EMPLOYMENT TRIBUNALS

Claimant: Mrs H Hughes

Respondent: Cheshire West and Chester Council

Heard at: Liverpool **On:** 20 June 2024

Before: Employment Judge Horne

Representatives
For the claimant: in person
For the respondent: Mr McArdle, legal executive

Judgment was sent to the parties on 24 June 2024.
The claimant has requested written reasons for the judgment in accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013.
Accordingly, the following reasons are provided.

REASONS

Parties

1. In order to achieve consistency with previous judgments and reasons:
   1.1. Clakim Ltd, Janbar Mg Ltd and Kajoliea Ltd are referred to as “the old Abbey companies”;
   1.2. the respondent is still referred to as “Vedamain”, despite its company name having changed to KingKabs Ltd; and
   1.3. “CWCC” is Cheshire West and Chester Council.

Scope of these reasons

2. These reasons explain why I struck out the claimant’s claim for damages for breach of contract. They also explain why I refused to allow the claimant to amend her claim for damages by alleging that CWCC was the claimant’s employer.
3. The claimant requested reasons for the “judgment”. Paragraph 1 of that judgment recorded my decision not to strike out the claimant’s complaint of detriment on the ground of a protected disclosure. That was a decision in the claimant’s favour (although I also made a deposit order). I have decided to prioritise the giving of written reasons for those decisions that were unfavourable to the claimant.

Relevant law

<u>Striking out</u>

4. Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides, so far as is relevant:

> (1) At any stage of the proceedings…. on the application of a party, a Tribunal may strike out all or part of a claim … on any of the following grounds-
>
> (a) that it … has no reasonable prospect of success;
>
> …
>
> (2) A claim … 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.

5. Before striking out a claim, the tribunal must first make reasonable efforts to understand the complaints and allegations. This includes carefully considering the claim form and supporting documentation that the claimant has provided: *Malik v. Birmingham City Council* UKEAT 0027/19 at para 50-51. "Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is": *Cox v. Adecco* UKEAT 0339/19.

6. It is desirable for employment tribunals to provide such assistance to litigants as may be appropriate in the formulation and presentation of their case. The fact that the litigant is self-represented is a factor relevant to what level of assistance is appropriate. When deciding how much assistance to afford a self-represented party, the tribunal must try to achieve the overriding objective and must avoid stepping into the arena: *Drysdale v. Department of Transport* [2014] IRLR 892.

<u>Amendments to claims</u>

7. Rule 2 sets out the overriding objective of dealing with cases fairly and justly. The overriding objective includes, where practicable, placing the parties on an equal footing, avoiding delay, saving expense, and dealing with cases in ways that are proportionate to the importance and complexity of the issues. Tribunals must seek to achieve the overriding objective in the exercise of any powers given to them under the rules.

8. Rule 29 gives the tribunal wide case management powers. These include the power to allow a party to amend their claim, although that power is not expressly included.

9. Guidance as to whether or not to allow applications to amend is given in the case of *Selkent Bus Company v. Moore* [1996] IRLR 661. The following points emerge:

    9.1. A careful balancing exercise is required.

    9.2. The paramount consideration is that of comparative disadvantage. The tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it.

10. The following factors identified in *Selkent* may help the tribunal to conduct that balancing exercise:

10.1. The tribunal should consider whether the amendment is merely a re-labelling of facts already relied on in the claim form or whether it seeks to introduce a wholly new claim. (Technical distinctions are not important here: what is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

10.2. Where the amendment raises substantial additional factual enquiry, the tribunal should give greater prominence to the issue of time limits and whether or not the relevant time limit should be extended.

10.3. The tribunal should have regard to the manner and timing of the amendment.

11. The factors identified in *Selkent* should not be used as a checklist. What is required in every case is an analysis of comparative disadvantage: *Vaughan v. Modality Partnership* UKEAT 0147/20.

12. Where an application is made to amend a claim before the expiry of the statutory time limit for the proposed new claim, the balance of disadvantage will usually favour granting the amendment. The fact that the proposed claim is in time is a "factor of considerable weight", although it is not determinative: see *Gillett v. Bridge 86 Ltd* UKEAT/0051/17 at para 25 and *Patka v. BBC* UKEAT/0190/17 at para 38. There is no rule of law that the proposed new claim must be hopeless before the amendment can be refused, but it is relevant to consider whether it would be susceptible to being struck out under rule 37 if the proposed claim had been presented in a timely claim form.

Jurisdiction to consider claims for damages for breach of contract

13. Section 3 of the Employment Tribunals Act 1996 ("ETA") relevantly provides:

> "
>
> (2) … this section applies to-
>
> (a) a claim for damages for breach of a contract of employment or other contract connected with employment…
>
> if the claim is such that a court in England and Wales … would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.
>
> …
>
> (6) In this section a reference to breach of a contract includes a reference to breach of – (a) a term implied in a contract by or under any enactment or otherwise,…"

14. Section 42 of ETA relevantly defines "contract of employment" as "a contract of service… whether express or implied and (if it is express) whether oral or in writing". In the same section, "employment" means employment under a contract of employment, "employee" means a person who is or was employed under a contract of employment, and "employer" means the person by whom the employee is or was employed

15. The Employment Tribunals (Extension of Jurisdiction) Order 1994 was made under section 3 ETA. Its relevant articles are:

    "3 Extension of jurisdiction

    Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages…. if-

    (a) the claim is one to which [section 3 ETA] applies

    …and

    (c) the claim arises or is outstanding on the termination of the employee's employment.

    …

    7 Time within which proceedings may be brought

    …an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented-

    (a) Within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

    (b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

    …

    (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable."

16. Article 4 additionally provides that, subject to certain conditions, proceedings may be brought in the employment tribunal in respect of a claim of an employer. By Article 8(c)(i), the time limit for such a claim runs from the day on which the claim form was received by "the employer (or other person who is the respondent party to the employee's contract claim)".

17. A question of law has arisen in this case. It concerns who may be a respondent to a claim for damages for breach of contract in an employment tribunal. Must it be the employer? Or can the tribunal consider a claim against a person other than the employer?

18. Neither the ETA nor the Extension of Jurisdiction Order expressly exclude non-employers as respondents to an employee's contract claim. Article 8(c)(i) appears to envisage that a "respondent party to the employee's contract claim" may be an "other person". Nevertheless, in my view, it was the plain intention of the legislature that the employer should be the only person against whom an employee can bring a contract claim. This was also the view of the Employment Appeal Tribunal in *Oni v. UNISON* UKEAT 0092/17.

<u>Implied contract of employment</u>

19. A contract of employment may be implied. But where there are express contracts governing the relationship between the parties, the tribunal will not imply a contract

of employment unless it is necessary to do so: *James v. London Borough of Greenwich* [2008] EWCA Civ 35.

Background

20. The claimant is a taxi driver. Vedamain is a private hire operator. Its director is Mr Thomas. Vedamain had a contract with CWCC for the transport of children to school. Until December 2019, that work was done by the old Abbey companies, but it transferred to Vedamain following a business sale. The claimant drove her own vehicle under an agreement with the old Abbey companies. Following the business sale, she drove under an agreement with Vedamain. At a meeting on 29 July 2020, Mr Thomas terminated that agreement.

21. The claimant presented a claim against Vedamain and the old Abbey companies. It was given the case number 2418209/2020.

22. At a preliminary hearing on 19 to 21 December 2022, I announced a number of decisions, which included:

    (a) "the worker status decision" – the claimant was a worker for Vedamain

    (b) "the employment contract decision" – the claimant was not employed by Vedamain or the old Abbey companies under a contract of employment.

23. Those two decisions were recorded in written a judgment sent to the parties on 10 January 2023. Written reasons were sent to the parties in April 2023.

24. On 24 July 2023 the claimant presented a new claim form to the tribunal, this time against CWCC. This was claim 2407605/2023. In her claim form, the claimant raised numerous complaints including a claim for damages for breach of contract.

25. A final hearing was listed to take place for three days on 17 to 19 February 2025.

26. The claimant continued to drive under school contracts for the benefit of CWCC. She says that she finally stopped doing any school driving on 21 March 2024.

The claim for damages

27. The claimant clarified her claim for damages at a preliminary hearing. The hearing took place before me on 12 April 2024. Having asked the claimant questions about how she put her case, I recorded my understanding of the claim in case management summary which was sent to the parties on 20 April 2024. So far as the claim for damages for breach of contract was concerned, the case management summary said this:

    "

    40. Two breaches of contract are alleged:

        40.1 Dismissal by Vedamain; and

        40.2 Failure by Vedamain and the Old Abbey Companies to pay holiday pay for 13 years.

    41. The claimant has suggested two routes by which CWCC are liable for these alleged breaches:

        41.1 "vicarious liability" and

41.2 Breach by CWCC of its contract with Vedamain, under which the claimant had rights as a third party."

28. At the preliminary hearing, the claimant applied to amend her claim. She asked to allege that CWCC was her employer under a contract of employment.

29. In support of her amendment application, the claimant relied on an 18-page written submission that I read. Most relevant to her application was paragraph 72, which read:

"

(i) Like myself the respondent is bound to operate within the Miscellaneous Act 1976, they do not seem to have an independent Operator's License. So like me they are reliant on a person/company with such license, hence the need for [Mr Thomas].

(ii) The outsourcing of the work makes good economical and business sense, in regards to the limited work for drivers and vehicles.

(iii) I believe I have established the CIB is a working contract specifically between myself and [CWCC] This is confirmed by the [Disclosure and Barring Service].

(iv) The contract which I have been named as performing, requires me to complete it the same time daily for the same pay and is ongoing and continual.

(v) [mutuality of obligation], no Flexibility and Exclusivity was established in the Judgment [a reference to the written reasons for the worker status decision and the employment contract decision].

(vi) The Code of Conduct are specifically addressed to and for me to follow, they read like a "contract of service".

(vii) It would appear this is a 'scam' contract as identified in [*Autoclenz Ltd v. Belcher* [2011] UKSC 41]."

30. At today's preliminary hearing, the claimant confirmed that, if her application were granted, she would not just be complaining about CWCC's failure to prevent her dismissal by Vedamain, but she would also claiming her holiday pay against CWCC.

Conclusions – amendment application

31. I started by deciding the amendment application.

32. I first assessed the disadvantage that would be caused to the respondent by granting the amendment. A highly relevant factor in this case is that today – the date of the preliminary hearing - is the last day on which the claimant could present a claim for damages for breach of contract against CWCC within the three-month time limit. (I should add that I explained this clearly to the claimant during the hearing.) In one sense, therefore, it is true that, if the amendment is granted, all the tribunal will be doing is avoiding an unnecessary formality – the respondent would be placed at the same disadvantage if the claimant presented a new claim later today.

33. Nevertheless, I have reached the conclusion that the respondent would be significantly disadvantaged by the granting of the amendment. It would leave the tribunal with little practical alternative but to order that the proposed new claim be determined at the final hearing along with everything else. Additional issues would include whether the claimant had a contract of employment with CWCC and, potentially, what holiday pay the claimant was entitled to over a period of up to 14 years. This will add considerable further complexity to a three-day final hearing, which already requires careful management if it is not to overrun its time allocation. Requiring the claimant to present a new claim gives the tribunal the option of ordering that the hearing of the new claim wait behind the final hearing of claim 2407605/2023.

34. Refusing the amendment causes little, if any, disadvantage to the claimant. This is because the proposed claim has little or no reasonable prospect of success on its merits. My reasons for forming such a pessimistic view of the claimant's chances are:

    34.1. It is common ground that there was an express contract for services between Vedamain and CWCC, by which Vedamain agreed to provide school transport.

    34.2. The claimant positively asserted – and I found in the worker status decision – that she had a contract with Vedamain. The essential terms of that contract were that the claimant would work for Vedamain in return for agreed remuneration.

    34.3. Those two contracts adequately explain the relationship between the parties. The claimant contends that these contracts are a "sham" in the sense that they did not truly reflect the intentions of the parties, but the claimant positively relied on the existence of these agreements, and consistently maintained that position against Vedamain throughout claim 2418209/2020.

    34.4. The material highlighted in the claimant's written submissions does not show that the parties intended that there should be any direct contract between a school driver and the local authority. The claimant's activities were tightly regulated by CWCC, but this was by way of licence conditions. The legal framework for such conditions derives from section 55(3) of the Local Government (Miscellaneous Provisions) Act 1976. There is no need for a contract.

    34.5. It is therefore unnecessary to imply a contract of employment between the claimant and CWCC.

Conclusions – striking out

35. The breach of contract claim in its original form is bound to fail.

36. There are several reasons why it cannot succeed.

37. First, it is a claim against a person other than the employer. The Extension of Jurisdiction order does not allow for such a claim (see above).

38. Second, I have determined in claim 2418209/2020 (the employment contract decision) that the claimant was not employed under a contract of employment. She was not an "employee" within the meaning of section 42 ETA and her contract (if she had one) with CWCC could not therefore have been connected with "employment" within the meaning of that section.

39. Third, if her employment was with Vedamain, the last day she worked in that employment was 29 July 2020. Her claim was presented after the expiry of the statutory time limit. The existence of the new material does not begin to show that it was not reasonably practicable for her to have presented her claim against CWCC before the time limit expired.

40. Fourth, even if there was a contract of employment between the claimant and Vedamain, that would not give the claimant any contractual right against CWCC. The claimant has relied on case law relating to the principle of vicarious liability. That exists in the law of tort, as the claimant's written submissions themselves recognise. The Contracts (Rights of Third) Parties Act 1999 does not help the claimant. This is because the Standard Terms and Conditions between Vedamain and CWCC expressly excluded the operation of that Act.

Disposal

41. For the above reasons, the claim for damages for breach of contract is struck out.

Employment Judge Horne
8 July 2024

ORDER SENT TO THE PARTIES ON
11 July 2024

FOR THE TRIBUNAL OFFICE

(1) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rules 74-84.

(2) You may apply under rule 29 for this Order to be varied, suspended or set aside.