EMPLOYMENT TRIBUNALS

Claimant: Mr R Kosinski

Respondent: Unipart Group Limited

PRELIMINARY HEARING

Heard at: Birmingham (in public) **On:** 3 July 2024

Before: Employment Judge Camp

Appearances
For the Claimant: in person
For the Respondent: Mr S Willey, solicitor

REASONS

1. These are the written reasons for the decisions made at this hearing refusing the Claimant's application to debar Make UK from representing the Respondent and extending time for the presentation of the responses to two out of three of the Claimant's claim forms. Written reasons were requested at the hearing by the Claimant after oral reasons were given. The written record of those decisions was sent to the parties shortly after the hearing.

Excluding the Respondent's representatives

2. At the start of the hearing, before we read anything else, the Claimant said he wanted to make an application. The application he wanted to make was to exclude Make UK, who are the representatives of the Respondent, from being the representatives of the Respondent. He had prepared a written application, but had not prior to the hearing provided a copy of it to the Respondent's representatives, who are joining this hearing by video (and he was aware that they were going to be joining this hearing by video).

3. I pointed out to the Claimant, before he got going on making his application orally, that, to the best of my knowledge, the Tribunal has no power to exclude a party from having the representative of their choice. I asked him where in the Rules of Procedure, or in any other relevant piece of legislation, he thought I got that power and he said he didn't know.

4. I nevertheless asked the Claimant to tell me about his application, so that I could properly understand it. He took me to a particular document.

5. Before I go further, I should say that there are issues to do with documents for this hearing in addition to the fact, already mentioned, that the Claimant's written application was not provided to the Respondent's representatives. The Claimant has provided an electronic file of documents; possibly multiple electronic files of documents. At any rate, I have an electronic file from him. He referred me to something which appears to be a bigger file, and we are going to have to sort that out in due course. It may well be that he has not provided copies of his electronic file(s) to the Respondent's representative, but that is probably not going to cause particular difficulties in practice, at least not insurmountable ones.

6. The Respondent has provided a file of documents. It was copied to the Claimant. For whatever reason, the Claimant is not content to use it. To cut a long story short, looking back to the written record of a previous preliminary hearing, heard by Employment Judge Beck on 24 May 2023, the Employment Judge, in paragraph 18 of her written record of that hearing, referred to a certain document. It appears under the paragraph describing the second claim: claim number 1303229/2022. (The Claimant has presented three claim forms).

7. Within the claim form for the second claim there is reference to "*Breach of health and safety conditions to protect personal health and safety during a verbal aggressive assault and afterwards*" and this is reflected in paragraph 18 of Employment Judge Beck's writeup of the hearing, which contains the following:

> *…In respect of the second claim, the claimant refers to complaints of age and sex discrimination, and a breach of health and safety legislation. He alleges sex and age discrimination in respect of an incident on the 23/2/22, when he states he was aggressively verbally abused twice by Miss D Derewenko, and his line manager Mr C Baskerville did not intervene. He states the lack of intervention was based on discrimination on the grounds of his age and sex. It is not clear what health and safety legislation is alleged to have been breached. Reference is made in a separate 1-page document (page 33 of the bundle) which the claimant advises today was submitted on the 6/5/22, to issues concerning rubbish, reach trucks being parked in the aisle so that orders could not be picked safely, and colleagues not turning pallets around quickly enough which resulted in him crawling on the floor to pick orders. …*

8. I do not have the bundle, page 33 of which is referred to in the above quoted passage. I in fact emailed Employment Judge Beck last night asking whether she still had a copy of it and she doesn't, so I have had to make do. It has since become clear that the document at that page 33 which the Judge was referring to is something I do have, at page 58 (electronic page 61) of the file of documents that was lodged by the Respondent's representatives for the present hearing.

9. The Claimant has told me today that Employment Judge Beck made a mistake when writing up the hearing. The Claimant says that, in fact, that document has nothing to do with any of his claims and that it is a document that was included in the bundle of documents the Respondent put before Employment Judge Beck; and that it should not have been put before her or before me.

10. The Claimant's application to prohibit the Respondent's representatives from representing the Respondent stems from an allegation that because – supposedly

– that document should not have been included, there has been some kind of breach of data protection legislation, and/or that there might be such a breach in the future. It is on the basis of the Claimant's fears of future data protection breaches that he says Make UK should be excluded as the Respondent's representatives.

11. I am refusing the Claimant's application. I have refused it on a number of bases, but principally these.

12. First, I have no power to exclude a party's representative from these proceedings. Subject to a requirement that non-legal representatives acting for profit have to be registered, in the Employment Tribunals, claimants and respondents are entitled to be represented by anyone. So far as concerns representation at hearings, this is explicitly set out in primary legislation: section 6(1)(c) of the Employment Tribunals Act 1996. I sometimes wish that things were a little stricter, as they are in the civil courts, but they are as I have just described them to be.

13. Secondly, the document on which the application is based was included in the file / bundle for the previous hearing and has been included in the bundle for this hearing on the basis that it was thought to be relevant, not for any improper reason. In any event, based on what the Claimant apparently told Employment Judge Beck at the May 2023 hearing, it is a relevant document, and it would have been wrong for the Respondent not to have included it.

14. Thirdly, including a document in a file of documents put before an Employment Tribunal does not breach data protection right because there is a legal proceedings exception within data protection legislation.

15. Fourthly, even if I thought the Respondent's representatives had breached data protection legislation by including the document and even if I had the power to prohibit the Respondent from having its chosen representatives, it would not be in accordance with the overriding objective to do so on the basis of the Claimant's fears about data protection breaches that have not happened and might never happen, but which might conceivably happen in the future.

Extension of time for presenting the responses

16. I am now making a decision on the Respondent's applications for extensions of time to present two of its responses, which was one of the things that this hearing was set up to deal with.

17. I shall start with some background.

18. The Claimant was employed by the Respondent and a predecessor from 2012 to 4 August 2022. He had TUPE-transferred to the respondent in 2019. There were two periods of early conciliation and he has presented three claim forms. He is claiming unfair dismissal; race, sex and age discrimination; possibly some kind of disability discrimination; and victimisation.

19. The claimant had a previous period of employment with the respondent from 2006 to 2011. He brought three claims about that employment, which were struck out

at a preliminary hearing in 2011 by Employment Judge Kelly. He alleges that criminals associated with the Respondent "*started a number of attempts to get* [him] *killed*" following that PH, and that there was "*leaking*" of a "*vital piece of information from the employment tribunal in Birmingham*" that was used to "*assist in those crimes*". He considers this to be relevant background to his present claims.

20. By way of further background, see the written records of the two previous preliminary hearings, of 23 January 2023 and 24 May 2023.

21. The first of the three claims with which we are presently concerned, 1303163/2022, was presented on 6 July 2022 following a period of ACAS early conciliation from 15 May to 20 June 2022. That claim was responded to on time and in accordance with the Rules.

22. There are no material differences between the three claims in terms of how the Respondent was named, what address was given for the Respondent, nor, so far as I can tell, in terms of how the claim forms were sent to the Respondent by the Tribunal: by post to the Respondent's head office in Cowley, Oxfordshire.

23. For reasons that are obscure to me, rather than putting all of his claims in the same claim form as would be normal (and, indeed, in accordance with the overriding objective), the Claimant decided to present a second claim form on 14 July 2022. That was claim number 1303229/2022. The Tribunal sent it to the Respondent just like the first claim form and the response was due on 16 August 2022. It was not responded to by that date. A response, accompanied by an application for an extension of time to present it, was filed on 29 September 2022.

24. That is the first of two applications for an extension of time to present a response that I am dealing with now.

25. I should perhaps mention that although the second claim arises out of different facts from the first claim, it relates to the same period of employment and also concerns events that took place in the first half of 2022. The first claim relates, amongst other things, to an application for a job, as, in part, does the second claim, but to a different job application.

26. The third claim is different from the first two claims and it is understandable that it was included in a separate claim form. Its claim number is 1307861/2022. It was presented to the tribunal on 22 September 2022. The response was due on 21 October 2022. The response was not in fact filed until 23 January 2023. However, on 15 November 2022, the Respondent's representatives had written to the Tribunal in response to the standard letter that had been sent out by the Tribunal earlier that same day saying that no response to the claim had been received. They explained that the Respondent's position was that it had never received the case papers and that was why no response had been received; and they asked for the case papers to be re-served, naming the individual for whose attention they should be addressed when they were re-served. That the Tribunal did not re-serve the case papers until January 2023 was not the Respondent's fault; the Respondent was late in responding to the claim, but responded very quickly to what it says was the first notification it received of the claim's existence.

Once the case papers were re-served, a response and application for an extension of time for presenting it quickly followed.

27. The third claim relates principally, but not exclusively, to the Claimant's dismissal on 4 August 2022. That had not, of course, happened at the time the first and second claims were presented. It does, though, relate to the same employment and it was inevitable – and manifestly appropriate – that the three claims should be consolidated. I am not entirely sure why, but the Claimant has resisted their consolidation. Nevertheless, they were duly consolidated, by an order of Employment Judge Gilroy KC, made at a preliminary hearing in January 2023.

28. Little else than consolidation happened at that January 2023 preliminary hearing. The next hearing was the one before Employment Judge Beck on 24 May 2023. She decided not to deal with the applications to extend time for presenting the response. I expect the reason she didn't was that at that stage the Respondent was running an argument that one of the claims – the second one, I think – should have been struck out because of an alleged failure to comply with section 18A of the Employment Tribunals Act in relation to early conciliation. (I came into this hearing somewhat baffled as to why that argument had ever been raised because the Claimant undoubtedly had gone through early conciliation. I expressed that view and the Respondent's representative was content to accept it without me needing formally to give a formal, reasoned decision). A strike out application could only be dealt with at a preliminary hearing in public, and Employment Judge Beck's hearing was a preliminary hearing for case management in private. I assume she thought it best for all of the Respondent's applications to be dealt with together at a single hearing, which is why the hearing today came about.

29. Today's hearing should have been in September 2023. It didn't take place then because it was postponed at the Respondent's request. Employment Judge Beck had decided that there should, or at least could, be witness evidence at the hearing and the Respondent had put in a statement from an individual – a Mrs Ward – who sadly has been suffering from breast cancer, was off work on the date of the hearing and apparently remains off work still and is too unwell to attend today. The Respondent has not asked for a further postponement and in fact it has decided it is content to rely just on her written evidence, but its stance was different in September 2023.

30. It appears that the Tribunal was unable to relist that hearing on any mutually convenient dates before today: 3 July 2024. We are, then, nearly two years on from the presentation of the first claim and in effect nothing, or almost nothing, has been achieved.

31. In resisting the Respondent's applications for an extension of time, the Claimant's focus has largely been on what has happened since it applied for extensions of time. He makes allegations to the effect that the Respondent has, through its representatives, deliberately been wasting time. He is, for example, particularly exercised about the postponement of the September 2023 hearing on the basis of the unavailability of a witness who the Respondent has now decided it does not need to call.

32. That is not my focus. My focus is, and I think should be, on what happened up to the applications being made, and on what the direct consequences of the Respondent's actions and omissions in terms of responding to the claims has been. Although the things the Claimant is concerned about are not irrelevant, if it would have been in accordance with the overriding objective to extend time when the applications were made, I don't think that in practice the way in which the Respondent has subsequently conducted the proceedings is going to make a great deal of difference to that. I am dealing with the Respondent's applications for extensions of time to present responses, not with an application by the Claimant to strike out Responses on the basis of unreasonable conduct. And if I were dealing with such an application by the Claimant, the most important factor would almost certainly be whether a fair final hearing remains possible; and, manifestly, it does.

33. Mr Willey for the Respondent has, rightly, referred me to the well-known case of **Kwik-Save Stores Ltd v Swain & Ors** [1997] ICR 49. I am really, though, just applying the overriding objective and deciding whether it would be more in accordance with fairness and justice to grant the applications for extensions or to refuse them. I have to take all the relevant circumstances into account.

34. One potentially important factor is the reason the responses were not presented on time. To an extent, Mrs Ward's witness statement addresses that. She has not attended the hearing to be cross-examined and that affects the weight I give her evidence. However, the reality, as the Claimant has pointed out in submissions, is that even if she had given oral evidence, she could at best provide little assistance to me because she cannot speak from her own knowledge, but only on the basis of what others have told her and what she has surmised. She was not, and doesn't purport to have been, the one individual responsible for dealing with all post that arrived at the Respondent's head office, or anything like that.

35. I suspect the truth is that nobody knows from their own knowledge precisely what happened with the case papers for the second and third claims. Almost certainly, there was simply an administrative error inside the Respondent of the kind that commonly happens within offices – post is mislaid, or misfiled, or goes to the wrong person, who doesn't know what to do with it and puts it out of sight and out of mind; things of that kind.

36. In relation to the second claim, the Respondent suggests that, perhaps, some individuals within the Respondent's head office were concerned that, in accordance with how the Claimant had named the Respondent in the claim form, the case papers were addressed not just to the Respondent [Unipart Group Limited] but to "*Unipart Group LTD / NHS Supply Chain contract*". The Claimant worked for what was referred to as the "NHS Supply Chain", but "NHS Supply Chain" is not a legal entity. His employer was the Respondent and, as I understand it, the Respondent was not the only company with employees working for the NHS Supply Chain. The Respondent says there may have been some misplaced concern that the case papers were not actually for the Respondent, but for some other legal entity.

37. Maybe that was the reason, or part of the reason, for why the case papers did not find their way within the Respondent's head office to the right people. If so: it isn't

a particularly good reason – it is not as if the Claimant gave the wrong name or address for the Respondent; the Respondent was named in the claim form for the first claim in exactly the same way, and that was properly processed by the Respondent and was responded to on time; it amounts to just the kind of administrative error that I have already identified as inherently the most likely explanation for what happened.

38. In short in relation to the second claim, such limited evidence as there is suggests the reason the claim form was not responded to on time was probably a mistake or mistakes by staff within the Respondent's head office for which no one other than the Respondent is to blame. In fairness to the Respondent, Mr Willey, acting on its behalf, is not suggesting otherwise before me. I do, though, note that if the Claimant had complied with the overriding objective and put all of the complaints he at the time had in a single claim form, there wouldn't have been the second claim to respond to, but only claim 1 (incorporating all of claim 2) and claim 3.

39. The Respondent's position in relation to the third claim case papers is that they were never received. I doubt that that is strictly accurate. What the Respondent is almost certainly saying in truth is that those in positions of responsibility within the Respondent who are giving instructions to the Respondent's representatives have no record, and can find no record, of the case papers having been received. Once again, the most likely explanation is one or more administrative errors of the kind that would not occur in a perfect world, but that are routine in this imperfect one.

40. I asked the Claimant to put forward a plausible suggestion for what happened other than administrative error. He suggested it was or might be deliberate and that an attempt was made to drag things out, in the hope that he [the Claimant] would make a mistake. (This appears to be what he thinks occurred in relation to the claims he brought in 2011 that were struck out).

41. That is a rather improbable suggestion and I know of no substantial evidence to support it. I note that the first claim was responded to properly and timeously, suggesting the Respondent has no general practice of not responding to claims. I also note that the Respondent's delay in responding to claims 2 and 3 was not so very great: 5 or 6 weeks' late in one case and just less than a month in the other. It seems most unlikely that the Respondent, through its representatives, would deliberately ignore some but not all claim forms, risking a rule 21 judgment being made, for the sake of dragging things out by just a single month. The Respondent is a large organisation with a substantial in-house HR function and with exterior lawyers on hand. Those responsible for dealing with Tribunal claims would know that not responding to them would only cause the Respondent problems.

42. The allegation that the Respondent was hoping that the Claimant might make a mistake, perhaps leading to his claims being struck out, is not evidentially based. Apart from anything else, I don't see how delaying putting in a response by any period of time, let alone by just a month or so, is going to make the Claimant more likely to make a mistake than he would otherwise be.

43. This is, then, the very common situation where a Respondent, through administrative oversight – in other words, for no good reason but not for a *bad* reason – failed to put in a response. Once it realised there were claims it hadn't

responded to, it acted quickly. It did not file a response to the third claim for several months only because the Tribunal did not get back to its representatives with a copy of the case papers for several months. Although there has been considerable delay since January 2023, that is largely not the Respondent's fault. I am not for a moment suggesting it is the Claimant's fault either, but one option that was open to the Claimant – an option I expect he would have been advised to take if he had professional legal advisers – was to consent to the Tribunal extending time.

44. I turn to the balance of prejudice. If I ask what prejudice has been caused to the Claimant that is attributable to the Respondent's delay in presenting responses – as distinct from prejudice caused by other things, such as mistakes and delays by the Tribunal, or the Respondent's application to strike out, or the adjournment of the September 2023 hearing – the answer is: nothing discernible of significance. Possibly the case has not progressed as fast as it would otherwise have done, but even that is far from certain; and even if it is the case that but for the late presentation of responses the proceedings would have progressed further than would otherwise, the effective cause of that is not the late presentation of the responses but other things, such as Tribunal delays.

45. The prejudice that would be caused to the Respondent were I not to extend time would be very considerable. It is true that if time were not extended, although rule 21 would apply, that rule is not a default judgment provision and the Claimant would not automatically win; default judgment as such does not exist in the Employment Tribunals. However, the extent to which the Respondent would in those circumstances be able to participate in the proceedings would be a matter for the discretion of the Employment Judge, albeit the Respondent could not properly be shut out completely. My practice in a case of this kind where rule 21 applies is to require the claimant to prove their case and to allow the respondent's representatives to cross-examine the claimant and any witnesses and make submissions, but not to call any witnesses of the respondent's own. Other Employment Judges are no doubt less generous than that; and no Employment Judge would permit a Respondent in relation to whom rule 21 applied to defend the claim against them as if they had a valid response in place.

46. In summary, if I were to refuse the Respondent's applications, it would be severely handicapped in its ability to defend claims 2 and 3. This could well mean that those claims ended up being decided on the basis of something other than their true merits. This is certainly not a case where I can look at the claim and response forms and immediately see that the Claimant has an overwhelmingly strong case and where there would be no prejudice to the Respondent because they would lose come what may. The balance of prejudice is decidedly tipped in the Respondent's favour.

47. Finally, if extensions of time were not granted in relation to claims 2 and 3, claim 1 would still be proceeding as normal. Although each of the claims contains separate complaints and although the Claimant's most serious allegations are probably those made in claim 3, which mainly relates to dismissal, there is some overlap between claim 1 and the other claims, in that claim 1 contains allegations to the effect that managers within the Respondent were ageist and that allegation is also being made in the other two claims. In that scenario, it would be well within the bounds of possibility that the Tribunal deciding claim 1, having heard evidence

from both sides, would decide that that allegation was not made out but for the Tribunal deciding claims 2 and 3 would make a different decision, simply because it had not heard significant parts of the Respondent's side of things. To my mind, that would be most unsatisfactory. In a case where a fair final hearing remains possible and where neither the claim nor the response is so weak that it is liable to be struck out or to be the subject of a deposit order on the basis of lack of prospects of success, the best chance the Tribunal has of doing justice is by making a decision at the end of a final hearing having heard all of the available evidence and not only part of it.

48. For all those reasons, I exercise my discretion and grant the extensions of time sought.

Employment Judge Camp

5th September 2024