EMPLOYMENT TRIBUNALS

Heard at:	London South	**On:**	22 May 2024

Claimants: (1) Mr G Onos

(2) Mr P Garabagiu

Respondents: (1) Mr D M Ferris

(2) Performa Drywall Consultants Ltd

(3) Radius Construction Limited

Before: Employment Judge Ramsden

Representation:

Claimants: Mrs E Donaldson, Solicitor

Respondents: (1) Non-attending

(2) Non-attending

(3) Miss Halsall, Counsel

JUDGMENT

1. The claims brought by the First and Second Claimants against the Third Respondent are struck out.

REASONS

The Tribunal's jurisdiction

2. The Tribunal should consider any question of its jurisdiction to hear the complaint before it, even if not raised by the parties (*British Midland*

Airways Ltd. v Lewis [1978] ICR 782).

3. The Employment Tribunal's jurisdiction is conferred, as stated in section 2 of the Employment Tribunals Act 1996, by that Act and by any other Act, whether passed before or after that Act.

4. The Claimants have each pleaded in their Claim Forms that the Third Respondent "*is a Hirer who promised to pay the Claimant if his employers do not pay for the work from 14/10/2022 to 09/11/2022*".

5. The Claimants were asked by the Employment Judge to address the Tribunal on how their claims against the Third Respondent are within the Tribunal's jurisdiction. In response, the Claimants sought to amend their claims to instead assert that the Third Respondent employed them from 17 October 2022 to 9 November 2022, and that they agreed to pay the Claimants' wages for the period 14 to 16 October 2022 if they were not paid by the First or Second Respondents.

6. It was clear, therefore, that absent the application to amend being successful, the Tribunal did not have jurisdiction to hear the claims brought by either the First or Second Claimant against the Third Respondent.

Applications to amend

7. As observed by Mr Justice Langstaff (President) in *Chandhok v Tirkey* [2015] IRLR 195:

   "*The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond.*"

8. The Tribunal has the power, in Rule 29 of the Employment Tribunals Rules of Procedure 2013 (the **ET Rules**) to:

   "*at any stage of the proceedings, on its own initiative or on application, make a case management order…*".

9. This includes the power to permit a party to amend its Claim or Response, but that power should be exercised in accordance with the Overriding Objective in Rule 2 of the ET Rules:

   "*The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable-*

   (a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

10. The seminal cases on the proper approach to exercising the power in Rule 29 in relation to amendment applications are *Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore* [1996] IRLR 661, *Vaughan v Modality Partnership* UKEAT/0147/20/BA (V), *Abercrombie v Aga Rangemaster* [2013] EWCA Civ 1148, *Transport and General Workers Union v Safeway Stores Ltd* UKEAT/0092/07/LA and *Ladbrokes Racing Ltd v Traynor* UKEAT/0067/06.

11. It is clear from those authorities that when answering the question of whether the discretion in Rule 29 should be exercised to permit the amendment, the assessment is 'what does the overriding objective require?', or to put it another way, 'in which party's favour does the balance of injustice and hardship sit?'.

12. The case law offers some suggested factors that may be relevant to consider when assessing how the scales weighing the balance of injustice and hardship tip, though of course the actual assessment will be fact-dependent, and there may be other matters that are important to that analysis:

    a. *The nature of the proposed amendment*, for example, the adding of factual details to existing allegations; the addition or substitution of other labels for facts already pleaded; the making of entirely new factual allegations. Would the amendment sought be a minor matter, or a substantial alteration pleading a new cause of action? This should be considered both in terms of the legal effect of the amendment sought, and the evidential implications of making it – is it likely, for example, that the facts relied upon in the sought-to-be-added complaint involve substantially different areas of enquiry than those in the old? (*Abercrombie*)

b. *The applicability of time limits*. If the amendment would add a new cause of action, is that out of time; if so, what is the legal test for extending time applicable to that cause of action; and should the time limit be extended by allowing the amendment. The fact that an amendment would introduce an out-of-time claim is not an automatic bar to accepting the amendment application (*Safeway Stores*).

c. *The timing and manner of the application*. The Tribunal should seek to understand why the application was not made earlier, and why it is now being made. For example, is it because new information has come to light, or was the relevant information in the possession of the party now seeking the amendment at a much earlier point.

13. The party seeking to make the amendment must set out terms of proposed amendment, really in writing. It is not for the tribunal to do the drafting (*Magarot Forrest Care Management v Kennedy* UKEATS/0023/10).

14. The Claimants' solicitor took a break to draft the amended terms of the Claimants' ET1s that they would seek to replace the wording in their original by means of the amendment. The wording provided (in respect of each claim) was as follows:

"*Respondent 1 and Respondent 2 are the Claimant's employers, Respondent 3 was a Hirer until 17/10/2022, then, on 17/10/2022, the Respondent 3 entered into an employment contract with the Claimant on the same terms and conditions as the Claimant had with the Respondents 1 and 2. The Respondent 3 promised to pay retrospectively to the Claimant for their work from 14/10/2022 if his employers do not pay for the work from 14/10/2022 to 17/10/2022. Thus, the Respondent 3 was an employer for the Claimant from 17/10/2022 to 09/11/2022 under the same terms and conditions (daily rate is £190, weekend daily rate is £285, working hours are from 8 am to 5 pm and on weekends - from 8 am to 2pm, paid 2-weeks' holidays on Christmas, 1-week' notice)*".

15. The Claimants' application to amend was made on the basis that:

a. The Tribunal had failed to serve a copy of the Third Respondent's Response to the First Claimant's claim on the Claimants, and therefore did not know that the Third Respondent was denying employing the First Claimant until the Third Respondent and the Tribunal sent that Response to the First Claimant today;

b. The Claimants' solicitor had a heavy workload, and experienced some very serious health issues in April 2023, from which the road to recovery has been long; and

c. The amendment the Claimants seek to make is of a minor kind. The Third Respondent understood that the Claimants were asserting that it employed them from 17 October 2022, and if it did not then it should have sought further and better particulars from the Claimants, but it failed to do so.

16. The Third Respondent replied that:

a. It is for the Claimants to put their case. If the Claim Forms did not make it clear how the Claimants' claims against the Third Respondent were within the Tribunal's jurisdiction, it was not for the Third Respondent to seek further information about that;

b. The amendment sought is not minor – it would bring the claims from outside the Tribunal's jurisdiction to within it;

c. The requested amendment represents a significant change from the Claimants' case as the Third Respondent had understood it. The Third Respondent had understood the Claimants' case to be that the First, and possibly the Second, Respondent had employed them from the period 14 October to 9 November 2022, and that at its highest the Claimants were saying that they entered into a contract with the Third Respondent to the effect that if their employer(s) did not pay them in that period, the Third Respondent would. The terms of or enforcement of such a contract – not being a contract of employment – would be outside the Tribunal's jurisdiction;

d. Were the amendment to be brought as a new claim, for unauthorised deduction from wages under an employment contract between each of the Claimants and the Third Respondent, that claim would be significantly out of time – the last failure to pay under that contract would have been in November 2022, 18 months ago, and so such a new claim would be 15 months out of time. The test for extending time would be the stricter "not reasonably practicable" test – and in the circumstances of the length of delay by represented claimants, that test would not be met;

e. The prejudice to the Third Respondent of allowing the amendment would be significant. This is the third listing of this matter, and if the amendment were to be allowed, the Third Respondent would need an opportunity to amend its Responses to respond to the case as now put. This would mean a further re-listing of the matter, which is not proportionate, and would put the Third Respondent to further time and expense; and

f. The prejudice that the Claimants would be put to by not allowing the amendment is not significant. They would lose their right to pursue the Third Respondent, but their claims against the First and Second Respondent could proceed.

17. The Tribunal agreed with the Third Respondent, that the balance of justice and hardship lies firmly in favour of rejecting the requested amendment.

    a. *The nature of the proposed amendment*: The amendment is significant – it would bring the claims against the Third Respondent into the jurisdiction of the Employment Tribunal when they were not. This factor pushes against granting the amendment;

    b. *Time limits*: The Employment Judge agrees with Miss Halsall – the amendment, if presented as a new claim, would be 15 months out of time, and the stricter test of the Claimants needing to show both that it was "not reasonably practicable" to bring the claim in the primary time limit period of three months ***and*** that they brought the claim within such further period as was "reasonable" in the circumstances would apply. The Claimants have not made a case for satisfying either limb of that test today. Again, this consideration pushes against granting the requested amendment;

    c. *The timing of the application*: While the Claimants' solicitor has had very significant health difficulties (which might lessen the weight of the length of time in the late application), the impact of this is mitigated by:

        i. The significant opportunity the Claimants have had in the 18 months since the events in question to make an application to amend;

        ii. While the Claimants' solicitor was not a practising solicitor at that time the Claim Forms were filed (she became so in April 2023 when she became very ill), when asked by the Employment Judge if she was experienced in litigating in the Employment Tribunal, the Claimants' solicitor confirmed that she was;

        iii. While the Third Respondent's Response to the First Claimant's claim was not seen by the First Claimant (or his solicitor) until today:

            (I) That Response was identical in all material respects to that filed by the Third Respondent in response to the Second Claimant's claim, and the Second Claimant and his solicitor have been in receipt of that Response since 27 June 2023 – nearly a year prior to this hearing. The Third Respondent's case in respect of both Claimants has been clear since that time; and

            (II) The First Claimant was informed by the Tribunal that the Third Respondent's Response had been accepted on 15 May 2023, and the First Claimant has offered no good reason why it failed to contact the Tribunal to ask for a copy

of that Response in the period since, especially since the Claimants have been preparing for this hearing by preparing or organising five witness statements in support of their claims and a Bundle running to 198 pages.

Overall, therefore, the timing of the application represents a weighty factor against allowing the amendment; and

d. *The manner of the application*: Making the application on the first day of third listing of this matter, and making it only after given time to draft that written amendment so it could be understood by the Third Respondent and the Tribunal, added to the prejudice suffered by the Third Respondent. As Miss Halsall says, the Respondent would have to alter its preparation for the case it was prepared to meet if the argument was instead that it entered into employment contracts on 17 October 2022 with each of the Claimants, involving at minimum additional expense, but potentially also a relisting of this matter.

e. *Other considersations*: The prejudice to the Claimants should be seen in light of the fact that the Claimants' Claim Forms (unamended) say they were employed by the First Respondent for the whole period they were not paid. The First Respondent has not filed a Response in respect of either claims, and therefore Rule 21 is engaged. The Claimants have a case that case proceed, and can proceed at pace, against the First Respondent. Moreover, the Claimants also assert that the Second Respondent possibly employed them. The Second Respondent filed a Response in respect of each of the claims, but did so out of time in respect of the First Claimant, so the Second Respondent's Response to the First Claimant's claim was rejected, again engaging Rule 21. While the Second Respondent's Response against the Second Claimant was filed in time and was accepted by the Tribunal, because of the Second Respondent's failure to engage with these proceedings the Employment Judge has issued a strike-out warning in respect of that Response to the Second Respondent today, giving it until 9:30am tomorrow (23 May 2024, and the second day of this hearing) to respond. If that Response is struck-out, again, Rule 21 will be engaged. The Claimants therefore do not lose their rights to pursue a remedy for the complaints they are making by striking out their claims against the Third Respondent, albeit that they will lose one of the persons they can pursue for that remedy.

18. The Tribunal concludes, therefore, that the balance of injustice and hardship lies heavily against permitting the amendment sought by the Claimants, and that application is consequently rejected.

<u>Strike-out</u>

19. Rule 37 of the ET Rules 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 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..."

20. Having refused the Claimants' application to amend, the Claimants' claims against the Third Respondent cannot be considered by the Employment Tribunal. This is a matter which, in and of itself means the claims against the Third Respondents must be struck out, but in addition they have no reasonable prospect of success, as the Employment Tribunal has no jurisdiction to hear them, and so they are, in any event, struck out pursuant to Rule 37(1)(a).

21. In summary, therefore, each of the Claimant's claims against the Third Respondent is struck-out. This has no effect on the Claimants' claims against the First and Second Respondents.

Employment Judge Ramsden
22 May 2024