EMPLOYMENT TRIBUNALS

Claimant: Mr K Chima

First Respondent: South Ribble Borough Council

Second Respondent: South Ribble Leisure

Heard at: Manchester Employment Tribunal (by CVP)

On: 20 March 2024

Before: Employment Judge M Butler

Representation
Claimant: Self-representing
Respondent: Ms R Rule-Mullen

JUDGMENT (AT PUBLIC PRELIMINARY HEARING)

1. The claimant has no reasonable prospects of establishing that he was a contract worker pursuant to s.41 of the Equality Act 2010.

2. The claimant has no reasonable prospects of establishing that he was an applicant pursuant to s.39(1)(c) of the Equality Act 2010.

3. In those circumstances, the claim in its entirety is found to have no reasonable prospects of success and is struck out pursuant to Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013.

4. The final merits hearing listed for 01 and 02 October 2024 will not take place and is vacated.

REASONS

INTRODUCTION

1. Oral reasons were handed down at the hearing on 20 March 2024. The claimant requested written reasons by email dated 23 March 2024. These are those written reasons as requested.

2. The claimant brought his complaints of race discrimination against the first respondent only through a claim form presented on 11 April 2023.

3. At a preliminary hearing held on 18 January 2024, in front of Employment Judge Butler, the first respondent's application to strike out the claim failed (insofar as the issues that were recorded on the notice of hearing). However, Employment Judge Butler decided to list a further public hearing to determine the issues before this tribunal. Furthermore, the second respondent was added to the proceedings.

4. The claimant was late in attending the hearing. Employment Judge Butler directed his clerk to call the claimant at 10.06 to enquire as to whether he was attending the hearing and that there would be a delayed start of 10.30 to the hearing to enable the claimant to join. The claimant attended the hearing at 10.30. The claimant is reminded that he must be in attendance in line with the notice of hearing, irrespective of whether he considers the judge will need some reading time.

5. The tribunal benefited from a hearing bundle that ran to 259 pages in length.

6. The claimant at the beginning of the hearing explained that he did not have a copy of the bundle. However, he explained that he had all the documents and this would not cause him any difficulty. However, after further discussion the claimant accepted that he 'probably' did sign for it, as submitted by the respondent, but could not locate it. The claimant explained that he was happy to proceed in any event and not having the bundle in front of him was not going to hinder him.

7. The respondent forwarded to the tribunal the signature of the claimant when he signed for the bundle. This has been placed on file.

LIST OF ISSUES

8. Whether the claim should be struck out for having no reasonable prospects of success pursuant to Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 and/or whether to apply a deposit order. To determine this matter, two issues were to be determined:

    a. Was the claimant an applicant, to bring him within s.39 of the Equality Act 2010? And;
    b. Was the claimant a contract worker to bring him within s.41 of the Equality Act 2010?

LAW

<u>Rules on Strike Out and Deposit Orders</u>

9. Rule 37 of the Employment Tribunal Rules of Procedure provides for striking out of a claim or a response. It explains:

"(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 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;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."

10. In respect of Deposit Orders, Rule 39 of the Rules provides:

"(1) Where at a preliminary hearing (under rule 53) 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.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

11. Turning to the substantive law considered at this hearing.

Contract Workers

12. Section 41 of the Equality Act 2010 provides:

(1) A principal must not discriminate against a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

(b) by not allowing the worker to do, or to continue to do, the work;

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d) by subjecting the worker to any other detriment.

(2) A principal must not, in relation to contract work, harass a contract worker.

(3) A principal must not victimise a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

(b) by not allowing the worker to do, or to continue to do, the work;

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d) by subjecting the worker to any other detriment.

(4) A duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker).

(5) A "principal" is a person who makes work available for an individual who is—

(a) employed by another person, and

(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(5) "Contract work" is work such as is mentioned in subsection (5).

(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

Applicants

13. Section 39 of the Equality Act 2010 covers situations concerning applicants, and provides the following:

"(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment."

14. In Clymo v Wandsworth London Borough Council [1989] IRLR 241, the EAT held that to be an applicant there needed to be an available job or opportunity to offer.

15. In Tyagi v BBC World Service [2001] IRLR 465, LJ Brooke in the Court of Appeal explained at paragraph 25:

> *"In my judgment, he submitted correctly that it is these provisions that deal with the kind of situation that which Mr Tyagi may be concerned. Section 28(3) makes provision for proceedings in respect of a contravention of the section. A general discriminatory practice which, among other things, would be likely to result in an act of discrimination to the person to whom it is applied, including persons in any particular racial group, and as regards which there has been no occasion for applying it, is policed only by the Commission for Racial Equality. The way in which s.1 bites on the actual treatment of an applicant or the actual application of a requirement or condition adverse to an applicant, in my judgment, means that it does not bite on a discriminatory practice which is not in action at all vis-à-vis a particular applicant if he is not employed by the employer at all so as to be denied access to the opportunities and benefits or otherwise treated disadvantageously in the ways mentioned in s.4(2), and if he is not being treated unfavourably by not being offered a job because of a discriminatory practice because there is no job on offer."*

16. Whilst the EAT in Padgett v Serota & anor UK/EAT/0097/07, at paragraph 34 held:

> *"Reg 6(1) is however concerned with discrimination in respect of access to employment. Its reach is not unlimited. It applies where an employer has employment to offer, and is making arrangements for determining to whom he should offer employment (reg 6(1)(a)), offering employment on particular terms (reg 6(1)(b)), or refusing to offer or deliberately not offering it to a particular person or category of persons (reg 6(1)(c)). Generally speaking, therefore, it applies where an employer is recruiting."*

SUBMISSIONS

17. Ms Rule-Mullen, on behalf of the respondents, provided the tribunal with written submissions in advance of the hearing and supplemented them with oral submissions. The claimant made oral submissions at the hearing.

18. Ms Rule-Mullen submitted the following:

In respect of whether the claimant was a contract worker pursuant to s.41 of the Equality Act 2010.

a. The claimant's claims are brought on the basis of access to work, with his claim being that he was not permitted to work under a contract. His claim is that the first and/or second respondent was in breach "by not allowing the claimant to access employment due to his race" (para 8 of Particulars of Claim).
b. The claimant has brought no evidence that he was a contract worker, as defined by s.41 of the Equality Act 2010.There is no evidence brought that he was working under any contract. The claim is brought on the basis that he was prevented from obtaining employment or registration of self-employment.
c. The claimant only attended at the tennis centre purely in accordance with the claimant's daughter's membership.

In respect whether the claimant was an applicant pursuant to s.39 of the Equality Act 2010.

d. There was no job opportunity in January 2023 when the claimant put forward his email.
e. The email that the claimant sent to the respondents was not invited. There was no vacancy at the time.
f. The second respondent replied to the claimant to explain that vacancies if and when they arise would be advertised.
g. When the respondents did have a vacancy they placed adverts to that extent. As was done in September 2023 and February 2024, when there was a vacancy.
h. Cases including **Padgett**, **Clymo** and **Chevalier** (although Chevalier is a first instance decision and not binding on this tribunal) all support that there must be a need for a vacancy in order to be an applicant and a speculative request, which this was, is not enough.
i. The claimant made this speculative request on the basis that his County Court claim was struck out. This claim was struck out on 27 January 2023, with the claimant then sending this speculative request on 28 January 2023. That was the reason behind the email, not an application for ana advertised role.

The claimant submitted the following:

j. The respondent employs two types of tennis coach, salaried and self-employed coach. My claim addresses both.
k. The claimant made a further job application as set out in paragraph 5 of the particulars of claim. And that email could not be clearer [although the claimant's particulars of claim refers to an email of 11 February 2023, the text that is copied is from an email dated 28 January 2023, found at pp.243-244 of the bundle: this is the email the claimant relies on]. In that email the claimant wrote:

> "Kindly provide me with registration as a self-employed tennis coach at the South Ribble Tennis Centre on a zero hour contract. In other words, I am requesting employment as a tennis coach and I note that you are in charge of this process for the centre."

l. The claimant was applying for a role as a contract worker.
m. The respondent replied to the email to say "Thank you for your interest in working for South Ribble Leisure Limited". This was the respondents accepting that the claimant's email was a job application.
n. There was no mention int his response to adverts being placed on the LTA website. And there is no evidence that the respondents advertise vacancies on social media.
o. The claimant had his certificates and is a highly qualified coach.

p. An application was made directly to the respondents, and it was recognized as an application.
q. The claimant's argument is that there was not a requirement that a vacancy existed as the claimant wanted a zero hour contract.
r. The claimant accepted that he did not know and would not know whether there was a role available to him t the time he sent his email on 28 January 2023.

ANALYSIS AND CONCLUSIONS

Was the claimant a contract worker pursuant to s.41 of the Equality Act 2010

19. Section 41 of the Equality Act 2010 applies in fairly specific circumstances. In short, it requires an individual to be employed by one person and supplied to another in furtherance of a contract (which can be through a series of intermediary contracts) between the employer and that party the individual is supplied to.

20. There is a clear requirement that the claimant is under a contract with a supplier of services, with that supplier having some contractual relationship with an end-user. And this is clearly set out by section 41(5) and 41(7) of the Equality Act 2010.

21. The claimant's case, as explained to me, and as is clear in the particulars of claim, is brought solely on the basis of the claimant having sent an email on 28 January 2023 where he requests to be registered as a self-employed tennis coach.

22. The claimant's case has never been that he had a contract with another, and through a contractual arrangement he was supplied to either the first or second respondent. And that is because he wasn't.

23. In the circumstances outlined above, the claimant was not a contract worker pursuant to s.41 of the Equality Act 2010.

Was the claimant a contract worker pursuant to s.39 of the Equality Act 2010

24. The decisions of the Employment Appeal Tribunal in **Pidgett** and **Clymo**, and the Court of Appeal in **Tyagi**, are highly relevant to the matter before me. In short, these cases lay down the principles that to be an applicant there needs to be some job opportunity, at the least, available and on offer. And that a speculative application where no such job or opportunity was available would not make the individual an applicant for the purposes of s.39 of the Equality Act 2010.

25. The claimant's case is brought on the email of 28 January 2023 (see pp.243-244).

26. The claimant himself explained to me that he was not responding to an opportunity to work or to an advert by the respondent inviting applications for specified roles. He explained to the tribunal that he did not know whether such an opportunity existed.

27. The email in question is quite clearly the claimant simply making a speculative request for registration as a self-employed tennis coach on a zero hour contract. And that is all it is. It was an informal request by the claimant, rather than any formal application, as not such role or opportunity existed for the claimant to apply for.

28. The response to the claimant is quite clear. That vacancies if and when they are advertised would be through the the Council website and/or on social media And the claimant is advised to then check these areas for any upcoming vacancies. In

short, Mr Shannon is telling the claimant that there are no vacancies at present, but that going forward he should check the council website and/or social media for vacancies as they would be advertised on there when they become available. And this is what the respondents did in September 2023 and February 2024. Posts that the claimant did not apply for.

29. The claimant places weight on the words from Mr Shannan- thanking him for his interest in working for South Ribble Leisure Limited. He interprets this as being that there is an acknowledgment of an application made by him for a role. But that is a reading of those words out of context.

30. Taking the claimant's case at its absolute highest, the claimant did not apply for a role that the respondent was seeking to fill. No such available role existed. The claimant emailed a speculative request to the respondents with a view to being registered in some way.

31. The claimant does not fall into the category of being an applicant pursuant to s.39(1)(c), as there was nothing for him to apply for.

32. Given the above, the claimant was neither a contract worker pursuant to s.41 of the Equality Act 2010 nor was he an applicant pursuant to s.39 of the Equality Act 2010. His claim has no reasonable prospects of success and is struck out pursuant to Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013.

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Employment Judge **Mark Butler**

Date:04 April 2024

JUDGMENT SENT TO THE PARTIES ON

Date: 19 April 2024

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