EMPLOYMENT TRIBUNALS

Claimant: Mr A Murphy

Respondent: (1) Tart London Limited (in liquidation)

(2) Mr Adam Harrison
(3) Mr Jason Smith

Heard at: London South via CVP **On: 1 July 2021**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: in person
For the respondent: Mr French, Counsel

DECISION UNDER RULE 34

The claimant's application to join Mr Adam Harrison and Mr Jason Smith in respect of his Disability Discrimination claims succeeds.

The claimant's application to join Mr Jason Smith T/A 'That Boy Can Bake' fails

The claimant's application to lift or pierce the corporate veil of Tart London Limited fails

The claimant's application to join the first respondent's insurers fails

A Case Management Hearing by telephone will be listed

Reasons

<u>The issues, appearances and documents</u>

(1) This was an Open Preliminary Hearing to determine various issues of joinder as set out in the case management orders following a Hearing before EJ Nash on 3 March 2021.

(2) Those issues were agreed to be as follows:

(3) The claimant's application to join Mr Adam Harrison and Mr Jason Smith (directors of the first respondent) as respondents as follows:

a. Mr Harrison and Mr Smith be joined to the Equality Act claim as individual respondents, which will include consideration of whether the tribunal should consider the application which is made out of time. ('Issue 1')

b. Mr Harrison and Mr Smith be joined to the other claims on the basis that the corporate veil between them and the first respondent should be pierced. ('Issue 2')

c. Mr Jason Smith t/a That Boy Can Bake be joined to the claims on the basis that there was a TUPE transfer of the claimant's employment to him in August 2020. ('Issue 3')

d. Any application by the claimant to join the first respondent's insurers. ('Issue 4')

(4) The putative respondents appeared by Counsel, Mr French. The claimant was in person.

(5) At the outset of the Hearing, having regard to the claimant's asserted disability, the Tribunal asked if he need any adjustments on relation to the Tribunal process. The claimant said he didn't want to be drawn in to an argument, he didn't want to be baited, he didn't want to be talked over and to avoid making him become angry. The Tribunal said it would have due regard to the claimant's assertions.

(6) The Tribunal had received written submissions from both parties, an electronic bundle from the respondent (72 pages) and multiple electronic documents from the claimant in several tabs. The Tribunal was taken in particular to documents in tabs A, M and H. The respondent had produced and cited various authorities (which will be referred to below) and the claimant had also cited various authorities in his submissions, both written and oral. The Tribunal read the submissions before starting the Hearing including the previous submissions of the claimant at pages 64-79 in tab A.

(7) The ***Selkent Bus*** principles were explained to the claimant, a litigant in person, at the outset of the Hearing.

Relevant findings of fact

(8) The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered the documentation referred to and the submissions of the parties. Only findings of fact relevant to the issues before the Tribunal on the Preliminary Hearing, and those necessary for the Tribunal to determine, have been referred to in this decision. It has not been necessary, and neither would it be proportionate, to determine each and every fact in

dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings/conclusions below but that does not mean it was not considered if it was referenced to.

(9) The respondent is a limited company in creditors voluntary liquidation. When trading, it was a café and bakery business providing take away and eat in provision at 2 sites in Clapham and Dulwich. It employed approximately 23 staff across both sites.

(10) The putative named respondents Mr Adam Harrison and Mr Jason Smith are Directors of the Company.

(11) The claimant was employed by the respondent as a Kitchen assistant from 15 September 2019 until he was summarily dismissed on 15 October 2019. Whilst that was accepted as the effective date of termination by both parties for Statutory purposes, including Section 97 Employment Rights Act ('ERA'), the claimant asserted that for common law purposes, the respondent had repudiated his contract of employment as he had not been paid the correct amount of payment in lieu of notice on termination and the claimant had elected to affirm the contract.

(12) In the claimant's claim form presented on 18 February 2020, the claimant said his employment had ended on 29 November 2019.

(13) The claimant had approached ACAS for early conciliation on 5 December 2019 which concluded on 19 January 2020. The early conciliation process was initiated against the respondent only (Tart London Limited ('TLL')). The claim form named Mr Adam Harrison – chief Tart as the respondent but the respondent's address was given as TLL. There were no named respondents elsewhere in the claim form.

(14) The vetting team enquired of the claimant about the correct name of the respondent and this was confirmed by the claimant to be TLL. The claim was, accordingly, accepted against TLL only.

(15) The claims are for disability discrimination, wrongful dismissal, unauthorised deductions and holiday pay.

(16) On 1 August 2020, Mr Jason Smith established a business called 'That Boy Can Bake'. This is an unincorporated business.

Applicable law

(17) Rule 34 of the employment tribunals rules allows a Tribunal to add, remove or substitute a party.

(18) The ***Selkent Bus Co Ltd v Moore 1996 ICR 836*** principles provided guidance to a Tribunal to exercise its discretion when dealing with an application to amend a claim.

(19) The guidance provides for consideration of the nature of the amendment, the timing and manner of it and the applicability of time limits. The key question a Tribunal is asked to determine is where does the balance of injustice/prejudice lie if an application to amend is granted or refused. This is reflected in the presidential guidance on case management. This was recently confirmed by the EAT in ***Vaughan v Modality Partnership 2021 IRLR 97.***

(20) The Tribunal did not consider it proportionate or necessary to set out the entirety of the authorities elide upon by both parties in their written and oral submissions save to refer to some of key authorities. By way of emphasis, relied upon by one or both parties.

(21) The respondent relies on ***Cocking v Sandhurst (stationers) Limited 1974 ICR 650*** and ***Gillick v BP Chemicals 1993 IRLR 437*** in support of its resistance to the claimant's application on the basis that as there was no genuine mistake on the part of the claimant when he chose to bring a claim against the respondent only, the cases cited are authority for the proposition that the amendment should be refused.

(22) The clamant relied in particular on the case of ***Societe Generale v Geys 2012 UKSC 63*** to establish that he had elected to affirm his contract of employment in common law when he says the contract was repudiated without a correct payment of lieu in notice. The significance or relevance of that, he argued, was that there was a subsequent TUPE transfer under Regulation 3 of a part of the respondent's business to Mr Jason Smith t/a 'That Boy Can Bake' on 1 August 2020 on which date he was still employed.

(23) Both parties referred to ***Prest v Petrodel Resources Limited 2013 UKSC 34*** in respect of the issue about whether and when the corporate veil should be lifted or pierced.

Conclusions and analysis

Issue 1 – Mr Harrison and Mr Smith to be joined to the Equality Act claim

(24) The Tribunal considered that this was a significant amendment. The addition of two individual named respondents to the Disability Discrimination claims was to add the possibility of declaratory and financial relief against individuals. Their pre-existing awareness of the case in their capacity as Directors who were responsible for decision making for the respondent did not mitigate against the prospect of personal liability.

(25) The reasons for the application were essentially rooted in future viability of the respondent. Initially, the claimant had written to the Tribunal on 31 July 2020 seeking to have the Preliminary hearing scheduled for 9 September 2020 moved forward because he had discovered the respondent was likely to cease trading.

(26) The issue of their joinder was set out in the case management agenda document but was not decided at that Hearing.

(27) The application for joinder was formally made on 18 February 2021 consequent on the claimant's discovery that the respondent was in creditors voluntary liquidation.

(28) The reason for the joinder has been consistent. It is not because a mistake was made at the outset. It is not a change of heart or a change of mind. It is not because the claimant (now) feels he wants and is entitled to declaratory relief for discrimination against the individuals he holds responsible for discrimination. The reason is the change in circumstances of the respondent – its financial circumstances; or put differently that the claimant believes he will no longer have an effective remedy against the respondent.

(29) The Tribunal concludes that ***Cocking*** and ***Gillick*** are not authority for the asserted proposition that the only (and exclusive) basis upon which a Tribunal can/should exercise its discretion to add or substitute a party under Rule 34 is where there has been a (genuine) mistake on the part of the claimant. The Tribunal concluded that those authorities do not cut across the Tribunal's general and wide discretion to add a party under Rule 34 if it is in the interests of justice to do so and the well-established principles in ***Selkent Bus*** replicated in the presential guidance on case management to permit an amendment having regard to the balance of injustice. Paragraph 16.2 of the Presidential Guidance deals expressly, within the context of amendment, with the possibility of joinder of individuals in discrimination claims without any pre-qualification of an earlier mistake.

(30) It is right that ***Cocking*** and ***Gillick*** deal with cases on application to amend on the premise of whether or not there was a genuine mistake on the part of the claimant. The facts and context of those cases are however crucial. They are cases about (and involving claims about) the inter-relationship between parent and subsidiary companies where it is not uncommon for an employee to be mistaken about the true identity of his employer. They are not cases dealing with universal consideration of the joinder, removal or substitution of a party in every situation possible – including where there has been a change in circumstances or new facts which have come to light.

(31) In fact in ***Gillick***, it was stated expressly that a Tribunal should treat an application to amend as a question of discretion *having regard to all the circumstances*. Further, it was said (with the Tribunal's emphasis added):

(32) "*The approach set out in Cocking is not limited to cases in which the original and the new respondents are related as principal and subsidiary, or in some similar way. The presence or absence of a connection between the respondents is relevant, if at all, as a matter to be taken into account by the Tribunal in the exercise of its discretion, rather than as a limitation on the circumstances in which the discretion can be exercised."*

(33) Many employment claims in the workplace have an inherent element of vicarious liability – where a corporate employer is responsible for the asserted

wrongdoing by its employees. Even in Unfair Dismissal cases, for example, it is the individual investigating, dismissing or appeal officers whose decisions bind the employer and for whom the employer assumes responsibility.

(34) In Equality Act claims however that position is taken one step further, expressly, as S.110 Equality Act 2010 permits claims to be made directly against individuals personally for alleged discrimination. It is likely that there is a public policy reason behind that.

(35) In this case, the claimant had not attempted to widen his claim and bring in scope the named individuals from inception. There is proportionality in that with regard to the overriding objective. His reason to do so now is because he considers he will be about an effective remedy if he is successful. The purported named individuals are the alleged decision makers in relation to his employment and its termination. Although the formal application was made in February 2021, the issue was raised on 31 July 2020 by the claimant when he referred to the proposed closure of the respondent's business on social media and he wrote to the Tribunal. The overriding objective should apply equally at this stage where the reason to join named individuals in an Equality Act claim is consistent with a Tribunal's requirement to deal with cases fairly and justly with regard to the prospect of remedy if the claimant was to succeed in his claim.

(36) Having regard to ***Gillick***, in a case where the Tribunal is asked to join a respondent to a claim otherwise issued in time against a respondent *"there is no time limit which applies as such when it is proposed to add a new or substitute respondent to an application which has already been lodged timeously"*. The question of whether to allow an amendment is one which requires the exercise of discretion in the whole circumstances of the case.

(37) In relation to this issue, the Tribunal concludes that the balance of injustice lies in favour of granting the amendment.

<u>Issue 2 – Lifting or piercing the corporate veil</u>

(38) This issue was all but abandoned by the claimant at the Hearing. The claimant referred in submissions to this being a remedy of last resort and that he did not wish to spend much time on this issue.

(39) Notwithstanding the somewhat diluted approach to this issue at the Hearing, the Tribunal having regard to ***Prest*** concluded that this was not a case of either concealment or evasion. There was no concealing of the true identity of the 'real' employer. The corporate vehicle of a limited company (Tart London Limited), in this case, was at all times the true employer of the claimant.

(40) Neither did the Tribunal conclude there was any evasion. This was not a case where the respondent company was interposed to defeat a legal right to claim against the putative individual respondents – there was no existing legal liability of the putative respondents. It was said in ***Prest*** (with emphasis added):

(41) *"It is not an abuse to cause a legal liability to be incurred by the Company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's. On the contrary, <u>that is what incorporation is all about</u>"*

(42) The claims were issued against the respondent. Nothing was alleged in the claim form about the *real* structure. It was accepted and understood to be a company with limited liability with 2 Directors. Nothing was asserted regarding the employment of the other 22 employees. The Tribunal concluded that the genesis of this issue was solely in relation to the financial demise of the company. That however was an assertion the wrong way round. It was only being asserted to look behind the corporate veil because the Company's financial situation had become precarious not because the reality of the legal personality of the employer was different.

<u>Issue 3 – Jason Smith T/A That Boy Can Bake and TUPE 1 August 2020</u>

(43) The reason the claimant was seeking to rely on the ***Geys*** case was to establish that he had not accepted the respondent's repudiation of his contract of employment at common law when, on summary dismissal on 15 October 2019, he had not received the correct payment in lieu of notice. The claimant had said in his letter to the respondent on 16 October 2019 (H-2) that " *the contract continues to run on until such time as the company has paid me this payment in lieu of notice and has completed the legal formalities"*

(44) The same point was made in the claimant's letter of 2 December 2019, again by reference to monies owed for notice pay (H-17). This was notwithstanding that there was no PILON clause in his contract.

(45) It appeared that the claimant was conflating the right to receive notice of termination with damages for breach of contract. He was asserting he had not received notice of termination or a correct payment in lieu.

(46) Whether or not there was any force in the claimant's argument that at common law, he had affirmed the contract, it was not necessary for the Tribunal to resolve this. This was because by pursuing a claim against the respondent for wrongful dismissal in his claim form presented on 18 February 2020, asserting in his claim form that he had been dismissed on 29 November 2019 (which was clearly not the summary dismissal date) and further asserting in his narrative that pursuant to ***Geys***, his dismissal was effective on either 29 November or 13 December 2019 and further asserting that he was kept on payroll and his contract subsisted until 13 December 2019, his conduct, without any other qualification, or reservation of rights as he had done in correspondence, was inconsistent with the actions of a person continuing to affirm the contract at that point.

(47) In addition, the sole purpose of the claimant's argument was to establish he was employed by the respondent at the time of the alleged transfer to Jason Smith on 1 August 2020. The Tribunal concluded that the claimant's summary

dismissal on 15 October 2020 remained effective for the purpose of a Statutory claim under the TUPE Regulations 2006. Notwithstanding any argument on qualifying service, it was not being asserted that the dismissal was because of a relevant transfer and even if it was, such a dismissal would not be a nullity.

(48) Alternatively, the evidence before the Tribunal was wholly insufficient to establish that there had been a relevant transfer within Regulation 3 (1) of TUPE. The claimant's assertion was no more than an argument that the product offering and marketing collateral was comparable between the respondent and Mr Jason Smith t/a That Boy Can Bake. There was no analysis of what happened to the assets or the other employees (or if they were not taken on, why that was)in support of an argument that there was a transfer of an economic entity which retained its identity, whether in part or in whole. ***Spijkers v Gebroeders Benedik Abattoir 1986 ECR 1119, Suzen v Zehnacker Gebaeudereinigung GmBH 1997 IRLR 255, ECM Ltd v Cox 1999 IRLR 559.*** The claimant also asserted on his own case that the purported transferee business, was unlike the respondent, uniquely on line. The respondent's business is an eat in and take away including the sale of coffee.

Issue 4 – joinder of the respondent's insurers

(49) At the very outset of the preliminary Hearing, the claimant said he had nothing to say on the proposed joinder of the respondent's insurer. In submissions in support of his application, the claimant said nothing more regarding the proposed joinder of the first respondent's insurer. The Tribunal was not taken to any document in respect of any applicable policy or to the identity of the applicable insurer or why this was not possible. The application, in the Tribunal's conclusion, was no longer advanced or pursued and was thus dismissed.

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Employment Judge Khalil
6 July 2021