EMPLOYMENT TRIBUNALS

Claimant: Mr N Avramov

First Respondent : BAM Construct UK Ltd
Second Respondent: Silver Blaze Ltd t/a Silver Blaze Construction

RECORD OF A PRELIMINARY HEARING

Heard at: Watford **On:** 6 September 2023
Before: Employment Judge Alliott (sitting alone)

Appearances
For the claimant: Mr Z Rahman (solicitor)
For the First respondent: Mr J Platts-Mills (counsel)
For the Second respondent: Mr J Bromige (counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claim against the Second Respondent is dismissed upon withdrawal.

2. The claimant's claims against the First Respondent that he was automatically unfairly dismissed (Regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006) and that the First Respondent failed in its duty to inform and consult representatives in breach of Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and for a protective award (Section 188 of TULRA 1992 and/or Regulations 15 TUPE Regulations 2006) are dismissed upon withdrawal

3. The First and Second Respondent's applications for costs orders are dismissed.

REASONS

Introduction

1. This open preliminary hearing was ordered by Employment Judge Bloom on 17 March 2023 "To determine the issue of whether or not there was a relevant

transfer of the claimant's employment between the First and Second Respondents on or around 31 August 2020."

2. On 31 August 2023, Mr Rahman, on behalf of the claimant, emailed the tribunal and the respondent's representatives as follows:-

> "We can confirm that the claimant withdraws his TUPE claim for automatic unfair dismissal (Regulation 7(1) of the TUPE Regulations 2006) and protective award (Section 188 of TULRA 1992 and/or Regulation 15 TUPE Regulations 2006).
>
> In view of the above, the claimant requests that the PH listed for 6 September 2023 to consider the TUPE claim, is vacated."

3. On the same day, the claimant confirmed that all claims against the Second Respondent were withdrawn. Also on 31 August 2023 the Second Respondent indicated that it intended to make a costs application.

4. On 31 August 2023, Employment Judge Bansal directed that judgment confirming the claimant's withdrawal of all claims against the Second Respondent would be issued in due course and that the preliminary hearing listed for today should remain listed in order to hear the Second Respondent's application for costs.

5. The First Respondent has subsequently also made an application for costs.

Documentation

6. I was provided with the following documentation:

   6.1 The First Respondent's application for costs (3 pages)

   6.2 The First Respondent's bundle of documents (51 pages)

   6.3 The First Respondent's skeleton argument (7 pages)

   6.4 The Second Respondent's costs application (11 pages)

   6.5 The Second respondent's authorities bundle of 5 authorities (38 pages)

   6.6 The Second Respondent's schedule of costs (7 pages)

   6.7 The Second Respondent's costs bundle (66 pages)

   6.8 The Second Respondent's preliminary hearing bundle (138 pages)

   6.9 2 witness statements from the First and Second Respondent's witnesses (7 pages)

   6.10 The claimant's response document to the Second Respondent's application for costs (15 pages)

   6.11 The claimant's response document to the First Respondent's application for costs (2 pages)

   6.12 The claimant's witness statement (7 pages)

6.13 The claimant's bundle for the costs hearing (97 pages).

The evidence

7. In addition to the documentation, I heard oral evidence from the claimant.

Waiver of privilege

8. At the start of this hearing an issue was raised in relation to whether or not the claimant had waived legal professional privilege and, if so, to what extent.

9. This arose out of the claimant's witness statement wherein the following is stated:-

> "The exchange of documents took place on 24 April 2023. I did not have an opportunity to go through this with my representative until 20 July 2023 when we went over the evidence and my representative advised me that I should withdraw the claim. I agreed with his advice…"

10. I indicated that to adjourn this hearing to hear argument on the issue, which could potentially involve disclosure of all the claimant's legal representative's files, was disproportionate and I indicated I would proceed on the basis that the claimant could not be cross examined as to the nature of the advice he had received.

The applications

11. The Second Respondent's application is for its entire costs of the action in the sum of £28,680 to be capped at £20,000. The grounds are threefold:

    11.1 Under Rule 76(1)(b) that the claimant's claims against the Second Respondent had no reasonable prospect of success:

    11.2 Under Rule 76(1)(a) that the claimant was guilty of unreasonable conduct in failing to engage properly or at all with costs warning letters of 12 April 2021, 14 October 2021, 2 February 2023 and 1 August 2023.

    11.3 Under Rule 76(1)(a) that the claimant's alleged late withdrawal of his TUPE claims on 31 August 2023, three clear working days before this preliminary hearing on 6 September, coupled with his failure to serve a witness statement in advance of the preliminary hearing amounted to unreasonable conduct.

12 The First Respondent's application relates to the period after the preliminary hearing in front of Employment Judge Bloom on 17 March 2023 and is in the sum of £7,000 plus VAT. The grounds are that the claimant had acted unreasonably in the conduct of his claim (Rule 76(1)) in pursuing the claim despite the deposit order made on 21 October 2021, failure to serve a witness statement and withdrawing his claims six days before the preliminary hearing.

The law

All three parties have provided me with skeleton arguments containing submissions on the law. I record here that I have read and taken into account those submissions.

13 Rule 76 Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 provides as follows:-

> "(1) A tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –
>
> (a) A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) Any claim or response had no reasonable prospects of success.
>
> (2) A tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party."

14 In deciding whether to make a costs order I have to take into account the paying party's ability to pay.

15 The exercise of my discretion is twofold. Firstly, I must consider whether a party's conduct falls within Rule 76 and then, secondly, go on to consider whether it is appropriate to exercise my discretion to make a costs order.

16 The starting point is as reiterated by the Court of Appeal in Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420, CA, that costs in the employment tribunal are still the exception rather than the rule.

17 As far as assessing the prospects of success are concerned, Mr Bromige highlights a distinction in the authorities between a strike out application, when the tribunal does not have the benefit of having heard oral evidence and the tribunal must take the claimant's case at its highest, and the more normal course of events, when a costs application is made after the tribunal has given a full judgment with access to all the relevant material from which to make an assessment. However, in this case I have not had the benefit of hearing all the evidence. In essence, it seems to me that I have to assess whether, on a summary basis, I can conclude that there was virtually nothing to support the allegations.

18 Obviously enough, the making of a deposit order and costs warning letters are factors that I have to take into account in the exercise of my discretion.

19 As regards late withdrawal, as per the IDS Employment Law Handbook Practice and Procedure at 20.116:

> "A party might think that he or she can avoid a possible costs penalty if his or her claim (or response) is withdrawn before the hearing. But this is not necessarily so because costs may be incurred well in advance of the hearing proper. If a party allows preparation for the hearing to go on too long before abandoning an untenable case, that party may be liable for costs on account of his or her conduct.

…

In awarding costs against a claimant who has withdrawn a claim, an employment tribunal must consider whether the claimant has conducted the proceedings unreasonably in all the circumstances, and not whether the late withdrawal of the claim was in itself unreasonable – McPherson v BNP Paribas (London Branch) [2004] ICR 1398 CA".

20 Further, in the McPherson case the Court of Appeal

"…warned that it would be wrong if, acting on a misconceived analogy with the Civil Procedure Rules, tribunals took the line that it was unreasonable conduct for tribunal claimants to withdraw claims, and that if they did so, they should be made liable to pay all the costs of the proceedings. The court pointed out that, in fact, withdrawals could lead to a saving of costs, and that it would therefore be unfortunate if claimants were deterred from dropping claims by the prospect of an order for costs upon withdrawal that might well not be made against them if they fought on to a full hearing and failed. Therefore, before an order for costs can be made, it must be shown that the claimant's conduct of the proceedings has been unreasonable. This is determined by looking at the conduct overall."

The conduct of the claim

21 The claimant was employed by the First Respondent on 6 April 2009. By 2020 he was therefore a longstanding employee.

22 On 14 August 2020, the claimant received a letter from the First Respondent notifying him that his job was at risk of redundancy.

23 On 9 September 2020, the claimant raised a grievance. In it he states as follows:-

" 3. Around June 2020 I discovered that sub-contractors were completing work that had been previously started by myself and my team."

And

"I am aware the work of my previous team is now being undertaken by sub-contractors. I am still not clear how I can be told there is no work for me and yet the work is still being undertaken."

24 In his claim form the claimant disputes the genuiness of the redundancy situation. Further, he points to the fact that his work was now being carried out by the Second Respondent and asserts that there was a transfer of undertaking and/or a service provision change in that the First Respondent contracted out the tasks of carpentry work to the Second Respondent. The following is pleaded:-

"The claimant was employed as part of a group of employees whose principal purpose was carrying out carpentry work on behalf of the First Respondent. That work is now being carried out by the Second Respondent."

25 In his witness statement the claimant gives evidence as follows:-

"Towards the end of that period [July 2020] Mick Kelly (South East Area Manager) (now construction Director)) telephoned me and informed me that my job (along with

> the entirety of the Aftercare Team I was part of) was likely to be made redundant, and that my role will be moving to the Second Respondent."

26 Elsewhere the claimant refers to a conversation on 3 August 2020 with Mr Kelly wherein Mr Kelly suggested the claimant was entitled to be offered work before any attempts to contract it out to the Second Respondent, that the claimant should be offered the work and not contractors as he was an employee and that he should threaten legal action because what the First Respondent was doing was illegal.

27 The claimant refers to a number of text messages from Mr Kelly along the lines that he was being told "utter lies," that they "don't give a fuck about you" and that "he needed to tell the truth and fight back."

28 The claimant refers to his grievance being dealt with at a meeting on 6 October 2020 wherein he was represented by his Unite Union representative, Mr Gordon Lean. He states that during the meeting Mr Lean explained that his role still existed and was being carried out by the Second Respondent, and that the claimant should be transferred to them in accordance with TUPE. The claimant states that he was told that no other roles were available in the Aftercare Team setting and that:

> "I do not believe this to be true as I have seen with my own eyes work being undertaken in Kings Cross by staff at the Second Respondent, work that I used to do."

29 Based on what he was told my Mr Kelly and his union representative he believed that there had been a TUPE transfer.

30 I have been shown the grievance outcome letter which specifically refers to TUPE albeit rejecting that there had been any such transfer. Nevertheless, it indicates to me that at the time questions as to whether or not the claimant had been TUPE transferred were live and genuine as far as the claimant was concerned.

31 The claimant's evidence and assertions have, of course, not been tested and, given the fact that a lot of his evidence relates to conversations, I cannot assess the prospects of him successfully establishing those facts. They would, however, be surprising inventions.

32 A service provision change is a situation in which activities cease to be carried out by a person on his own behalf and are carried out instead by another person on the client's behalf. The claimant's perception was that his work was being undertaken by the Second Respondent and he was being made redundant. A manager at the First Respondent was telling him he was being lied to and his trade union representative was suggesting that there was a TUPE transfer. In the circumstances I do not conclude that the claimant knew or ought to have known that there was virtually nothing to support his allegations. In my judgment there were reasonable grounds for the claimant bringing his claims against the Second Respondent.

33 I take account of the fact that it is not unknown in this jurisdiction for employers to structure their operations so as to get around the TUPE provisions. I do not, of course, suggest that that is what the respondents were doing in this case, but I

do find that in these circumstances it was not unreasonable to bring his claims relating to TUPE.

34 The claimant presented his claim on 17 December 2020.

35 The First Respondent's grounds of resistance are dated 27 January 2021. It deals with the TUPE issue as follows:-

> "29 The First Respondent engages the Second Respondent as a sub-contractor to provide labour on an ad-hoc basis when additional labour resource is required. The First Respondent does not engage the Second Respondent to perform remedial or aftercare work that was previously carried out by the claimant, as alleged.
>
> 30. The activities carried out by the claimant did not transfer to the Second Respondent and therefore the First Respondent denies there has been a relevant transfer from the First Respondent to the Second Respondent within the meaning of the TUPE Regulations."

36 The Second Respondent's grounds of resistance were also filed on 27 January 2021. The Second Respondent denied that there had been any relevant transfer within the meaning of TUPE, and pointed to a pre-existing contract with the First Respondent of August 2018 to provide labour at the Kings Cross construction site. The nature of the labour to be supplied was independent contractors and not employees and further pointed to the fact that the work that the labour only subcontractors undertook did not include "aftercare" work. Of necessity, I have condensed the nature of the defence advanced.

37 What the defences do make clear is that there was a pre-existing relationship between the First and Second Respondents concerning the provision of labour to the Kings Cross site. The basis upon which the Second Respondent provided the labour and the nature of the tasks that that labour undertook, was clearly in dispute. In my judgment, from the claimant's perspective he had been made redundant and workers supplied by the Second Respondent were doing his work.

38 On 26 February 2021 the Second Respondent sent a costs warning letter to the claimant's legal advisors which was later forwarded to the claimant himself on 1 March 2021. As might be expected the Second Respondent was pointing to its response and asserts that there are clear reasons why there was no relevant transfer. In my judgment, it was not unreasonable for the claimant to continue with his claims on the basis of his reasoned perception of what had gone on as set out above.

39 Due to the fact that the Second Respondent had applied for a strike out order in its response, on 21 June 2021 Employment Judge Lewis directed that there be a preliminary hearing to determine the following issue:

> "To consider if any claim be struck out, or made subject to a deposit order on the grounds of having little or no prospect of success."

40 The preliminary hearing was listed for 21 October 2021.

41 On 14 October 2021, shortly before the preliminary hearing, the Second Respondents solicitors sent a second costs warning letter. Much the same points are made as before.

42 On 21 October 2021 Employment Judge Tobin heard the applications for strike out and/or deposit orders and made a deposit order in relation to the TUPE claims. At that time, the claimant was acting in person. The application for strike out orders was not dealt with by Employment Judge Tobin due to the late withdrawal of the claimant's legal representative and the late provision of documents/submissions by the respondents. As regards the First Respondent's position concerning the unfair dismissal, it is apparent that there was confusion due to the First Respondent both asserting that the claimant had been dismissed by virtue of redundancy and disputing that he had been dismissed.

43 As regards the TUPE issue, Employment Judge Tobin recorded the claimant's position as follows:-

> "He said he did not really understand the complex law in this regard, but as a colleague and his former solicitor told him that as he had been replaced by someone from the Second Respondent contractors for carpentry work it must be in breach of TUPE Regulations. "

44 Employment Judge Tobin states that:-

> "TUPE protection only applies, briefly, if the claimant was part of a business entity which transfers, without losing its identity, from the first respondent to the second respondent."

That certainly reflects regulation 3(1)(a) of the TUPE Regulations concerning a business transfer. What I do not know is whether Employment Judge Tobin considered service provision changes under Regulation 3(1)(b). There does not appear to be a direct reference to the same in his decision. Employment Judge Tobin identified seven particular aspects that he relied upon in concluding that the claimant had little reasonable prospect of success. Employment Judge Tobin referred to the claimant not producing any documents that supported the contention that a TUPE transfer had occurred, which is slightly surprising given that any documents would be within the possession and control of the respondents and disclosure had not yet taken place. I do not go behind the decision of Employment Judge Tobin but the mere fact that the respondents assert that the labour supplied by the Second Respondent was on a self-employed basis is not determinative. Very often 'so called' self-employed contractors are held in reality to be employees. Again, I am not suggesting that this was the position in this case but merely identifying that to continue to question the arrangements was not unreasonable in my judgment.

45 Employment Judge Tobin made a deposit order and the claimant paid it. As such, I accept that he was at risk of a finding of unreasonable conduct in the event that he pursued his claims to a full merits hearing and was unsuccessful once all the evidence had been heard and tested.

46 Once again, on 2 February 2023 the Second Respondents wrote a costs warning letter. Much the same points are reiterated with the addition of the fact of the deposit order being made.

47 A preliminary hearing was heard on 17 March 2023 in front of Employment Judge Bloom. The claimant was represented at this hearing. The Second Respondent made an application for a public preliminary hearing to determine whether or not there was a relevant transfer of the claimant's employment between the First and Second Respondent on or around 31 August 2020. Employment Judge Bloom considered that that was a sensible suggestion on the basis that the substantive hearing would last many days and that if there was no transfer between the First and Second Respondents it would be unjust and disproportionate for the Second Respondent to incur substantial additional costs in remaining within the proceedings. Accordingly, an open preliminary hearing was ordered to take place on 6 September 2023.

48 Employment Judge Bloom made directions for the open preliminary hearing. These included exchange of documents on the TUPE issue by 21 April 2023.

49 In his witness statement the claimant states:-

> "I felt that I would now finally be able to get to the bottom of question as to whether a transfer had taken place once the parties had exchanged documents."

50 Whether or not this is actually in the claimant's own words or, perhaps, more accurately reflects his legal advisor's position through him, in my judgment it is not an unreasonable proposition. Questions relating to TUPE transfers can be complex and, very often, the surrounding circumstances are opaque. In my judgment it was not unreasonable for the claimant to maintain his claims pending an opportunity to assess all relevant documentation which, of necessity, would come from the respondents.

51 Exchange of documents took place on 24 April 2023. There had clearly been some documents available for the deposit order hearing. I presume that further documents were provided by the respondents otherwise the exercise would not have taken place. Even if they were not, then it is clear to me that the claimant and his legal representative undertook a review of the matter pending the preliminary hearing scheduled for 6 September 2023.

52 The case management orders for the preliminary hearing included provision of a witness statement from the claimant by 14 July 2023. The claimant failed to provide a witness statement in accordance with that case management order. In my judgment that failure would only serve to hamper his prospects of success at the preliminary hearing. That would be to the benefit of the respondents and does not, in my judgment, constitute unreasonable conduct relevant to the issue of costs.

53 The claimant's witness statement sets out that he only had an opportunity to consider the matter in detail on 20 July 2023. The claimant's representative has alluded to the fact that he had domestic difficulties that prevented him from dealing with the matter more expeditiously.

54 Based on advice, the claimant decided to withdraw his TUPE claims.

55 On 24 July 2023 the claimant's legal advisor wrote to the respondents. The following was stated:-

> "I can confirm that provided that he has confirmation that there will be no pursuance of any costs on the TUPE claim, my client will agree to withdraw this aspect of the claim."

56 Neither respondent was prepared to forgo the opportunity to make an application for costs. That was their choice.

57 The claimant's TUPE claims were withdrawn unequivocally on 31 August 2023. I do not accept the respondents complaints that this was a late withdrawal of his claims. The withdrawal of his claims could have been accepted in July and the respondents would have saved themselves the expense of further preparation for the preliminary hearing and indeed these costs applications. The respondents elected to keep open their option for making an application for costs. That they did so is down to themselves.

58 As a matter of fact, the Second Respondent wrote a further costs warning letter on 1 August 2023.

59 Having considered all the circumstances of this case, in my judgment the claimant has not acted unreasonably in the bringing of his TUPE claims and the maintenance of them until after the formal disclosure on the TUPE issues. I do not find that his continuance of his claims in the face of the various costs warning letters was unreasonable. I do not find that his failure to serve a witness statement was unreasonable in terms of creating further costs. I do not find that the claimant withdrew his claim late. I do not find that the claimant's TUPE claims and/or his persistence with them until formal withdrawal was unreasonable conduct. Even had there been aspects of the claimant's conduct of the proceedings that were unreasonable, I would not exercise my discretion in favour of the respondents given the circumstances as understood by the claimant, which include comments said to have been said to him by senior managers casting aspersions on the conduct of the First Respondent and its arrangements with the Second Respondent.

60 Accordingly, the applications for costs are dismissed.

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Employment Judge Alliott

Date: 26 October 2023

Sent to the parties on:

1 November 2023

For the Tribunal: