. This relies on various denials of the Claimant's case which are based on documents or other evidence. The Claimant's position is that he disagrees with what the First Respondent has said, and he says he has evidence that proves otherwise. There is a clear dispute of fact here which will need to be decided on the evidence. As with discrimination claims, strike out in whistleblowing claims should only be used in the most obvious cases. It would not be appropriate to strike out the claim. For the same reason, it would not be appropriate to make a deposit order, as there is no proper basis for finding on the material before me today that this claim has little reasonable prospect of success.

The Second Respondent's applications

19. The Second Respondent also made a written application and I heard submissions from their representative Mr Lomas. Again, I do not repeat all these submissions here but I have read and considered them.

Employment status

20. The first application relates to whether the Claimant was an employee of the Second Respondent. This issue affects whether the Claimant can bring some of his claims against the Second Respondent. Mr Lomas fairly drew my attention to ***Evans v Parasol***, an EAT decision said it would be a "bold judge" who would strike out a status claim in this type of agency situation.

21. The Second Respondent says that there is no evidence the Claimant was their employee. The Claimant says that he started work through the Second Respondent, and even if there were potential transfers later he must have been an employee of the Second Respondent at some point. There are unsigned contracts with Respondent 3 to Respondent 6 in the bundle, but the Claimant's position is that he did not see these at the time, and he was not aware of any transfers of his employment when they are said to have happened.

22. There is clearly some confusion and dispute about the Claimant's employment status. The Claimant has explained his reasons why he believes he was employed by the Second Respondent, including the fact his first alleged employment with another respondent was from 12 April 2022, which is after he had started work through the First Respondent. I find that this needs to be considered properly at a hearing with evidence about what happened and when. Taking the claim at its highest, I do not find there is no reasonable prospect of

success. I therefore do not strike out the claims. Similarly, I do not make a deposit order. In the absence of full evidence there is no proper basis for finding on the material before me today that this claim has little reasonable prospect of success.

TUPE

23. The Second Respondent says that the Claimant was not their employee at all, and therefore there can be no TUPE claim for failure to inform and consult. Alternatively, even if the Claimant was their employee, any claim would be out of time as the first transfer happened on April 2022. The Claimant says it's not clear if there was a valid transfer at all. He also says he didn't know about any transfers until September or October as he wasn't told about them at the time.

24. The validity of the TUPE claims turns on the issue of employment status. The Claimant's state of knowledge about the potential transfers may also provide a reason why it was not reasonably practicable to bring his claim earlier. However, it would be premature to decide this issue at this hearing. If the Claimant was not an employee there would have been no TUPE transfer at all. If he was an employee, then there may be a time issue with his claim against the Second Respondent. This is an issue that needs to be decided at the final hearing. I therefore do not strike out the claim or make a deposit order.

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Employment Judge Oliver
Date 25 August 2023

Reasons sent to the Parties on 15 September 2023

For the Tribunal Office