EMPLOYMENT TRIBUNALS

Claimant: Mrs H Hughes

Respondent: KingKabs Ltd, company number 03623784 formerly known as Vedamain Ltd

Judgment ("the TUPE judgment") was sent to the parties on 8 June 2023. By e-mail dated 4 August 2023 ("the TUPE reconsideration application"), the claimant has applied for reconsideration of the TUPE judgment.

A further judgment was sent to the parties on 13 July 2023. Amongst the disputed decisions recorded in that judgment were: (a) a decision ("the detriment judgment") that Vedamain Ltd did not subject the claimant to an unlawful detriment and (b) a decision ("the sex discrimination judgment") that Vedamain Ltd did not discriminate against the claimant because of her sex. By e-mail dated 24 July 2023, the claimant has applied for those two decisions to be reconsidered. Those applications are referred to here as "the detriment reconsideration application" and "the sex discrimination reconsideration application".

JUDGMENT

1. The TUPE reconsideration application is refused.
2. The detriment reconsideration application is refused.
3. The sex discrimination reconsideration application is refused.

REASONS

Parties

1. In an effort to achieve consistency with other judgments and reasons**:**
   1.1. Clakim Ltd, Janbar Mg Ltd and Kajoliea Ltd are referred to as "the old Abbey companies";

1.2. the respondent is still referred to as "Vedamain", despite its company name having changed to KingKabs Ltd

1.3. "CWCC" is Cheshire West and Chester Council.

Relevant procedural history

2. The claimant presented her claim on 19 November 2020. Her claim form was accompanied by a document headed, "ET1 Grounds of Complaint". Under the heading, "My Public Interest Disclosure", the claimant stated, "I put my concerns in writing to the local licensing authority and the local MPs".

3. Elsewhere in her ET1 Grounds of Complaint, the claimant stated that she had raised a grievance, following which she had been dismissed. The relevance of the grievance became clear under the heading, "Automatic Unfair Dismissal". Her case, as it appeared there, was that she was an employee who had been dismissed for raising a grievance which asserted a statutory right. Dismissal of an employee for that reason is automatically unfair under section 104 of the Employment Rights Act 1996 ("ERA"). She also claimed that it was unfair for Vedamain to dismiss her for making a protected disclosure, without adding any further detail about the person or organisation to whom that protected disclosure had been made.

4. The case came before Employment Judge Doyle at a preliminary hearing on 23 September 2021. According to EJ Doyle's Case Management Summary, the complaints and issues had not yet been "identified and defined exclusively". EJ Doyle decided that, before the issues were clarified, there should be a preliminary hearing to decide issues of employment status. Some preliminary observations were recorded by EJ Doyle about how he understood the claimant was putting her case. This included the following paragraph:

> "Just to complete the picture, the claimant says that she made a public interest disclosure regarding [Vedamain] in or about July 2020. That public interest disclosure was made at least to Cheshire West and Chester Council (and possibly to [Vedamain]). Again, I make no findings of fact."

5. Any reader of this order would think that there was an important step in the litigation that still remained to be carried out. The claimant would need to say what her protected disclosures were and identify the people or organisations to whom she had made them.

6. The employment status issues, and other preliminary issues, eventually came to a preliminary hearing in public. It took place from 19 to 21 December 2022. At the conclusion of that hearing I orally announced my judgment that the claimant was a worker for Vedamain. Another decision I announced was that the claimant had not been employed by Vedamain under a contract of employment. This latter decision has come to be known as "the employment contract decision". Judgment recording the employment contract decision was sent to the parties on 10 January 2023. Written reasons were sent to the parties on 3 April 2023. I have previously referred to these reasons as "the April reasons" and will carry on using that terminology.

7. One of the consequences of the employment contract decision was that the claimant could not bring any kind of complaint of unfair dismissal. As the employment contract decision made clear, all complaints of unfair dismissal had to

fail, regardless of whether the dismissal was alleged to have been unfair under section 103A of ERA or any other section. The judgment sent to the parties on 10 January 2023 accordingly dismissed that complaint.

8. On 5 January 2023, the claimant applied to amend her claim. She asked to introduce a complaint that Vedamain had subjected her to a detriment contrary to section 47B of ERA. She also applied to join CWCC as a respondent. Her application said this about her protected disclosure:

> "My disclosure was made to [CWCC] as the Client of [Vedamain] to whom I was supplied to perform their work."

9. The claimant also applied for reconsideration of the employment contract decision. By a further judgment sent to the parties on 8 June 2023, I refused the claimant's application. I will refer to this decision as "the employment contract reconsideration refusal".

10. The employment contract reconsideration refusal was accompanied by written reasons. Relevantly, the written reasons stated:

> "
>
> [Subservience]
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> 10. There is no reasonable prospect of my finding that the licence conditions amounted to control exercised by the respondents. There was no need for the licence conditions to be implied terms of the contract between the respondents and the claimant. Vedamain Ltd and the old Abbey companies could already expect a driver to want to comply with the licensing conditions. A driver would have a powerful incentive to do so, because otherwise they would be at risk of losing their licence.
>
> [Economic risk]
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> 11. My view remains that the claimant took a degree of economic risk that tended to suggest that she was not employed under a contract of employment. There is no reasonable prospect that the various arguments put forward by the claimant will persuade me otherwise.
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> In particular:
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> (a) There is only limited value in comparing the cost of higher education with the cost of buying a passenger transport vehicle. Some courses, such as accountancy, are highly vocational, but many are gateways to a wide variety of different careers.
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> (b) The claimant cannot realistically compare herself to a commuter. There is a difference between (on the one hand) an employee who spends unpaid time and fuel driving to and from the place where they work, and (on the other hand) a person whose work consists of driving someone in their own vehicle as part of a service.
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> (c) The claimant also incurred other expenses regardless of the amount of paid driving she did. This would, if anything, increase the amount of economic risk she took.

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

11. In the meantime, a preliminary hearing took place on 5 June 2023. One of the purposes of the preliminary hearing was to consider the claimant's application to amend her claim by introducing complaints of whistleblowing detriment, contrary to section 47B of ERA. I granted that application in part. For the purpose of making that decision it was important to clarify the protected disclosure that the claimant claimed to have made. That exercise was also important for onward case management, as this recitation of the procedural history has already foreshadowed. We discussed what the claimant's protected disclosure was. I recorded it in the schedule to a case management order sent to the parties on 8 June 2023. Relevantly, the schedule read:

> "The claimant says that she made a protected disclosure by sending an e-mail to [CWCC] between 2 and 6 July 2020."

12. The schedule did not make any reference to any alleged protected disclosure to Vedamain, either in the claimant's grievance or otherwise. This is because the claimant did not suggest during the preliminary hearing that she had made any such disclosure.

13. A further issue arose for decision at the 5 June 2023 preliminary hearing. This was whether Vedamain had inherited the liability of the old Abbey companies to the claimant for historic unauthorised deductions from wages and failure to pay holiday pay. In turn, that issue depended on whether the old Abbey companies' liability had transferred to Vedamain under regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). For that to happen, the claimant would have needed to be an "employee" of the old Abbey companies within the meaning of regulation 2 of TUPE.

14. At the preliminary hearing I announced my decision that the claimant was not an employee of the old Abbey companies, as defined by regulation 2, and that liability therefore had not transferred to Vedamain. That was the TUPE judgment. It was sent to the parties on 8 June 2023.

15. Written reasons ("the TUPE Reasons") followed on 21 July 2023. At paragraph 33, the TUPE Reasons rehearsed the employment contract decision and the relevant passages of the April reasons that supported it. At paragraph 34 of the TUPE Reasons I added:

> "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."

16. As stated above, the claimant then made her TUPE reconsideration application on 4 August 2023.

17. The final hearing took place from 4 to 7 July 2023 before me and two non-legal members.

18. During the final hearing we returned to the issues that we would have to decide. This included discussions about what protected disclosures the claimant was saying she had made. The fruits of those discussions are recorded in paragraphs 5 and 6 of the Detriment and Sex Discrimination Reasons (see below). The claimant successfully asked to amend her claim to introduce a further alleged protected disclosure, which she said she had made orally to an employee of CWCC. She clarified that she was not relying on any protected disclosure that she had made to Members of Parliament. At no stage during the final hearing did the claimant suggest that she had made a protected disclosure to Vedamain, either by raising a grievance or otherwise.

19. I announced our unanimous judgment at the conclusion of the hearing. This included the detriment judgment and the sex discrimination judgment, both of which were sent to the parties on 13 July 2023. The claimant requested written reasons. On 11 September 2023 the written reasons were sent to the parties. I will refer to them as "the Detriment and Sex Discrimination Reasons", since they were both set out in the same document.

20. At paragraph 67 of the Detriment and Sex Discrimination Reasons, we observed that, prior to presenting her claim, the claimant had sent Vedamain a letter of claim. Its contents were described thus:

> "67. In a series of 17 bullet points, the claimant listed the legal complaints she was thinking of bringing against Vedamain. About half of them were recognisable as some form of complaint that an employment tribunal could consider. One of these was "automatic unfair dismissal", which was expressed to be based, in part, on "the Public Interest Disclosure I made [to CWCC]." Another was a complaint of automatic unfair dismissal for asserting a statutory right."

21. The claimant made her detriment reconsideration application and sex discrimination reconsideration application before the Detriment and Sex Discrimination Reasons had been sent to the parties.

22. The claimant has also appealed to the Employment Appeal Tribunal against various decisions, including the TUPE judgment.

Relevant law

23. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides the tribunal with a general power to reconsider any judgment "where it is necessary in the interests of justice to do so". The making of reconsideration applications is governed by rule 71.

24. Rule 72(1) states that an employment judge must consider any application made under rule 71. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application must be refused.

25. The overriding objective of the 2013 Rules is to enable the tribunal to deal with cases fairly and justly. By rule 2, dealing with cases fairly and justly includes putting the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the complexity and importance of the issues.

26. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

27. In *Chandok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...
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> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

28. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole. Merely ticking a box alleging discrimination by reference to a protected characteristic may not be sufficient to raise a complaint of such discrimination if the underlying facts cannot be ascertained from the narrative.

29. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA, HHJ Serota QC distinguished between a claim that is "pleaded but poorly particularised" and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal's jurisdiction. The remedy in an appropriate

case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, "clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points".

30. In relation to unrepresented claimants, tribunals must not be overly technical in their application of the *Chandok* approach. Where the claim form is capable of being read as including allegations (for example of constructive dismissal, or of dismissal on a different day), and the parties have attended the hearing prepared to deal with those allegations, the tribunal should ordinarily permit those allegations to be argued (*Aynge v. Trickett t/a Sully Club Restaurant* UKEAT/0264/17 at paras 10 and 13). If the claim form cannot bear that interpretation, consideration should be given to an amendment (para 14).

31. The claim form should not be interpreted in a vacuum. When deciding what complaints it raises, the tribunal is entitled to have regard to any clarification provided by the claimant at a subsequent preliminary hearing: *MacFarlane v. Commissioner of Police for the Metropolis* [2023] EAT 111.

The reconsideration grounds

32. The TUPE reconsideration application runs to 52 paragraphs.

33. Between them, the detriment reconsideration application and the sex discrimination reconsideration application consist of 18 paragraphs.

34. As I did in the employment contract reconsideration refusal, I have avoided a line-by-line response to the claimant's applications. In the interests of proportionality, I have looked for the claimant's main points in each reconsideration application and focused my analysis on those points.

<u>The TUPE reconsideration application</u>

35. The claimant's essential arguments in the TUPE reconsideration application appear to be:

    35.1. **Ground 1 –** Error of law. At the heart of the TUPE judgment was my decision on a disputed interpretation of regulation 2 of TUPE. Who is an "employee" within the meaning of that regulation? To qualify, must they be employed under a contract of employment, as defined in section 230(2) of the Employment Rights Act 1996 ("ERA")? Or is it sufficient for them to be a "worker" within the meaning of section 230(3)(b) of ERA? In TUPE Reasons paragraphs 27 and 30, I set out my answer to that question. Being a worker is not enough. To be an "employee" in the Regulation 2 sense, a person must be employed under a contract of employment, or in an employment relationship that is truly akin to a contract of employment. The claimant says I got the law wrong. At paragraph 12 of the TUPE reconsideration application, she maintains her argument that a worker is an employee within the meaning of regulation 2.

    35.2. **Ground 2 –** Contract of service. The claimant makes numerous points in an effort to persuade me that she was employed by the old Abbey companies under a contract of service, both whilst doing private hire driving on the App, and also whilst doing school contract driving. These points include:

        (a) The "Miscellaneous Act 1976" (which I take to be the Local Government (Miscellaneous Provisions) Act 1976) provides that a contract for hire of a private hire taxi is deemed to have been made

between the passenger and the operator; therefore private hire drivers do not contract with the passenger;

(b) she did not pay for her own fuel;

(c) she had to comply with "stringent conditions" in her private hire licence;

(d) she could not negotiate fares; and

(e) there were restrictions on her freedom to choose how she took children to and from school.

The detriment reconsideration application

36. Paragraph 6 of the detriment reconsideration application states:

> "I concede I could not prove, although I believe on the balance of probabilities the Respondent Knew about my written disclosure to the Cheshire West and Chester Council, however I believe due to the Formal Grievance letter that fact is immaterial if the tribunal was to accept the Formal Grievance Letter as a Publc Interest Disclosure."

37. That paragraph appears to summarise the points made by the claimant in paragraphs 1 to 5 of the detriment reconsideration application. The thrust of her argument is that, even if Vedamain did not know the claimant had made a protected disclosure to CWCC, her detriment complaint should nonetheless succeed, because Vedamain knew that she had made a protected disclosure in her grievance.

38. I have identified this point as "**Ground 3 –** grievance was a protected disclosure."

The sex discrimination reconsideration application

39. The 8 paragraphs of the sex discrimination reconsideration application can, I think, be distilled into these grounds:

39.1. **Ground 4** – Error in defining comparator's circumstances. The claimant says that her circumstances and those of her male comparator were the same, in that both she and her comparator had done something potentially harmful to the respondent's business, and we were wrong to find that their circumstances were materially different.

39.2. **Ground 5 –** Facts supporting inference of discrimination. The claimant has highlighted facts which she says we ought to have taken into account and from which (says the claimant) the tribunal could conclude that the claimant's contract was terminated because she is a woman.

Conclusions

40. I take each of the grounds in turn.

Ground 1 – Error of law

41. There is no reasonable prospect of my changing my mind about the law. I think my interpretation of regulation 2 of TUPE is correct. If I have got it wrong, the Employment Appeal Tribunal will say so.

Ground 2 – Contract of service

42. This reconsideration ground wears the clothes of a fresh reconsideration application engaging with a new and different judgment. Underneath the disguise, however, it is in reality a second challenge to the employment contract decision. Whilst the employment contract decision concerned employment with Vedamain, it had equal force when considering the employment relationship with the old Abbey companies (see the TUPE Reasons at paragraph 34, set out above).

43. Consistently with the claimant's position throughout these proceedings, the TUPE reconsideration application appears to advance the same composite argument that both the old Abbey companies and Vedamain employed her under a contract of employment. There is no attempt to mark the old Abbey companies out as a special case. She does not identify any particular feature of the driving arrangements with the old Abbey companies that could make it any more likely that she was an employee of the old Abbey companies than she was an employee of Vedamain.

44. I have considered the claimant's supporting arguments which I have summarised in paragraphs (a) to (e). They appear to be substantially the same as the ones she advanced in her application for reconsideration of the employment contract decision. I engaged with them in the employment contract reconsideration refusal and there is no reasonable prospect that my decision would be any different now.

45. I have not so far dealt with the claimant's argument about the effect of the Local Government (Miscellaneous Provisions) Act 1976. It gets the claimant nowhere. I have already found that the claimant had a contract with Vedamain and, before that, with the old Abbey companies. That was a step towards my conclusion that the claimant was a worker. It was never part of the employment contract decision that the claimant contracted directly with passengers. Nor was it part of my decision that she contracted direction with CWCC for school runs.

Ground 3 – grievance was a protected disclosure

46. The tribunal could not have found that Vedamain was motivated by any protected disclosure in the claimant's grievance. It was not part of the claimant's case. Properly interpreted, the claim form alleged that the claimant had made a protected disclosure to CWCC and not to Vedamain. That interpretation is not only the most natural reading of the ET1 Grounds of Claim, but it is also consistent with what the claimant wrote in her letter of claim and her amendment application on 5 January 2023. Consistently with *MacFarlane,* the tribunal can also have regard to what the claimant said to clarify her claim at subsequent preliminary hearings. EJ Doyle thought there might possibly have been an alleged protected disclosure to Vedamain, but he expressly stated that he was not trying to define the complaints and issues with precision. The more reliable guide is what the claimant told me at the preliminary hearing on 5 June 2023, and what she said at the final hearing. She was quite clear: her protected disclosures were only to CWCC.

47. In theory, a party can obtain permission to amend their claim even after judgment has been sent to the parties. There is no reasonable prospect of that happening in this case. The balance of disadvantage would inevitably favour refusing the amendment. Witness statements were prepared on the clear understanding that the claimant's alleged protected disclosure was to CWCC and not to Vedamain. The oral evidence was presented to us on that understanding, too. There were no questions from Vedamain's representative to the claimant about what she thought the information in her grievance tended to show. Mr Thomas was not asked about

any particular information in the grievance that allegedly motivated him to dismiss the claimant. It would not help to achieve the overriding objective for there to be a further hearing to elicit oral evidence on these matters. This claim is already three years old. The fact of judgment having been given is also a significant factor. Since the final hearing in July, Mr Thomas could reasonably have expected not to have to give evidence in this case again. All parties would naturally have started to put the events of July 2020 out of their mind. It will inevitably be harder for Mr Thomas to answer questions about his motivation now than it would have been if the right questions had been put to him before judgment was announced.

48. There is therefore no reasonable prospect of the detriment judgment being varied or revoked.

Ground 4 – Error in defining comparator's circumstances

49. I now turn to the sex discrimination reconsideration application, which is the subject of Ground 4. There is no reasonable prospect of this ground succeeding. We explained (Detriment and Sex Discrimination Reasons paragraph 128) why we considered the male comparator's circumstances to be materially different from those of the claimant. Ground 4 points to a material similarity: both the claimant's and the comparator's actions were capable of damaging Vedamain's business. But that is beside the point. It does not help the claimant to say that her circumstances had some degree of similarity with the circumstances of the man who put the unpleasant comment on Facebook. She has not engaged with the material differences. Those differences were that the man was one of a group of disaffected drivers (and therefore harder to dislodge) and had not fundamentally challenged Vedamain's business model in the way the claimant had.

Ground 5 – Facts supporting inference of discrimination

50. The sex discrimination reconsideration application sets out facts which, according to the claimant, would enable the tribunal to conclude that her contract was terminated because she is a woman.

51. Those facts include the lack of credibility of the explanation put forward by Vedamain.

52. At paragraph 88 of the Detriment and Sex Discrimination Reasons, we reminded ourselves of the guidance in *Igen v. Wong.* Paragraph (6) of that guidance was binding on us in its own right and confirmed by subsequent appellate authority. When deciding whether the claimant has proved facts from which the tribunal could conclude a discriminatory reason, the tribunal must assume that no adequate explanation has been given.

53. Another point made by the claimant is that she was "a female driver in a man's world". We took account of that point (Detriment and Sex Discrimination Reasons paragraph 129) and explained why that fact did not shift the burden to the respondent.

54. New points appear to include the fact that no men were asked to attend a grievance meeting. That does not raise any reasonable prospect of the sex discrimination judgment being revoked. There was no evidence that a man had raised a grievance. The claimant says that discrimination can be inferred from the fact that she was not allowed to be accompanied by a trade union representative. That does not point to the claimant being dismissed because she was a woman. It

is much more consistent with Vedamain being determined to maintain its stance that its drivers were independent contractors.

Disposal

55. It therefore follows that the claimant's latest three reconsideration applications must be refused.

Employment Judge Horne

17 October 2023

SENT TO THE PARTIES ON

24 October 2023

FOR THE TRIBUNAL OFFICE