EMPLOYMENT TRIBUNALS

Claimant: Mr S Wright

Respondent: Veolia ES (UK) Limited (1)
Amey PLC (2)

Heard at: Birmingham **On:** 28 July 2023

Before: Employment Judge Maxwell

Appearances
For the claimant: Mrs J Wright, the Claimant's wife
For the respondent: Mr T Hussain, Consultant

JUDGMENT

The Claimant's claims against the Second Respondent are struck out because they have no reasonable prospect of success.

REASONS

Preliminary Issue

1. This preliminary hearing in public was listed to determine:

   1.1 whether the claimant's claim against the second respondent should be struck out under Rule 37(1)(a) of the Employment Tribunal Rules on the basis that it has no reasonable prospect of success given that the second respondent was not the claimant's employer at the material time.

Procedural History

2. By a claim form presented on 9 August 2022, the Claimant brought complaints of arrears of pay and breach of contract, against the first and second respondents. His claim form particulars provided:

> **I have been disadvantaged by a breach of contract by Amey and unlawful with holding of wages by Veolia. From 2014 I was employed by Amey and was TUPE'd to Veolia on 4/3/22 - my terms of employment should remain the same.**

I was off sick which highlighted the fact my information was transferred incorrectly. On 28/6/22 I received £0 (not even SSP). On speaking to Sue Cummine (V) she said it was because Amey advised my sick entitlement was 20 days. I confirmed it is 8 weeks full & 8 weeks1/2 pay - I sent proof.

Apparently this needed to be confirmed by Amey who refused and just sent numerous conflicting emails. I supplied proof of entitlement along with an email from Melissa Langdon (A) from 2018 confirming this.

Amey claimed they could prove they paid me only 20 days sick throughout my employment with them. I have proof (bank statements) showing their untruths and that they honoured my original contract.

My transfer document to Amey confirmed my contract remained the same, proof was sent to Veolia who still refused to pay outstanding monies.

On 28/7/22, I received £416.54 when I should've received 14 pay. I advised them withholding my wage put me in financial hardship.

I sent a formal grievance to Veolia on 17/7/2022, I was advised that Neil Terry (V) would deal with my case. Despite numerous emails I've received no acknowledgement from him. Veolia's grievance procedure says they'll arrange a meeting within 5 working days. Today, 17 working days later, no meeting has been offered.

On 29/7/22 I got an email from Vicky Elliott (V) to advise Amey said I was entitled to 4 weeks full pay then 4 weeks 14 pay, proving they previously gave wrong information. She said she would work out owed pay on 1 /8/22 and advise when it'd be paid. To date, I haven't received this.

Although still incorrect, Veolia has acknowledged they owe me money but have left me in financial hardship, withholding money I'm entitled to.

Mistakes happen but Amey and Veolia's refusal to resolve the issue has left me in financial hardship for a prolonged period, caused stress and forced me to return to work before I had MRI results – which could've caused further injury. I have been massively affected by the transfer which shouldn't have been the case.

3. Subsequently, the Claimant brought a further claim against the first Respondent only, for unfair dismissal and breach of contract.

4. The Claimant reached a settlement with the first Respondent and withdrew all claims against that party. He has, however, sought to continue with his claim against the second Respondent.

5. The second Respondent presented a late response, in circumstances described in the order granting an extension of time. Part of the response was an application for strike out on the basis that any liability for the Claimant's claims transferred to the from the second Respondent to the first. This point is the basis for the preliminary hearing today.

Agreed Matters

6. The parties agree the Claimant's employment transferred from the second to the first Respondent, by operation of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"), on 4 April 2022.

Argument

7. The Claimant argued there was a breach of contract because the second Respondent failed to inform and consult employees about the TUPE transfer or any proposed changes to terms and conditions. A letter in the hearing bundle dated 24 January 2022, referring to consultation with employee and union representatives, which advised the Claimant of his transfer on 4 April 2022, was said not to have been received by him. There were no consultation meetings. One had been planned but this was cancelled and never rescheduled. The Claimant wondered if this was because he was not in the union. He questioned where the second Respondent got the employee liability information ("ELI") from, which it then provided to the first Respondent. I was taken to paragraph 5 of the first Respondent's grounds of resistance and told the information provided to employees in the December 2020 letter related to a proposed transfer to a different transferee that did not proceed. The Claimant said that no check was made on sick pay (i.e. to ascertain the correct contractual entitlement) prior to the transfer. Finally, it was said the measures referred to in the letter of 24 January 2022 could not have been the error with respect to sick pay.

8. The Respondent argued that any liability for arrears of pay or breach of contract had transferred to the first Respondent. The claim form did not include a claim about failure of warning and consultation, which in any event would be the breach of a statutory duty rather than a claim in contact. It was also said that any such claim would have been out of time.

Law

<u>TUPE</u>

9. So far as material, regulation 4 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** provides

> **4.— Effect of relevant transfer on contracts of employment**
>
> **(1) Except where objection is made under paragraph (7), 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), but subject to paragraph (6), and regulations 8 and 15(9), 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;**
>
> **[…]**
>
> **(4) Subject to regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer.**
>
> **(5) Paragraph (4) does not prevent a variation of the contract of employment if—**
>
> **(a) the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or**
>
> **(b) the terms of that contract permit the employer to make such a variation.**
>
> **(5A) In paragraph (5), the expression "changes in the workforce" includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act2).**

Strike Out

10. Rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 provides:

> **(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 any 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[…].**

11. The test of "no reasonable prospect of success" was considered in **North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 CA**, per Maurice Kay LJ:

> **26 […] what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success. […]**
>
> **29 […] It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.[…]**

12. Consideration of striking out often arises when attempts have been made to clarify the claims being made. Guidance in this regard was provided in **Cox v Adecco [2021] ICR 1307 EAT**, per HHJ Tayler:

28. From these cases a number of general propositions emerge, some generally well-understood, some not so much:

> **(1) No-one gains by truly hopeless cases being pursued to a hearing;**
>
> **(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;**
>
> **(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;**
>
> **(4) The Claimant's case must ordinarily be taken at its highest;**
>
> **(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;**
>
> **(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;**
>
> **(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;**
>
> **(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;**
>
> **(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.**

[…]

30. There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's

> **sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. Often it is argued that a claim is bound to fail because there is one issue that is hopeless. For example, in the protected disclosure context, it might be argued that the claimant will not be able to establish a reasonable belief in wrongdoing; however, it is generally not possible to analyse the issue of wrongdoing without considering what information the claimant contends has been disclosed and what type of wrongdoing the claimant contends the information tended to show.**
>
> **[…]**
>
> **32. This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable steps to identify the claims and issues.**
>
> **[…]**
>
> **34. In many cases an application for a deposit order may be a more proportionate way forward.**

Conclusion

13. The Claimant is pursuing claims for unlawful deductions (arrears of pay) and breach of contract against the second Respondent only (having settled with and withdrawn as against the first Respondent). His claims have no reasonable prospect of success as against the second Respondent. The Tribunal at a final hearing would, inevitably, dismiss them for the reasons set out below.

14. The legal liability for unlawful deductions or any breach of contract committed by the second Respondent, would have transferred to the first Respondent on 4 April 2022. The Claimant did not lose any right to pay or the benefit of his contractual terms as at that point, rather he was entitled to and in due course did sue the first Respondent in this regard.

15. Quite plainly, the Claimant's original claim to the Tribunal was about sick pay, more especially the failure by the first Respondent to recognise and comply with what he believed was his entitlement to 8 weeks full pay and then 8 weeks half pay. He sought to ventilate this by raising a grievance and engaging in extensive correspondence. He found this all very stressful. He said at the hearing before me today that he lost his livelihood as a result.

16. I remind myself that when considering any claim form, especially one prepared without the benefit of legal advice, I must read this in a fair and non-technical way. Even on a most generous approach, however, the Claimant was not then

bringing a claim for a failure to inform and consult appropriate employee representatives, pursuant to Regulation 15 of the **Trade Union & Labour Relations (Consolidation) Act 1992** ("TULCRA"). The words consult or consultation do not appear anywhere in his claim form. He does not there complain about the steps taken or not by the second Respondent to discuss the proposed transfer and its implications with representatives of the workforce.

17. The substance of the Claimant's complaint is a failure by the first Respondent to recognise and fulfil his sick pay entitlement, for which he blames the second Respondent, as he says it gave the wrong ELI. Whilst TUPE provides a potential remedy for losses caused by the provision of erroneous ELI under Regulation 12, it only does so for the transferee employer. This particular Regulation does not allow for a complaint by an affected employee.

18. The remedy for an individual is to bring a complaint about the consequences of any such failing against their new employer, if it fails to honour what they say is their correct entitlement (e.g. unlawful deductions, breach of contract or unfair dismissal) which the Claimant did.

19. The Claimant believes that if his claim is not allowed to proceed, then he will be denied the right to complain about his treatment, which he says culminated in the loss of his employment. He referred to the second Respondent running away from this. The Claimant was not, however, deprived of that right to complain about his treatment. He was entitled to seek to enforce his rights against his new employer. He had the opportunity to sue person 1 for the wrong done by person 2. The Claimant did that when he brought proceedings against the first Respondent.

EJ Maxwell
28 July 2023