Case number: 2408062/2022

RESERVED

EMPLOYMENT TRIBUNALS

Claimant: Mr A Ali

Respondents: 1. Clearwater Solicitors Ltd
2. Mohammed Mahrouf Yaqua
3. Shafaqat Ali Khan

Heard at: Manchester (by CVP) **On:** **31** January 2024 & 29 February 2024 (in chambers)

Before: Employment Judge Shotter (sitting alone)

Representatives
For the claimant: In person
For the respondent: Mr Mahmood, litigation consultant

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of breach of contract brought under S.3 Employment Tribunals Act 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 is scandalous or vexatious or has no reasonable prospect of success, is struck out and dismissed.

2. The claimant's complaint of unlawful deduction of wages brought under section 13 of the Employment Rights Act 1996 is scandalous or vexatious or has no reasonable prospect of success, is struck out and dismissed.

REASONS

Introduction

1. This was a preliminary hearing for case management purposes. I had before me a bundle consisting of 181-pages and the claimant's witness statement.

2. This preliminary hearing has been listed to determine striking out the claimant's breach of contract claim (and any other claim following the

further information provided by the claimant) under rule 37 of the Employment Tribunal Rules of Procedure 2013 contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, or making a deposit order under rule 39.

3. The parties agreed the open preliminary hearing with an estimated length of hearing of I day will be heard by CVP. There was a discussion about whether I can deal with the claimant's claims of disability discrimination in addition to the breach of contract, and the parties finally agreed that as the claimant is confused and only prepared to deal with the breach of contract and not his other claims including the claim of indirect age discrimination which appears to be a new claim raised by the claimant in his witness statement dated 4 December 2023 without any amended pleading or an application to amend. I have today (29 February2024) checked the Tribunal file and the position is that the claimant has not made a formal application to amend explaining time limit issues and he has not produced a draft amended Grounds of Complaint. The existing claims do not include a complaint brought under section 19 of the Equality Act 2010 ("the EqA") relating to his protected characteristic of age. The claimant is aware that the final hearing is listed to start on the 21 October 2024 and we discussed the impact of a late application to amend on the trial and the issue of the balance of prejudice between the parties.

4. Finally, the parties also agreed that I could deal with the respondent's application for specific discovery in relation to the claimant's mitigation.

5. We also discussed reasonable adjustments for the claimant. I was guided to the Equal Treatment Bench Book and Presidential Guidance for Vulnerable Witnesses as the claimant has a number of medical conditions. I agreed the claimant could take as many breaks as he wanted during the hearing, which he did.

6. I had before me the claimant's witness statement dated 4 December 2023 which I took into account. No live evidence was heard, and my deliberations took into account oral submissions made by both parties and the documents to which I was referred to in the preliminary hearing bundle which are undisputed. As I have heard no evidence under oath and was not in a position to resolve any conflicts in the positions adopted by the parties, my findings set out below are for the purpose of this preliminary hearing only and do not bind any other judge.

Case Summary

7. ACAS Early conciliation took place between 24 June and 3 August 2022. By a claim form received on the 30 August 2022 the claimant who was employed as a solicitor/business development 21 April 2021 (according to the claimant) or 1 October 2021 (according to the respondent) and resigned on the 25 March 2023.

8. The claimant did not have 2 years continuity of service and his claim for unfair dismissal was struck out on the 5 December 2022.

9. Turning to the breach of contract claim, the claimant brings a complaint of breach of contract for damages in excess of £300,000 under the contractual jurisdiction of employment tribunals governed by S.3 Employment Tribunals Act 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 ("ETA"). The claimant is aware of the £20,000 limit in the Employment Tribunal.

<u>The 21 April 2021 Business Agreement reached between the parties.</u>

10. The claimant maintains he negotiated a sale of a solicitors practice "AA Solicitors" including goodwill and a lease, to the first respondent, who reneged on an agreement to employ him on an agreed salary and other payments. It is the first respondent's failure to pay the claimant the agreed salary and other payments which gives rise to the breach of contract claim.

11. The Agreement is set out in a document titled "Business Agreement" made on 21 April 2021 ("the Business Agreement"). It is notable that the parties intended the contract to be a "Business Agreement" and not a contract of employment. An Employment Tribunal has no jurisdiction over the enforcement of business agreements and their terms. It can only enforce a legally binding contract between an employer and an employee. The claimant was not an employee when he entered into the Business Agreement to sell his legal practice AA Solicitors to the respondent with part of the consideration being either a self-employed consultancy agreement or an employment contract with the first respondent. The Business Agreement did not specify whether the claimant was to be employed under a contract of employment or work for the first respondent on a self-employed basis as a consultant, and there is no reference to the actual amount of payment other than the percentage generated as a result of the business sale of AA Solicitors.

12. The Business Agreement included the following provisions relating to the self-employed consultancy agreement or employment contract:

    12.1 Clause 1 and 2: the claimant will "work at Clearwater Solicitors Ltd (CS). The start date will be on 14 June 2021."

    12.2 Clause 2: the claimant "**will become self-employed or employed consultant for a minimum of 4 years of Clearwater Solicitors Ltd with the following duties: to supervise and work at the office…supervise and run the conveyancing department…as well as some fee earning**" (my emphasis).

12.3 Clause 6 provided the claimant "will be paid a monthly wage/fee" and entitled to 20 percent of the billing and after 4 years a premium for using the trading name and goodwill of AA solicitors.

12.4 The Agreement was witnessed and signed by the parties.

13. It is undisputed the claimant's employment did not start on the 14 June 2021.

14. The claimant will give undisputed evidence to the effect that the respondent before it entered into the Business Agreement was aware he was the subject of a disciplinary due to be adjudicated by the Solicitors Disciplinary Tribunal ("the SDT"). However, there is an issue as to whether the claimant informed the respondent that he could not act as a supervisor or manager, could not act as head of department and did not have the right to practice as an individual solicitor. The respondent disputes that the claimant provided this information, although they were aware that he was the subject to a disciplinary. The respondent will rely on an email sent to it by the claimant on the 6 April 2021 (before the Business Agreement was signed) confirming that "following a decision of the SDT I have a fine etc but the main issue is I have restrictions on my practicing certificate which are essentially; I cannot own a company, cannot be a director or be colf or cofa etc or be signatory to a client account…" It is notable that what the claimant omits from the email is the fact that the SDT placed an indefinite restriction which had an effect on his ability to practice to supervise other staff (including solicitors) and run a department. In short, the claimant was unable to meet the terms of the Business Agreement as recorded in clause 2 referenced above, and yet he agreed with the respondent to supervise and run a department as part of the sale agreement.

<u>The SDT judgment</u>

15. The Solicitors Disciplinary Tribunal judgment is dated 7 May 2021 following a hearing between 29 March and 1 April 2021 at which a number of allegations regarding fraud on behalf of AA Solicitors Ltd was found against the claimant. The claimant was ordered to pay a fine of £35,000 he was the subject of indefinite restrictions on his practice including not being a partner or working without being under supervision, in short he was unable to supervise others or be responsible for running a department, and any practice employing him was required to supervise at all times.

16. The Business Agreement was to come into effect on the 14 June 2021. In May 2021 Mohammed Mahrouf Yaqub (the second respondent) who had negotiated the Business Agreement found AA Solicitors had closed in December 2020 and no longer existed as a business entity. The

second respondent took the view that the Business Agreement reached on the 21 April 2021 was frustrated. The second respondent's evidence will be that the first respondent did not purchase the claimant's firm AA Solicitors, and the Business Agreement was null and void on the basis that its performance was impossible as AA Solicitors no longer existed, and it was different from what the parties originally intended.

17. The claimant provide the second respondent with a copy of the SDT Order dated 1 April 2021 on the 4 May 2021, which was the first indication the respondent had of its contents, and approval had to be obtained from the Solicitors Regulation Authority ("the SRA ") in order that the first respondent could employ the claimant in any capacity.

<u>The new oral agreement entered into by the parties.</u>

18. By 11 May 2021 it was agreed between the claimant and the respondents that he could not work as previously agreed and an oral agreement was entered into whereby the claimant would be employed as an assistant solicitor under the terms set out by the SRA in a letter dated 1 July 2021 including that the claimant "if approved" would be employed as a conveyancing solicitor in the conveyancing department with limited involvement in the work, "no involvement" in client care letters, new quotes and case opening, no exchange or completions until after a file review and no involvement with post-completion or supervisory duties. The claimant was required to be supervised. I find by the 11 May 2021 the parties had proposed a new agreement on the basis that the original contract terms set out in the Business Agreement were no longer relevant or effective. As a matter of logic, even if I had found that enforcement of the Business Agreement was within the Tribunal's jurisdiction, which I did not as it was clearly a commercial agreement with payment for a business, part of which the claimant has included in his damages claim of £300,000, I would have gone on to find the proposed agreement was the 11 May 2021 oral agreement whereupon the respondent would offer an employment contract to the claimant when the employment restrictions were agreed by the SRA and approval granted for the claimant to be employed by the first respondent.

19. The SRA set out a number of recommendations in an email dated 2 September 2021 to the claimant including the limitations referred to above, which he accepted on the 2 September 2021. Approval for the claimant to be employed by the respondent was granted on the 10 September 2021 with the restrictions in place, the second respondent having confirmed he accepted the conditions on behalf of the first respondent.

20. Having made the offer to the claimant, which he accepted the consideration being a payment of salary, which fell well below the payments the claimant expected to receive under the Business Agreement had he commenced working under either a consultancy

agreement/employment contract on the 14 June 2021 with the purchase of AA Solicitors. Following the SRA's decision on the 10 September 2021 the respondent employed the claimant on the 1 October 2021 as an assistant solicitor. Prior to his date the claimant was not employed by the respondent but conducted in-house training on a self-employed basis.

21. The claimant's employment with the first respondent began on the 1 October 2021, there were concerns about him, and he resigned having found another job on the 31 March 2022. The claimant believes he was constructively unfairly dismissed.

Contract claims – law and conclusion

22. The contractual jurisdiction of employment tribunals is governed by S.3 ETA, together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 ('the Order') for a tribunal to be able to hear a contractual claim brought by an employee, that claim must arise or be outstanding on the termination of the employee's employment, and must seek one of the following:

• damages for breach of a contract of employment or any other contract connected with employment

• the recovery of a sum due under such a contract, or

• the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

23. Under Article 3(c), the employment tribunal only has jurisdiction in respect of an employee's contract claim if the claim 'arises or is outstanding on the termination of the employee's employment'. Only employees working under a contract of employment can bring a contract claim and the claim must relate to the contract in question. In the claimant's case the contract he seeks to enforce is a Business Agreement that was no longer relevant or effective and over which the Tribunal has no jurisdiction, bearing in mind it relates to the sale and purchase of AA Solicitors and there is no guarantee the claimant would have started work as an employee as opposed to a self-employed contractor at the start date on 14 June 2021. I did not accept the claimant's argument that he personally was AA Solicitors and the first respondent was essentially purchasing him and not the limited company AA Solicitors Ltd, bearing in mind that AA Solicitors Ltd were no longer trading and another firm of Solicitors had taken over the files and some of the staff.

24. The reality is that the Business Agreement was superseded by the oral agreement to employ the claimant on completely different terms, which the claimant accepted evidenced by the fact that he worked for the first respondent from 1 October 2021 to 31 March 2022 on the terms agreed, which included a requirement that the claimant was supervised at all times and pay and for which he received was substantially less pay than the claimant had envisaged being paid as either a self-employed consultant or employee under the Business Agreement.

25. The claimant submitted that the Business Agreement was enforceable, arguing that he had agreed to the restrictions and substantial decrease in salary, but at the same time the Business Agreement was a binding contract, the sale of the business was a work in progress because hundreds of cases were transferred from the solicitor's practice that took over the files of AA Solicitors before it closed down as a result of indemnity insurance problems and indemnity insurance run off. The claimant argued that the terms of his employment were all included in the Business Agreement and the relevant parts were enforceable on termination of his employment as of 31 March 2022 and within the Tribunal's jurisdiction because the parties intended it to be legally binding for a period of 4 years, which covered the period of his actual employment.

26. I am aware that parties who enter a contract of employment when the performance of which was not to start until a later date (in the claimant's case 14 June 2022) could be enforced. In the well-known case of *Sarker v South Tees Acute Hospitals NHS Trust 1997 ICR 673, EAT*, the EAT held that the term 'employee' is widely defined in the Employment Rights Act 1996 (ERA) as anyone who has entered into a contract of employment, without any requirement that the worker must actually have started performing the appropriate duties under the contract. The EAT observed that the relevant legislation seemed to support the proposition that 'employment' begins when a contract of employment is entered into, not when an employee starts work under that contract. Accordingly, the EAT held that the phrase 'the termination of the employee's employment' in Article 3 had to be construed by reference to the termination of the contract of employment, whether or not the employee has started work. Furthermore, the EAT stated that its conclusion was supported by the purpose behind the extension of contractual jurisdiction to employment tribunals, which was to avoid the situation where an employee is forced to use both a tribunal and a court of law in order to have all his or her claims determined.

27. I do not accept the claimant's submissions. I found that the contract connected to his employment was the oral agreement reached between the parties including the limitations placed on the claimant by the SDT and SRA before he commenced working for the respondent as an employee on 1 October 2021, just under 3 months after he was to start working either as an employee or self-employed consultant on 14 June 2021. The Business Agreement is unclear as to what capacity the claimant would be working for the first respondent, and this is a problem for the claimant, given the Tribunal has no jurisdiction to hear a breach of contract claim brought by a self-employed consultant. There is also the issue of time limits, and I do not accept the proposition that as the claimant's employment/self-employment should have commenced on the 14 June 2021 and was delayed until the 1 October 2021 with the effective date of termination being 25 March 2022, the claim was within time. Had the claimant believed at the time that (a) the Business Agreement was an employment contract it was reasonably practicable for him to have issued proceedings for breach of contract within the statutory 3 month period and sue on the Business Agreement. Instead, the claimant has waited until 24 June 2022 before undergoing ACAS early conciliation and presenting the claim form on 30

August 2022 relying on a breach of contract that allegedly took place on 14 June 2021 before he had agreed new terms and conditions of employment with the first respondent under which he continued to work for approximately 5 months.

28. The contract in question must be a contract 'connected with employment' As indicated above, an employment tribunal has jurisdiction to hear contractual claims only where the claim relates to a breach of the employment contract, or another contract 'connected with employment' and I took the view that this was not a case where I needed to deal with the doctrine of frustration as the factual matrix speaks for itself under lining the hopelessness of the claimant's case. If I am wrong on this point, I would have gone on to find the doctrine of frustration was trigged. It is apparent from the 6 April 2021 email sent by the claimant to the respondent above, that due to an number of unforeseen events including the closure of the claimant's business AA Solicitors Ltd by December 2020 and the restrictions imposed against the claimant's ability to practice as a solicitor, the business could not be sold and the claimant could not supervise or run a department. In short, as far as the respondent was concerned these were unforeseen events that made the performance of the Business Agreement impossible, and as evidenced by the new contract entered into by the parties pending the claimant starting work on the 1 October 2022, what the parties were left with was radically different from that which they both envisaged at the time the Business Agreement was entered into on 21 April 2021.

Law: strike out on the basis of no reasonable prospects of success/deposit order

29. The Tribunal's power to strike out the Claim is set out in Employment Tribunals Rules of Procedure 2013 rule 37(1) that "*(a) that it is scandalous or vexatious or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant … has been scandalous, unreasonable or vexatious*".

30. The Employment Tribunals Rules of Procedure 2013 rule 39(1) provides that where "*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*".

31. In Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330. The Court of Appeal held, as a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute. On a striking-out application (as opposed to a hearing on the merits), the Tribunal is in no position to conduct a mini-trial, with the result that it is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence. Such an exception might be where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents or, as it was put in Ezsias, where the facts sought to be established by the claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation' (para 29, per Maurice Kay LJ). I

found that this was the case in respect of the claimant's breach of contract claim which has no real substance and the "facts" relied on by the claimant can properly be described as 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation' that reflects what appears to be a factual matrix largely accepted by the parties.

32. In Ezsias, reference was made to 'a crucial core of disputed facts' that was 'not susceptible to determination otherwise than by hearing and evaluating the evidence.' Lord Justice Morris Kay in paragraph 26 stated the issue was "whether an application has a realistic as opposed to a merely fanciful prospect of success" and he accepted that there may be cases which "embraced dispute of facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success. I took the view that the claimant's case has no reasonable prospects of success given the contemporaneous documentation which reflected the dealings between the parties at the time and not the gloss now given to them by the claimant who has these proceedings in mind.

33. The basis for making a deposit order with reference to the provision "little reasonable prospect of success" imposes a lower threshold compared to a threshold for striking out a claim, thus a deposit order is a less draconian alternative to striking out a claim perceived to be weak but which could reasonably be described as having no reasonable prospect of success. I considered whether the claimant's claim of breach of contract fell under the description of "little reasonable prospect of success" a less draconian outcome, and decided that it did not and fell under the definition of "no reasonable prospect of success."

34. From the schedule of loss it is clear that the claimant's unlawful deduction of wages relate to the Agreement dated 14 June 2021 also included in the breach of contract claim, and the loss of earnings from 25 March 2022 to 14 June 2025 are damages flowing from the dismissal. The claimant's schedule of loss set out the following. There is no stand-alone unlawful deduction of wages claim and I have also dismissed this claim on the basis that it also has no reasonable prospects of success.

35. In exercising these powers, I had in my mind at all times the overriding objective in seeking to deal with cases justly and expeditiously and in proportion to the matters in dispute. This case has been listed for 6-days starting on the 21 October 2024. The hearing allocation is too long can now be reduced still taking into account the reasonable adjustment of breaks as and when required for the claimant. The parties will send to the Tribunal a blank Agenda dealing with the remaining disability discrimination complaints and an agreed list of draft issues.

36. In conclusion, the claimant's complaint of breach of contract brought under S.3 Employment Tribunals Act 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 is scandalous or vexatious or has no reasonable prospect of success, is struck out and dismissed. The claimant's complaint of unlawful deduction of wages brought under section 13 of the Employment Rights Act 1996 is scandalous or vexatious or has no reasonable prospect of success, is struck out and dismissed.

RESERVED

37. A separate Case Management Order has been sent to the parties dealing with the respondent's application for specific discovery and the date for the preliminary hearing, which will not take place before myself.

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Employment Judge Shotter

DATE: 29 February 2024

ORDER SENT TO THE PARTIES ON
DATE: 13 March 2024

FOR THE TRIBUNAL OFFICE