



EMPLOYMENT TRIBUNALS

Claimant: Mr D Bailey

Respondent: (1) ISS Facility Services Ltd
(2) Wilson James Ltd
(3) Mitie Security Ltd
(4) ABM Facility Services

Heard at: London Central (CVP)

On: 6 May 2022

Before: Employment Judge Leonard-Johnston

Representation

Claimant: In person
First Respondent: Ms. N Siddall-Collier
Second, Third,
Fourth Respondents: Not in attendance

JUDGMENT

The tribunal has no jurisdiction to hear this claim on the grounds of the *res judicata* principle and it is dismissed.

REASONS

1. Judgement having been given orally and the respondent having requested written reasons at the hearing on 6 May 2022, the following reasons are provided.

The current claim

2. The claim filed on 9 February 2022 is an application for arrears of pay and employer pension contribution. It is made against the claimant's former employer ISS Facility Services Ltd, who transferred the claimant's employment contract to ABM Facility Services in 2021. The Claimant remains employed by ABM Facility Services Ltd.
3. The claim is based on the claimant's assertion that the respondents have not

complied with Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) in the various transfers of his employment contract between the respondents. The claim can be summarised as follows:

- a. That the respondents have not paid sufficient pension contributions into the claimant's pension scheme, as he says he was entitled to 14% employer contribution and is being paid 4%.
 - b. That the claimant is entitled to work 60 hours a week but the respondents are in breach of contract by only offering him 48 hours per week.
4. The claimant also says that expenses to cover shoe wear and uniform dry cleaning were part of his original contract, but this was not in his claim form and the claimant did not seek leave to amend his claim.

Strike out application

5. When the first respondent filed its ET3 responding to the current claim it made an application for a strike out on two grounds. First, on the basis that the proper respondent to this claim is not the first respondent, but the claimant's current employer, the fourth respondent. The first respondent's case is that the claimant's employment was transferred by virtue of the TUPE Regulations 2006 in November 2021 to the fourth respondent and that accordingly the liabilities under the employment contract transferred to the fourth respondent. Second, that the first respondent had already been subject of the same cause of action under a previous claim brought by the claimant against the first respondent in 2016, namely case 2206485/2016 ("the 2016 claim"). The application for strike out was renewed in correspondence.
6. At the hearing I explained that the question of whether this claim should be dismissed on the grounds of *res judicata* principle is better categorised as a jurisdictional point rather than an application for a strike out under Rule 37 of the Employment Tribunals Rules of Procedure 2013 (as amended). I also explained that if I find against the claimant on the jurisdiction point, it would not be necessary for me to determine who the proper respondent is. The first respondent did not object.
7. The second, third and fourth respondents did not file a response nor attend the hearing. Hereinafter I refer to the first respondent as the respondent.

The previous claims

8. The 2016 claim was heard before EJ Hodgson on 3 March 2017 and I had the reasons before me dated 8 June 2017. In 2016 the claimant was claiming a general breach of TUPE regulations, in particular he was disputing employer pension contributions of 4% rather than the 14% he says he was entitled to, and an alleged reduction of working hours from 60 hours to 48 hours.
9. In respect of the claim for unpaid wages relating to the hours of work, it was struck out on the basis that there was no arguable case for unlawful deduction of wages.
10. In relation to the pension part of the claim, EJ Hodgson stated the following at paragraph 24:

"There is no obligation on the face of it to honour that 14% payment. Be that as it may, I do not need to decide that point, the difficulty is the claimant has already, on his own admission, litigated about this and failed. He is seeking to litigate about it again, that is an abuse of process, that is what is technically known as res judicata. He is not permitted to litigate again. It seems inevitable that if the matter has to be decided, that the case would be struck out as an abuse of process. I am not going to

strike out as an abuse of process today because I have not got all of the relevant documents before me; however, I have sufficient before me, on the basis of the statement of the position from the respondent, and the agreed position as accepted by the claimant, to say that there is no reasonable prospect of success in the pension claim. If only for the fact that there is no defence advanced to the abuse of process allegation: that is sufficient to say there is no reasonable prospect of success.”

11. In addition to the 2016 claim, the Respondent’s representative, having been at the hearing before EJ Hogson, submitted that prior to the 2016 claim there were two previous claims arising out of the same contract of employment. One against the second and one against the third respondent. Whilst I had no evidence of these previous claims before me, it is consistent with EJ Hodgson’s judgment that there was at least one claim relating to the same set of factual circumstances prior to the 2016 claim.

Claimant’s submissions

12. As the claimant is a litigant in person, I explained the principles of *res judicata* and cause of action estoppel to him and pointed him towards paragraph 24 of EJ Hodson’s judgment in particular. I asked him to explain why, having been on notice from at least 2017 that attempting to re-open old judgments is an abuse of the Tribunal’s process, that was not the case here.
13. The Claimant’s case is that this is an entirely new claim. He asserts a breach of the TUPE regulations and submitted that this claim is not a re-litigation of the previous claim because what he is now seeking is a declaration that his contract is void because of the TUPE regulations. The claimant pointed toward paragraph one of the 2017 judgment as evidence that TUPE had not formed part of his claim. The relevant sentence formed part of the summary of the claim, and is as follows: *“He also refers, generally, to TUPE breach of employment contract.”* The claimant asserts that this meant that the Tribunal thought his claim was only a general complaint about TUPE and not a specific allegation of a breach. The Claimant said that despite the reference in paragraph one the Tribunal did not understand that his claim was on the grounds of non-compliance with the TUPE regulations. However, he admitted that after the 2017 decision he did not request a reconsideration and did not appeal.

Respondent’s submission

14. The respondent submits that when you read the entire judgment it is very obvious that TUPE was being considered throughout the entire decision. The claimant was asked to provide original contract, did provide it, and it was reviewed as part of the hearing (see paragraphs 8,9 and 20). The respondent submits that a decision had clearly been made in respect of that contract. . At paragraphs 22 and 23 the Tribunal found that the claimant was misreading his contract in respect of the assertion of an entitlement to 60 hours per week and that there was no arguable case of unlawful deduction of wages.
15. In addition, the Respondent submits that the remedy being sought by the claimant is not available under the TUPE regulations. TUPE regulations allow claims to be brought in respect of other rights, which is what happened in the 2016 claim. The Respondent also submits that the attempt to reframe the current claim as specific to TUPE, and as a claim for a declaration rather than for financial remedy is inconsistent with the claim form and has only been raised at the hearing.

The Law

16. Where a cause of action or issue has already come before a court or tribunal and has been decided, a party who seeks to reopen or raise the same issue in subsequent proceedings before a different court or tribunal is barred from doing so because of the '*res judicata*' principle, in particular what is known as cause of action estoppel.
17. The *res judicata* doctrine also captures the rule from *Henderson v Henderson* 1843 3 Hare 100, ChD which prevents a party from raising a cause of action or issue that could and should have been dealt with in earlier proceedings to which they were also party. The leading case summarising the relevant legal principles is *Virgin Atlantic Airways Ltd v Zodia Seats UK Ltd (formerly known as Contour Aerospace Ltd)* [2014] AC 160, SC.
18. The claim does not need to be identical in order for it to fall within the cause of action estoppel so long as the causes of actions are materially the same (see *British Association for Shooting and Conservation v Cokayne* [2008] I.C.R. 185).

Conclusions

19. I do not accept that this claim is entirely different from the 2016 claim on the basis that this is now a claim for a declaration that his contract is void under the TUPE regulations. That is inconsistent with the claim form. I find that the claimant's attempt to reframe the claim is disingenuous. I accept the respondent's submission that no such remedy is available.
20. The claimant's key disagreement with his current and former employers is that his original employment contract entitled him to longer working hours and more employer pension contributions than he is currently receiving, and that this isn't permitted under the TUPE regulations. This is the basis of the current grounds of claim, and it is materially the same as the 2016 claim. I find that this is a classic case of cause of action estoppel. This claim is clearly raising the same cause of action as the 2016 claim, which in itself was a re-litigation of at least one, possibly two, cases against his former employers relating to disagreements about his employment contract. There is no new issue here or material factor that could not reasonably have been argued previously. The claimant did not appeal the previous decision. Accordingly, I find that the principle of *res judicata* prevents the Tribunal from hearing this claim.
21. In addition, the claimant was on notice from the last hearing that relitigating matters is not permitted. I've considered the public interest in the finality and certainty of legal proceedings, the private interests of the claimant and respondents, and in all the circumstances, I find the claimant is abusing the Employment Tribunal process by repeating these claims.
22. For the reasons above I find that the tribunal has no jurisdiction to hear the claim and it is dismissed.

Employment Judge **Leonard-Johnston**

Date 19 May 2022

JUDGMENT SENT TO THE PARTIES ON

19/05/2022.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.