EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108432/2022

Preliminary Hearing held remotely at Dundee on 19 April 2023

Employment Judge A Kemp

Mr E Okodugha	**Claimant** **Represented by:** **Ms L Campbell,** **Solicitor**
Next Level Security Services Ltd	**First respondent** **Represented by:** **Ms T Carling,** **Solicitor**
Group Employment Services Ltd	**Second respondent** **Represented by:** **Mr R Lyons,** **Lawyer**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal:

(i) reserves the issue of jurisdiction to the Final Hearing;

(ii) grants the application by the claimant to receive Further and Better Particulars of his Claim, or alternatively by allowing the same as an amendment to the Claim; and

(iii) refuses the application to strike out the Claim against the second respondent under Rule 37 of the Employment Tribunal Rules of Procedure.

REASONS

Introduction

1. This is a claim for what is alleged to be a constructive unfair dismissal under sections 95(1)(c) and 98 of the Employment Rights Act 1996, and for what was alleged as a breach of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the Regulations"). In the latter respect the claimant alleges in the Claim Form a lack of "sharing of information" as to pay and hours, and "lack of information concerning changes to working practice". He alleges that after the transfer of employment from the second respondent to the first respondent he was not offered hours, and that he resigned on 12 August 2022.

2. Both respondents dispute the claims. It is not disputed by any of the parties that the claimant was initially employed by the first respondent, and transferred to the second respondent on 1 April 2022 following what was a relevant transfer under the Regulations. Nor is it disputed that he was added to those doing so somewhat towards the end of the process, on or around 30 March 2022. No point on jurisdiction has been taken by the second respondent in its Response Form, but it is a matter to which I refer below.

3. The second respondent made an application for dismissal, which I take to be strike out under Rule 37, in an email dated 14 March 2023. The second respondent referred in doing so to the terms of its Response Form. That does not however specifically address any claim for breach of the Regulations, only the claim as to constructive unfair dismissal.

4. The claimant wrote to object to that application on 15 March 2023. The claimant in doing so referred to the fact that he had provided Further and Better Particulars, in which he refers to a breach of provisions as to information and consultation with him prior to the transfer by the second

respondent (although he also refers to an alleged similar lack of information and consultation by the first respondent).

5. The present hearing took place remotely by Cloud Video Platform. Reference was made during it to a Bundle of Documents helpfully provided by the second respondent. It had been arranged to address only the issue of strike out, but during the hearing an issue as to an amendment said to have been made by the claimant in the Further and Better Particulars was raised, and I also raised with parties an issue of jurisdiction in relation to the claim as against the second respondent.

Second respondent's application

6. Mr Lyons elaborated on his argument orally and the following is a basic summary. The large majority of the Claim Form is directed to the first respondent. The breach of the Regulations alleged of the second respondent was only as to information. There was a lack of detail given. The attempt to add a claim as to consultation is to add a claim under Regulation 13(6), separate to that under Regulation 13(2), which requires an amendment. He confirmed that he opposed that amendment, and in doing so referred to the cases of ***Selkent*** and ***Dedman,*** both of which are referred to below. He supported the taking of a point over jurisdiction on the issue of timebar, which was also a factor to be applied to the proposed amendment. The balance of prejudice favoured refusing the amendment, as the second respondent would have expense in responding to such matters at this stage. He referred to the measures letter dated 24 February 2022 in the Bundle, sent by the first respondent, but said that there was not much to consult over. That was clear from a comparison between the letter and the pleadings for the claimant. He was not aware of whether there had been election of employee representatives. There was a practical problem from the late change of mind by the claimant. The claim against the second respondent should be struck out, as it had no liability for constructive dismissal and it had understood that the claim against it was as to employee liability information, as to which no claim lay against the second respondent by the claimant himself.

Claimant's response

7. Ms Campbell objected to the application, and the following is a basic summary of her argument. She had taken over the case from previous agents in about October 2022, and the case was an unusual one with a zero hours contract which had not been committed to writing, but there had then been long service with full time hours. The Further and Better Particulars were not an amendment as they gave additional information to a claim that had been made in the Claim Form. There had been some information given to the claimant, and some consultation with him, by the second respondent before transfer but not on the effect on the hours he would be offered after the transfer. The claimant's position was that over the period of employment he had worked full time hours of around 35 hours per week or more, save for periods of annual leave or sickness. After the transfer he had not been offered such hours, and latterly had resigned as a constructive dismissal. She sought further time to consider the points over jurisdiction, both whether the claim might be time-barred, and if so whether it was not reasonably practicable to have presented the claim in time and that it was presented within a reasonable period of time thereafter.

First respondent's response

8. Ms Carling argued that the Claim should not be struck out as against the second respondent, and the following is again a basic summary of her argument. Only the second respondent could speak to the issues of what occurred prior to transfer including as to elections of representatives, and what information was given, and consultation held. The first respondent had sent a measures letter making its position clear. Once the transfer had taken place, the obligation as to information and consultation ceased, as the case of ***UCATT v Amicus*** makes clear. I understand that to be a reference to ***Amicus and Transport and General Workers' Union (TGWU) v (1) Union of Construction, Allied Trades and Technicians (UCATT) (2) Glasgow City Council (3) City Building (Glasgow) LLP [2009] IRLR 253.***

The law

9. A Tribunal is required when addressing such applications as the present to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

> "**2 Overriding objective**
>
> 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;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
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> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (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."

Strike out

10. Rule 37 provides for strike out of a claim as follows:

> "**37 Striking out**
>
> (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 prospects of success……."

11. The EAT has held that the striking out process requires a two-stage test in ***HM Prison Service v Dolby [2003] IRLR 694***, and later in ***Hassan v Tesco Stores Ltd UKEAT/0098/16***. The first stage involves a finding that

one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In ***Hassan*** Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit'.

The Regulations

12. The Regulations provide for a duty on the part of the transferor to inform representatives of the employees affected by a prospective transfer as to matters provided for in Regulation 13, which includes any measures that are envisaged will be taken by the transferee after transfer. That is partly achieved on the basis of employee liability information provided under Regulation 11 by the transferor to the transferee, with basic information on the current terms of employment and related matters of the transferring employees. Regulation 14 has provision for election of representatives where there is not a recognised trade union. Regulation 15 has provision for a claim to an Employment Tribunal, by employees where the claim relates to a failure to elect representatives, and by the employee representatives themselves for other matters generally, but also for employees for matters not falling within the category of issues for representatives, all basically summarising the statutory provisions. Regulation 15(8) provides that there may be liability on the part of the transferor, and Regulation 15(9) that that may be joint and several liability with the transferee. For the present claim the first respondent is the transferee, and the second respondent the transferor.

13. The Regulations implement in part the Acquired Rights Directive 2001/23/EC, which is retained law under the European Union (Withdrawal) Act 2018. The Regulations include matters that go beyond such implementation, including by the concept of a service provision change under Regulation 3(1)(b). In so far as there is implementation of an EC Directive, the Regulations require to be construed purposively.

Amendment

14. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. There is no Rule specifically to

address that, save in respect of additional respondents in Rule 34. Whether or not particulars amount to an amendment requiring permission from the Tribunal to be received falls within the Tribunal's general power to make case management orders set out in Rule 29 which commences as follows:

> "**29 Case management orders**
> The Tribunal may at any stage of the proceedings, on its own initiative or on application to make a case management order…."

15. Earlier iterations of the Tribunal Rules of Procedure contained a specific rule on amendment, and the changes brought into effect by the current Rules, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, require to be borne in mind when addressing earlier case law.

16. The nature of the exercise of discretion in amendment applications was discussed in the case of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201***. In that case the application to amend involved adding a new cause of action not pled in the original claim form. The claim originally was for unfair dismissal, that sought to be added by amendment was for trade union activities. The Tribunal granted the application but it was refused on appeal to the EAT. The EAT stated the following:

> "Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
> What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant;
> *(a) The nature of the amendment*
> Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the

existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, eg, in the case of unfair dismissal, s.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

17. In ***Harvey on Industrial Relations and Employment Law*** Division PI, paragraph 311, it is noted that distinctions may be drawn between firstly cases in which the amendment application provides further detail of fact in respect of a case already pleaded, secondly those cases where the facts essentially remain as pleaded but the remedy or legal provision relied upon is sought to be changed, often called a change of label, and thirdly those cases where there are both new issues of fact and of legal provision on which the remedy is sought, of which ***Selkent*** is an example.

18. The first two categories are noted as being those where amendment may more readily be allowed (although that depends on all the circumstances and there may be occasions where to allow amendment would not be

appropriate). The third category was noted to be more difficult for the applicant to succeed with, as the amendment seeks to introduce a new claim which, if it had been taken by a separate Claim Form, would or might have been outwith the jurisdiction of the Tribunal as out of time.

19. In ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204*** the Court of Appeal said this in relation to an amendment which arguably raises a new cause of action and therefore in the third category, suggesting that the Tribunal should

> " … focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

20. In order to determine whether the amendment amounts to a wholly new claim and in the third of the categories set out above it is necessary to examine the case as set out in the original Claim to see if it provides a 'causative link' with the proposed amendment (***Housing Corporation v Bryant [1999] ICR 123***). In that case the claimant made no reference in her original unfair dismissal claim to alleged victimisation, which was a claim she subsequently sought to make by way of amendment. The Court of Appeal rejected the amendment on the basis that the case as pleaded revealed no grounds for a claim of victimisation and it was not just and equitable to extend the time limit. It said that the proposed amendment

> “was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time”.

21. The Court of Appeal has commented that the extent of any new factual enquiry following an amendment application is one of the factors to take into account, in ***Evershed v New Star Asset Management Holdings Ltd [2010] EWCA Civ 870.*** If the new claim is sufficiently similar to that originally pled, that supports the granting of the amendment where the “thrust of the complaints in both is essentially the same”.

22. The onus is on the claimant to persuade the tribunal that it is just and equitable to extend time where a discrimination claim is otherwise outwith

the jurisdiction, and the exercise of discretion is the exception rather than the rule (***Robertson v Bexley Community Centre [2003] IRLR 434***), confirmed in ***Department of Constitutional Affairs v Jones [2008] IRLR 128***.

23. No single factor, such as the reason for delay, is determinative when considering whether or not to allow an amendment and a Tribunal should still go on to consider any other potentially relevant factors beyond those identified in ***Selkent***, such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, and ***Gillett v Bridge 86 Ltd UKEAT/0051/17***.

24. Whether to allow amendment is accordingly a multi-factorial approach considering all material circumstances. In ***Vaughan v Modality Partnership [2021] IRLR 97*** the EAT summarised matters and held that there was a balance of justice and hardship to be struck between the parties.

Jurisdiction

25. The Tribunal is a creature of statute and can only exercise the jurisdiction given to it. Although the second respondent did not plead any argument over time-bar, it appeared to me on reading the Bundle in preparation for the hearing that one might arise in relation to the claim against it. That is as the claim against it under Regulation 15 appeared to be for the period prior to transfer, which is that prior to 1 April 2022. Early Conciliation was commenced for the second respondent on 22 December 2022, a Certificate was issued on that date, and the present claim presented also on that date. Regulation 15(12) states that a complaint cannot be considered by a Tribunal unless presented, in the case of a complaint such as those in the present case, before the end of the period of three months beginning with the date the transfer is completed, unless it was not reasonably practicable to have done so and the claim is presented within a reasonable period. In Regulations 15(13) and 16A provision is made to extend time for early conciliation.

Discussion

Jurisdiction

26. It appears to me that I must address the issue of jurisdiction first of all, although as stated that had not been raised by the second respondent in its Response, or in its application for strike out. It is a matter on which the Tribunal must be satisfied. Ms Campbell had not had notice of the point, and it appeared to me to be in accordance with the overriding objective to allow her time to consider the position, and take instructions. The following comments are made subject to that opportunity.

27. The first issue is whether or not the claim, which she accepts is made as against the second respondent solely on the basis of an alleged breach of the Regulations prior to the date of transfer, was commenced outwith the primary period of three months provided for in Regulation 15(12). It appears to me that it was, in that Early Conciliation ought ordinarily to have commenced before 1 July 2022, and it was commenced and concluded on 21 December 2022. Ms Campbell will have an opportunity to make submissions on that if there is any dispute that it is outwith that primary period.

28. That is not however the end of the enquiry if that point is accepted. There are two supplementary questions, the first as to reasonable practicability and the second that the claim was commenced within a reasonable period of time thereafter, which may take the case out of the ordinary category. The test is of course the same as for some other claims, particularly unfair dismissal, on which a body of case law has built up. No point arises in that regard as against the second respondent for the alleged dismissal given the date of that and the commencement of early conciliation as against the first respondent. It is not clear whether there might be an issue as against the first claimant for the claims made against it under the Regulations, but they are liable to be the same, if so, as those involving the second respondent.

29. These questions involve matters of fact, on which Ms Campbell shall have the opportunity to take instructions and provide Further and Better Particulars of her client's position in that regard. Assuming that she does

so, the respondents should have then the opportunity to answer that. It appears to me that the matter should then be reserved for consideration at the Final Hearing, having regard to the authority of ***Galilee v Commissioner of Police of the Metropolis [2018] ICR 634*** unless either respondent seeks to have the issue addressed otherwise, in which event a further Preliminary Hearing may be convened, if that is considered appropriate. I direct the claimant to provide the Further and Better Particulars in that regard by 4pm on 5 May 2023, and the respondents to provide their Responses to the same by 4pm on 19 May 2023.

Amendment

30. It appears to me appropriate to address next the proposed amendment issue. It appeared to me helpful to start with the ***Selkent*** guidelines, as they have become known. I considered first of all the nature of the amendment. The Claim Form included a heading of "Breach of [the Regulations]". It referred to the lack of provision of information. It appeared to me that that must have involved a claim under Regulation 15, for not providing the information required by Regulation 13, as no claim lies in favour of a claimant under Regulation 12. I consider that it is clear from the Regulations that information is given to allow consultation to take place. The duty under Regulation 13 appears from its heading "Duty to inform and consult representatives." It is then made clear in Regulation 13(2) that the purpose of giving information is to enable consultation with representatives. It appears to me from that that there is a very strong causative link between the terms of the Claim Form and the Further and Better Particulars. I did not consider that the terms of the Claim Form should be read as restricted to Regulation 13(2) being breached, as there was no specification given to that extent, and the Claim Form did refer to a more general breach of the Regulations. I consider that in all the circumstances the Particulars give further detail of a claim that has been made in the Claim Form, in effect under Regulation 15 which in turn refers to the provisions of Regulation 13(2) and (6), albeit that it might well have been pled with greater specification. It is not at this stage clear whether the claimant also seeks to argue a breach of Regulation 14 as to the election of representatives to inform and consult, although for reasons I address below it appears to me that his position must be that

representatives were not elected (as otherwise he can have no claim himself).

31. I also take account of the fact that only the second respondent may be in a position to know what if any election of representatives took place, if it was not done why that was, and if it was what information was given and consultation took place. The claimant appears to have become involved in the transfer only on or around 30 March 2022. The second respondent will also be aware of what information it gave the claimant, and what consultation it held with him. If there were elected representatives in place by 30 March 2022 the claim appears to me to be one that must be pursued by those representatives and not the claimant himself, but if there were no representatives he may be able to pursue the claims himself.

32. I then took into account that there may be an issue of timebar, but that that is a question of fact on matters some at least of which are still to be clarified. It is not determinative in any event, as discussed in ***Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07***. Whilst Mr Lyons argued that as the claimant had had legal advice after the transfer that meant that it could not be reasonably practicable not to have commenced the claim as against the second respondent within the primary time limit, the position is not so simple as that in my opinion. The full circumstances are relevant, and having received legal advice is a factor, and may be a very strong (and in many cases decisive) factor - ***Dedman v British Building and Engineering Appliances Ltd*** **[1974] ICR 53.** ***Wall's Meat Co Ltd v Khan*** **[1979] ICR 52** and ***Marks & Spencer plc v Williams-Ryan [2005] IRLR 562*****.** But that is not always so. That is illustrated by ***Ebay (UK) Ltd v Buzzeo UKEAT/0159/13*** in which the EAT held that the tribunal had failed to consider with sufficient care a possible supervening cause of delay apart from negligence of the solicitor, illness on the part of the claimant, and whether it was this rather than negligent advice that had led to the primary time limit being missed. All the relevant facts in a particular case require to be considered in this context.

33. The manner and timing of the provision of particulars was not in my view a factor that went unduly against the claimant as the Further and Better Particulars were provided to the second respondent as I understand it in

February 2023, in good time before the Final Hearing which has been arranged for 6 – 8 June 2023.

34. I considered the issue of the balance of prejudice. I appreciate that researching matters and giving evidence involves additional time and expense for the second respondent, but it appears to me that that is likely to be limited, includes matters that may be known only to the second respondent, and is outweighed by the potential prejudice to the claimant. On the face of it he had a job which provided him with reasonably full hours before the transfer, and if his pleadings are held to be accurate, that ended after the transfer and led to what he claims was a constructive dismissal. The potential award against the second respondent for a breach of the Regulations, if there was one and that is within the jurisdiction of the Tribunal, is 13 weeks' pay. There is at least a prospect of that claim succeeding, although that should not be taken as an indication that it will. If there is hardship to the second respondent in attending an in person hearing there is the possibility of alleviating that to an extent as I address further below.

35. Having regard to all the circumstances I considered that it was in accordance with the overriding objective to allow the Particulars to be received as being further specification of a claim that had been pled, and if not that as an amendment to the existing Claim which it was appropriate to allow.

Strike out

36. The pleadings of the claimant did not fully address the claims being made under the Regulations. It was not specified by the claimant either in the Claim Form or Further and Better Particulars which Regulation was founded on, and at least fully in each case why that was. Nor did the second respondent address the issue of information fully in its Response Form, although that may have been as it assumed that there was only an employees' liability information claim pursued. That was not, however, an accurate assumption. No such claim lies to an employee, and the claim being made against the second respondent was it seems to me tolerably clear that it was one that was being pursued under Regulation 15, which requires a failure to comply with a duty under Regulations 13 or 14 or both.

I do accept that the Claim Form referred specifically to information, and not in terms to consultation, but as stated above the giving of information is not in a vacuum, and is for the purpose of consultation. The Claim Form has not addressed the issue of the election of representatives specifically, but if there were such representatives the claim lies only with them, and it must I consider follow from that that the claimant's position is that there were no such elected representatives. There are potential defences in Regulation 13(9) and (10), together with provisions in (11) that may be engaged, but those have not (at least yet) been pled by the second respondent.

37. None of the parties made mention in their pleadings of whether employee representatives had been elected, and so far as the claimant and first respondent are concerned they may not know. The second respondent does, however, and if there were employee representatives that may be an answer to the claim directed to it. As that has not been pled (again at least yet) as matters stand at this stage the claimant may therefore have the ability to pursue that claim himself.

38. The circumstances of the claimant's termination of employment are not agreed, but for these purposes I take the claimant's allegations at their highest, and *pro veritate*. He alleges that he was employed on a full-time basis or something akin to that. The second respondent's records for the last 12 weeks of employment prior to transfer show an average of about 25 hours per week, with the hours each week varying. The claimant alleges that the position prior to that is different, and that periods were affected by annual leave and sickness. The records provided are only for 12 weeks, and do not comprehensively contradict the claimant's position. There is no written contract of employment or particulars of employment for the claimant before me, and it appears likely that none currently exists, although there may have been one issued earlier. There is what I understand to be employee liability information provided by the second respondent to the first respondent for the claimant referring to his contract as being for zero hours, but on what basis that was given is not clear. The claimant appears to accept that at one stage he was on such a zero hours' contract, but argues that it became an implied term of contract that he would have full time hours. The precise terms of contract between the

claimant and second respondent, being the terms that transferred to the first respondent, are not therefore fully clear, and may well be disputed matters of fact.

39. What is also not clear to me is precisely what, if any, information was given to the claimant by the second respondent prior to transfer as to any measures to be taken by the first respondent as transferee. That is in the context that there is what has been referred to as a measures letter in the Bundle from the first respondent to the second respondent saying that they do not use zero hours contracts, and would offer terms on the basis of some form of agreed average, to summarise their position. It is not known whether something to that effect was said to the claimant or not. It is not known what effect any breach of the duty to inform and consult had, and that may be relevant as the Tribunal has a discretion under Regulation 16(3) on what if any remedy to award in the event that a breach of duty is held to have taken place.

40. There are therefore many unknown, and what may well be disputed, facts in this case that may bear upon the issues to be determined. The second respondent may well dispute what the claimant alleges, but at this stage that is not to the real point. There is nothing that I consider comes close to meeting the statutory test of no reasonable prospects of success for the claimant in establishing a breach of the statutory duty to provide information and then to consult under the Regulations. I leave to one side any issue as to election of representatives as there is no clear pleading of such a claim at present.

41. Separately I do not consider that it is in accordance with the overriding objective to strike out the claim against the second respondent. There is a claim pled in relation to breach of the Regulations, but it may also be that the claimant will seek to provide a second Further and Better Particulars of that claim, which may yet be allowed subject to any response from the respondents, such that it is not appropriate to strike out at this stage a claim which may yet have merit, to use the words in ***Hassan***.

42. I have therefore refused the application for strike out. For the avoidance of doubt, I should state that I do so solely in relation to the claim as to breach of the Regulation 15. The claim of constructive unfair dismissal is

separate. There can only be such a dismissal by the employer, if dismissal is established, and that was at the material time the first respondent. The second respondent cannot in my view "contribute" to that in law, as I understand Ms Campbell now accepts. The provisions as to employee liability information are as between transferor and transferee, such that the claimant has no direct right of claim in relation to any breach, if there was one, as I understand Ms Campbell also now accepts. Had the only claims been for constructive unfair dismissal or on the basis of Regulation 12 I would have granted the application by the second respondent. As I understand that those claims are not pursued against the second respondent, and the claim against the first respondent does not include one under Regulation 12, I do not consider that any further order is required.

43. All parties may wish to consider whether it would be of assistance to the Tribunal to have further particulars of their respective positions, going beyond the issue of jurisdiction, in light of the terms of this Judgment. They may also wish to consider whether a Statement of Agreed Facts can be concluded between them to reduce the need for oral evidence. The Final Hearing has been arranged to take place in person, and if that causes any particular hardship an application can either be made to have the hearing held on a hybrid basis, or remotely, on which parties can consider the terms of Presidential Guidance. That can then be considered by the Tribunal having regard to that Guidance and the overriding objective. Subject to the foregoing matters shall proceed towards the Final Hearing already fixed.

Employment Judge : A Kemp
Date of Judgment : 25 April 2023
Date sent to parties : 25 April 2023