EMPLOYMENT TRIBUNALS

Claimant: Mr P Ainsworth

Respondent: Paymentsense Limited

Heard at: Cardiff, by video **On:** 9 May 2024

Before: Employment Judge S Jenkins

Representation:
Claimant: In person
Respondent: Ms L Bell (Counsel)

JUDGMENT on an application to amend having been sent to the parties on 13 May 2024, and reasons having been requested by the Claimant on 21 May 2024, in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Introduction

1. The hearing was a preliminary hearing to consider the matters identified by Employment Judge Brace, at an earlier preliminary hearing on 12 March 2024, as requiring consideration at a further preliminary hearing. These included:

    4.1 What claims are included in the ET1 and attached Grounds of Claim?

    4.2. Whether the Claimant requires permission to amend his claim to rely on the dismissal complaints he seeks to bring; and, if so,

    4.3 Whether permission is given for the Claimant to amend his claim.

2. I read the parties' skeleton arguments, and the documents in a hearing bundle to which my attention was drawn. I also considered the parties' additional oral submissions.

Background circumstances

3. I heard no evidence, and therefore made no findings of fact. However, I considered it appropriate to record my understanding of the broad background circumstances to the case and the issues I had to consider. Nothing in this section should be taken as a finding of fact which in any way binds a Tribunal considering this case further.

4. The Claimant was briefly engaged by the Respondent, from 23 January 2023 until 27 February 2023 (the Claimant's position) or 20 March 2023 (the Respondent's position). The Respondent is a payment services provider providing payment solutions to customers. The Claimant's services to the Respondent, as a payments consultant procuring new customers for the Respondent, were provided via a limited company, "Consulting AM Limited".

5. The engagement was confirmed in an agreement dated 23 January 2023, entered into between the Respondent and Consulting AM Limited, signed by the Claimant as Managing Director of that company.

6. The agreement had as its title, "Payments Consultant Agreement (Via A Service Company)", and the Claimant accepted during the hearing that the intention behind the agreement was that the relationship would not be one of employment. However, he contends that the agreement did not reflect the true intentions of the parties, and that the relationship was ultimately one of employment. The Respondent contends that the agreement properly reflects the parties' intentions.

7. The precise status of the relationship between the parties is therefore a key element in this case, which remains to be resolved on evidence. For the purposes of this hearing, and only for those purposes, I have proceeded on the basis of the Claimant will be able to establish that he was an employee of the Respondent.

8. Whatever the Claimant's status, it appears that the Respondent was dissatisfied with the performance of the Claimant/Consulting AM Limited, and, on Friday, 24 February 2023, one of the Respondent's managers emailed the Claimant, requiring him to procure sales leads by the following Tuesday or the relationship would be brought to an end.

9. The Claimant replied to that email on the same day, noting, "*As you are aware, our contract clearly states that a two-week notice period is required for termination. We have fulfilled all our obligations under the contract and have been committed to a successful partnership with your company. Therefore, your decision to terminate the contract without fulfilling the notice period is a clear breach of contract.*".

10. The Claimant went on to say, "*I would like to remind you that this action is in violation of UK law and our contractual agreement. In accordance with the terms of the contract, we expect you to fulfil your obligations and provide the required notice period for termination. Failure to do so will result in us taking legal action against your company to seek damages for the losses incurred as a result of your breach of contract.*".

11. The Claimant then contends that his access to various WhatsApp groups was withdrawn, and that the same occurred in relation to his access to the Respondent's systems, such that he was constructively unfairly dismissed. The Respondent disputes those matters. and contends that it subsequently terminated the relationship by giving the required notice.

12. The Claimant brought his claim on 15 June 2023. In that, he ticked boxes at section 8.1 to indicated that he was bringing complaints that he had been unfairly dismissed (including constructively dismissed), and that he had been discriminated against on the ground of age.

13. The Claimant provided an attachment to his Claim Form, in which he outlined various matters which he felt amounted to harassment related to age and direct age discrimination. Within the section relating to direct age discrimination, the Claimant noted that he considered himself to have been constructively dismissed on 24 February 2023.

14. For the purposes of this hearing, the Respondent accepted that the Claim Form included claims of direct age discrimination and harassment related to age, and that the direct discrimination claim includes a claim that the Claimant's dismissal was an act of direct age discrimination.

Background to this hearing

15. The hearing before Judge Brace on 12 March 2024 led to her reconsidering and revoking an earlier judgment she had signed dismissing the Claimant's unfair dismissal claim for lack of continuous service.

16. Judge Brace then directed the Claimant to confirm the complaints, in particular the complaints relating to dismissal, he asserted were in the Claim Form, or, if not, should be permitted by way of amendment.

17. The Claimant did that, and his document indicated that, in addition to complaints of direct age discrimination and harassment, he was also pursuing complaints of automatic unfair dismissal by reference to Regulation 6(3)(a)(v) of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (“FTE Regulations”), wrongful dismissal, and failure to pay in respect of the National Minimum Wage (“NMW”).

18. The Respondent, following a direction from Judge Brace, indicated that it did not consider that those additional complaints were in the Claim Form, and that the Claimant should not be permitted to amend his claim to include them.

Law

19. With regard to the inclusion of complaints in claim forms, the Employment Appeal Tribunal ("EAT") noted in ***Chandok v Tirkey*** **[2015] ICR 527**, at paragraph 16, that:

"*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. A Respondent is not required to answer a witness statement, nor a document, but the claims made - meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.*"

20. With regard to the amendments, the test to be applied involves the assessment of the balance of injustice and hardship of allowing or refusing the amendment. The EAT, in ***Selkent Bus Co Ltd v Moore*** **[1996] ICR 836**, reiterated that point, which had previously been made in ***Cocking v Sandhurst (Stationers) Limited*** **[1974] ICR 650**, and noted a non-exhaustive list of relevant circumstances which would need to be taken into account in the balancing exercise, namely; the nature of the amendment, the applicability of time limits, and the timing and manner of the application to amend. Those points were subsequently encapsulated within the Employment Tribunals (England & Wales) Presidential Guidance on General Case Management (2018), Guidance Note 1.

21. The EAT, more recently, in ***Vaughan v Modality Partnership*** **[2021] ICR 535**, gave detailed guidance on applications to amend tribunal pleadings. That confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application, but noted that the focus should be on the real practical consequences of allowing or refusing the amendment, considering whether the Claimant has a need for the amendment to be granted as opposed to a desire that it be granted.

22. The circumstances set out in ***Selkent*** were specifically referred to as being non-exhaustive, and other factors can be taken account in the balancing exercise. That may include the merits of the claim being sought to be added. The EAT, in ***Kumari v Greater Manchester Mental Health NHS***

Foundation Trust **[2022] EAT 132**, noted that the assessment of the merits formed at a preliminary hearing must have been properly reached by reference to identifiable factors that are apparent at the preliminary hearing, and taking proper account, particularly where the claim is one of discrimination, of the fact that the tribunal does not have all the evidence before it and is not conducting the trial.

23. The particular regulation in the FTE Regulations that the Claimant asserted applied in his case, Regulation 6(3)(a)(v), provides as follows:

> "***6.— Unfair dismissal and the right not to be subjected to detriment***
>
> *(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part 10 of the [Employment Rights Act] 1996 if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).*
>
> *…*
>
> *(3) The reasons or, as the case may be, grounds are –*
>
> *(a) that the employee has –*
>
> *…*
>
> *(v) alleged that the employer had infringed these Regulations;*"

Conclusions

Were the complaints in the Claim Form?

24. My reading of the Claim Form, even making allowance for the Claimant being a litigant in person, albeit a clearly educated and capable litigant in person, was that it contained only complaints of age discrimination, albeit that that encompassed the complaint that the dismissal was itself a discriminatory act.

25. I did not consider that the Claim Form included a complaint that the dismissal was automatically unfair by virtue of being because the Claimant had alleged that the Respondent had infringed the PTE Regulations, nor did I consider that the Claim Form made any reference to claims of wrongful dismissal or failure to pay the NMW.

26. The Claimant had appeared to broadly acknowledge those points in his submissions during this preliminary hearing, as he noted that the references to any such matters were only implicit and were not explicit.

Amendment

27. Moving then to consider whether to permit the Claimant to amend his claim to bring those complaints, I noted the core requirement of the ***Vaughan*** guidance, applying ***Selkent*** and ***Cocking***, which was to consider the balance of injustice and hardship in allowing or refusing the application, the focus being on the real practical consequences of allowing or refusing the amendment. I noted however that the ***Selkent*** non-exhaustive list of relevant circumstances remains relevant.

28. Looking at those circumstances, I concluded that the amendments were substantial, involving complaints not previously advanced, and indeed, in relation to the unfair dismissal claim, advancing factual matters not previously raised.

29. I also noted that the complaints, if allowed by way of amendment had been brought significantly out of time. Allowing for the adjustment relating to ACAS early conciliation, all claims should have been advanced by 7 July 2023, but had not been raised for some time after that.

30. Also, with regard to the manner in which the application to amend was made, I noticed that the Claimant's unfair dismissal claim had developed in a rather piecemeal manner, following concerns regarding his length of service having been advanced by the Employment Tribunal. He first sought to adjust his claim by reference to the FTE Regulations generally, and he then specifically focused on an assertion that an allegation of infringement of those Regulations had occurred, which would bring him within the scope of regulation 6(3)(a)(v).

31. Also relevant, to my mind, were the prospects of success of the Claimant's claim of automatic unfair dismissal. In that regard, I noted the content of the Claimant's email of 24 February 2023, which he confirmed was the email in which he alleged that the Respondent had infringed the Regulations. In that, he noted only, "*I would like to remind you that this action [i.e. the lack of notice] is in violation of UK law and our contractual agreement*". However, Regulation 6(3)(a)(v) requires that the reason for dismissal be that the employee has "*alleged that the employer had infringed <u>these Regulations</u>*" (my emphasis).

32. I noted the Claimant's submission that there is no authority that a claimant looking to rely on the sub-paragraph needs to specifically refer to the FTE Regulations, and I anticipate that he is right in respect of that, certainly by reference to the authorities dealing with the need to identify breaches of legal obligations for the purposes of protected disclosures. However, there does, at least, need to be some reference to infringement of the Regulations, i.e. to less favourable treatment by reference to part-time

status. In my view, the Claimant's email provided no indication of that. The only concern referenced was the lack of notice of termination of the contract, which was not a matter specific to a fixed-term employee.

33. In terms of the balance of prejudice, as well as the obvious prejudice to both sides respectively of not being able to advance a claim or of having to defend a claim, the Claimant pointed to hardship which would arise through the Respondent being able to defend the discriminatory dismissal complaint by saying that its reason for dismissal was because the Claimant had made an allegation of infringement of the FTE Regulations. However, the Respondent confirmed that that is not an argument it is advancing.

34. By contrast, I noted the hardship to the Respondent of having to advance additional arguments in defence of a claim which, in my view, at best has very little, if indeed any, prospect of success.

35. Overall, taking into account all the circumstances, I did not consider it appropriate to allow the Claimant's application to amend his claim by adding in a complaint of automatic unfair dismissal. The balance of prejudice lay in favour of refusing the application to amend to add what can only be described as a very weak claim.

36. However, I took a different view of the balance of prejudice in relation to the wrongful dismissal and NMW complaints. As the Claimant noted, they both, to a degree, flow from the status question. If the Claimant was an employee, he would have been entitled to some notice, and, if he was an employee or worker, he would have been entitled to receive the NMW.

37. The additional evidential scope of those claims will therefore be narrow, certainly much narrower than in relation to the unfair dismissal claim, and they will, to a large extent, stand or fall by reference to the status determination. Other therefore, than the obvious prejudice of having to defend a complaint it considers it should not have to, the Respondent will be faced with very little prejudice in terms of its ability to defend those additional complaints.

38. On balance, and whilst this should not be taken as any conclusion that the claims of wrongful dismissal and in respect of the NMW should be taken to have any particular prospects of success, I considered that the balance of prejudice weighed in favour of granting those amendments.

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Employment Judge S Jenkins
Dated: 13 June 2024

REASONS SENT TO THE PARTIES ON 14 June 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche