EMPLOYMENT TRIBUNALS

Claimant: Mr A T Lewis
Respondent: TSG Building Services Plc

RECORD OF A PRELIMINARY HEARING

Heard at: Watford Employment Tribunal
On: 14 December 2023
Before: Employment Judge Bloch KC

Appearances
For the claimant: In person
For the respondent: Mr Peter Linstead, counsel

JUDGMENT BY CONSENT

1. The claimant is (for the purposes of these proceedings) a worker for the respondent within the meaning of s.43K of the Employment Rights Act 1996 ("ERA").

2. This determination is made on the basis of a concession by the respondent as follows:

   > "For the purposes of the claimant's claim under case number 3303306/2023 the respondent:
   >
   > 1. Concedes that the claimant is a worker for the purposes of s.43K of the ERA only.
   >
   > 2. The respondent concedes that it will not be submitted in these proceedings that there is any difference in remedy between what the claimant can claim under s.43K ERA and what could be claimed under s.103A ERA.
   >
   > This concession is made in relation to these proceedings only."

3. On the basis of the above concession it is not necessary or appropriate in accordance with the overriding objective for me to determine whether the claimant is an employee or worker under s.230 ERA.

REASONS

4. Following a preliminary hearing on 26 September 2023 before Employment Judge Havard, he directed there should be a preliminary issue to determine:

   4.1 Was the claimant an employee of the respondent within the meaning of s.230 of the Employment Rights Act 1996?

   4.2 Was the claimant a worker for the respondent within the meaning of sections 230 and/or 43K of the Employment Rights Act 1996?

5. A substantial bundle was prepared for this hearing numbering 160 pages and the respondent's counsel produced a skeleton argument for the preliminary hearing of 23 pages length and a list of 12 case authorities.

6. However, matters took a surprising turn at the beginning of the hearing when the respondent, by its counsel, indicated that the hearing was strictly not necessary given that the respondent was prepared to make a concession that the claimant was a worker for the purposes of s.43K ERA – for the purposes of these proceedings only.

7. One of the matters which concerned me was whether the claimant was bringing a claim (only) of being subjected to a detriment under s.47B ERA relating to protected disclosures or whether there was also a claim for automatic unfair dismissal under s.103 ERA. S.103A provides:

   > " Protected disclosure.
   >
   > An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

8. Mr Linstead on behalf of the respondent, submitted that on the face of the ET1, the claim was only under s.47B and not also under 103A. The claimant did not seek to argue otherwise when I put the point carefully to him. Indeed, the only hint that there might be a claim of unfair dismissal arises from the ticking of the unfair dismissal box by the claimant in the ET1. The key wording in the ET1 was at pages 10 and 11 of the bundle where the claimant referred to a whistleblowing claim for reporting health and safety breaches and reference also to his whistleblowing health and safety disclosures concerning health and safety breaches. At paragraph 9.2 of the ET1 the claimant claimed compensation for loss of income based on a 40 hour week and referred to a request for interim relief (which application was latter made by him and refused by the tribunal).

9. In my judgment, on a fair reading of the ET1, there was no claim made under s.103A of the ERA and, indeed, the hearing on 26 September 2023 seems to have proceeded on the basis of a whistleblowing claim only (under s.47B). It was recorded that the claimant maintained that he was entitled to pursue a whistleblowing claim based on his status as an employee or worker etc. No reference was made to any claim of unfair dismissal. In reaching my conclusion I was of course conscious that the claimant is unrepresented and one should take that into account in determining what claims he was actually intending to advance in these proceedings. Any concerns that I had in this regard were allayed by the further concession which I asked the respondent to consider and which they freely

gave, namely that in these proceedings they would not seek to submit that there is any difference in remedy between what the claimant could claim under s.43K and what he could have claimed under s.103A ERA.

10. In all of those circumstances I made the order referred to above.

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Employment Judge Bloch KC

3 January 2024

Sent to the parties on:

24/1/2024

For the Tribunal Office:

N Gotecha