Case No: 2201708/2022

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: 23 August 2022**

Before: **Employment Judge Isaacson**

Representation
Claimant: In person
First Respondent: Ms. N Siddall-Collier
Second Respondent: Mr P Chadwick, consultant
Third Respondent: Not in attendance
Fourth Respondent: Mr A O'Neil, solicitor

JUDGMENT

1. The Tribunal has no jurisdiction to hear the claimant's claims against the first, second and third respondents on the basis that any liability under the claimant's contract of employment transferred to the fourth respondent following a TUPE transfer from the third respondent to the fourth respondent on 1 November 2021. All claims against the first, second and third respondents are dismissed.

2. The Tribunal has no jurisdiction to hear the claimant's claims against the respondents for arrears of pay relating to hours of works or employer pension contributions on the grounds of the *res judicata* principle and are dismissed.

3. The claimant's claims for the loss of work shoes and dry-cleaning vouchers are allowed to proceed. A Judge sitting alone will consider at an open preliminary hearing on 1 November 2022 whether the remaining claims should be struck out on the basis that they have no reasonable prospects of success or on the basis the claims are an abuse of the process. The Judge will also consider any costs applications and any further case management.

REASONS

1. Judgement having been given orally and the first respondent having requested written reasons at the hearing on 23 August 2022, the following reasons are provided.

Background – previous claims

First claim

2. The claimant, Mr D Bailey, was employed firstly by Group 4 Securitas Limited on 15 July 1996 and was then transferred to Wilson James Limited in 2004.

3. The claimant presented a claim 3200958/05 on 3 May 2005 against Wilson James LTD complaining an unlawful deduction from wages. I will refer to this claim as the first claim. His main complaint was that he took authorised holiday at the end of 2004 and deductions of £1095 were made from his pay on 31 January and 28 February 2005. The claimant was successful. The Tribunal concluded that the respondent in that case had not done enough to satisfy the Tribunal that Mr Bailey contracted to new terms and conditions different to those that operated before the transfer. The claimant relies on this part of the Judgment that he is still entitled to his original terms and conditions today. The claimant told the Tribunal that following the hearing he was paid or given credit for the £1095 deduction relating to holiday pay but that there was no written settlement agreement.

Second claim

4. The claimant informed this Tribunal that he had brought a civil claim against the second respondent for approximately 2 to 3 thousand pounds for pension contributions not paid between 2004 and 2006. The claimant was vague about the claim and did not produce any documents relating to it, despite the parties asking for it in advance, but confirmed that the claim had been unsuccessful. The claimant pointed the Tribunal to a letter confirming the setting up of a stakeholder pension in 2006. I refer to this pension civil claim as the second claim.

5. The claimant was transferred to Mitie Security LTD (Mitie), the third respondent in 2009 and then to ISS Facility Services LTD (ISS), the first respondent, in 2015.

Third claim

6. The claimant presented a claim in the Tribunal in July 2016 against the first respondent. Case number 2206485/2016 is referred to as the third claim. A copy of the written reasons provided by EJ Hodgson commences at p163. The written reasons confirm that the parties agreed that some sick pay had not been paid and Judgment was entered for the admitted amount.

7. The other claims before that Tribunal were recorded as claims for unlawful deduction from wages with also a reference generally to TUPE breach of employment contract. EJ Hodgson specifically recorded there were no claims pursuant to section 11 Employment Rights Act 1996 or regulation 30 of the Working Time Regulations 1998.

8. The written reasons refer to a document headed Pay and Conditions of Employment from Group 4 which was incomplete dated 1 July 2001. EJ Hodgson quoted from clauses B2 relating to hours of work and C2a of that document relating to holiday pay and that the claimant relied on the clauses to say he had a right to work 60 hours each week. EJ Hodgson referred to clause B1 which referred to a basic working week of 40 hours. EJ Hodgson concluded that the claimant's contention that the basic normal working hours were 60 was erroneous. He concluded, following an application by the respondent to strike out the claims on the basis that there were no reasonable prospects of success, that there was no arguable case of unlawful deduction from wages and that the claimant "was paid for the work that he did".

9. The written reasons also refer to a G4 document regarding a pension scheme and further correspondence which the claimant relied on to claim he was entitled to an employer pension contribution of 14%.

10. In relation to the claimant's pension claim EJ Hodgson dismissed the claim on the basis that the claim had no reasonable prospect of success. He concluded on the face of the documents he had seen there was no obligation to honour the 14% employer pension contribution. In addition the claimant had admitted that he had already litigated about this and failed. EJ Hodgson did not strike out on the basis the claimant had already litigated this point as an abuse of the process because the claimant had not provided all the relevant documents. However he felt he had sufficient evidence before him to conclude there was 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. The claimant's employment was transferred to ABM Facility Services LTD (ABM) the fourth respondent in November 2021. The Claimant remains employed by ABM Facility Services Ltd

<u>Fourth claim</u>

12. The claimant filed on 9 February 2022 an application for arrears of pay and employer pension contribution, case number 2200562/2022, the fourth claim. It was made against the claimant's former employers, the same four respondents named in these proceedings.

13. The claim is summarised in EJ Leonard- Johnston's Judgment and Reasons sent to the parties on 19 May 2022:

    "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.*

    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."

14. EJ Leonard-Johnston was considering an application to strike out by the respondents. She explained to the claimant that she was considering whether the claim should be dismissed on the grounds of res judicata principle which is a jurisdictional point. Having considered submissions from the parties and having quoted at length from EJ Hodgson's written reasons she concluded:

"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."*

<u>Fifth claim</u>

15. On 6 April 2022 the claimant presented a further claim case number 2201708/2022, the fifth claim. On the 24 June 2022 EJ Leonard- Johnston sent a notice to the parties that on initial consideration of the claim it was her view that the claim had no reasonable prospects of success as the same issues had already been litigated in cases 2200562/2021 and 2206485/2016 and therefore appear to be barred or are an abuse of the process and have raised no new issues and are insufficiently pleaded to have reasonable prospects of success. In addition, the claim appeared to be presented whilst claim 2200562/2021 was being determined in an attempt to add new respondents although the respondents are the same as in case 2200562/2021.

16. On 10 July 2021 the claimant wrote a letter to the Tribunal with his response to EJ Leonard- Johnston's initial consideration order:

"Dear Judge Leonard-Johnston,

With regards to the Order dated 24 June 2022, I provide my response below:

I plead that my case should proceed under the continuing wrong doctrine. The continuing wrong started under TUPE in 2015 when I transferred to ISS Facilities. This is why ISS is linked to my case against my current employer ABM. I was then transferred to ABM Facility on 1 November in 2021 where the wrong has continued.

My claim is that my contract has been unilaterally altered by ABM to my detriment. Equally my contract was unilaterally altered by ISS to my detriment, and this was the case with both Mitie and Wilson James. These employers are linked to this case because they have all failed to honour my original contract which started with Group 4 in 1996.

It has been impossible to get my case heard in full as the Respondents have sought to bar any submissions which I have tried to make in person at the Hearing and therefore although I still continue to be wronged the utilisation of the Res Judicata to prevent me from seeking redress for the wrongs has again put me at a detriment. I have a right to be treated fairly in my contract of employment and to raise my complaint without fear of being seen as attempting to abuse the judicial process.

I request that the tribunal grants that my case be heard in full.

Yours Faithfully,

Devon Bailey"

Open Preliminary Hearing (OPH)

17. The purpose of the OPH before me is to decide whether the claimant's fifth claim ought to proceed. Contained within the bundle provided by the parties was, as well as the pleadings, a clarification of the claimant's claim at p21, a schedule of loss and a statement from the claimant.

Claimant's submissions and clarification of his fifth claim

18. Sometime was spent going through the claimant's previous claims and to establish what civil claim he had made regarding pension. The Claimant raised for the first time that he was alleging that the fourth respondent had reduced his holiday entitlement from 28 days to 20 days and made a reference to sick pay. These new allegations did not appear to have been raised previously in the claim form or further clarification of the claims. I concluded they were not part of the claimant's fifth claim.

19. The claimant clarified that his settlement with the second respondent referred to in his email at p24 was not a separate settlement agreement but that he did receive or received credit for £1095 ordered in case 2206485/2016 the third claim.

20. The claimant referred to p105 of the bundle as evidence that he was entitled to contractual hours of 60 hrs (Group 4 T&C). He said this was evidence of the hours which should have transferred from the second to the third respondent in 2009 and should remain his hours today.

21. The claimant argued that there was a continuing wrong doctrine so that each time he was not offered 60 hours was a new wrong he could pursue. He could not explain the doctrine further and it appears to be an American doctrine that he had found on the internet.

22. No further arguments were raised by the claimant when I repeatedly asked him why I should allow his claims for hours of work and pension contributions to proceed when they had been clearly litigated before and there were two judgments before the Tribunal and possibly a third civil judgment. The claimant's email to the Tribunal dated 10 July 2022 quoted above argues that his contractual right to 60 hours and 14% pension contributions cannot be unilaterally altered by the respondents. He argues that he was barred from making submissions and therefore continues to be wronged.

23. In relation to his claim for work shoes he explained that he is claiming that he should have been bought a new pair of work shoes every year worth approximately £40 a pair. He received new shoes each year from G4 and Wilson James LTD. He did not receive work shoes from Mitie or ISS or ABM. He claims the loss of work shoes from the transfer in March 2009 from the second respondent to the third respondent.

24. The claim for dry cleaning vouchers also applies from March 2009 and is a claim for the cost of monthly dry cleaning work clothes.

First respondent's submission

25. The first respondent had assisted the Tribunal at both previous hearings in 2017 and 2022. The first respondent argues that the claimant's claims for 60 hours of work and pension contributions have already been litigated and cannot be litigated again. The claimant is behaving unreasonably and vexatiously in attempting to pursue the alleged preservation of his original contract and pension contributions having had the principles of res judicata explained to him by two employment Judges. The claimant was ordered to provide any documents relating to his claims in 2017 and today has not produced any new documents. All the material was before EJ Hodgson when he made his decision in 2017.

26. In any event the first respondent is not the claimant's current employer and any liability for the claimant's claims passed to the fourth respondent under a TUPE transfer in November 2021.

27. The claimant cannot make a claim for failure to notify Employee Liability Information. This claim is only available to the transferee.

Second respondent's submission

28. The second respondent argued that there is no claim relating to shoes and dry-cleaning vouchers against the second respondent. The 2005 judgment dealt with holiday pay. Any liability for hours of work and pension contributions passed to the fourth respondent in November 2021. In any event both claims have already been litigated and cannot be litigated again.

Fourth respondent's submission

29. The fourth respondent echoed the comments made by the first and second respondent's representatives regarding the claims for 60 hours and pension contributions of 14%. The claimant has produced no new evidence since the previous hearings in 2017 and earlier in 2022. The claimant has raised the same arguments time and time again. The fourth respondent argued that the claim was vexatious and the claimant had been warned if he pursued the claim they would be seeking costs.

30. The fourth respondent argued that when you read the entire judgment of EJ Hodgson it was obvious that TUPE was being considered throughout the entire decision. 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.

31. The claimant's pension claim had already been litigated but in any event he was wrong to argue that under the TUPE regulations or Pension Act he was entitled to retain employer contributions of 14%.

32. Any claim for failure to provide the correct employee information was out of time and any claim should, in any event, be brought by the transferee and the claimant cannot piggyback on such a claim.

33. The fourth respondent argued that the claimant's claims for work shoes and dry-cleaning vouchers are an abuse of the process under the principle set out in Henderson v Henderson that a claimant should bring all claims in one go when it is proper to do so. The claimant had an opportunity to amend his claim in May 2022 and failed to do so. Any claim should have been brought when previous proceedings were presented in 2016. It is arguable that by his actions the claimant has affirmed any breach that occurred back in 2009.

34. It was alleged that the claimant continued to not tell the Tribunal all the correct information regarding his previous claims. The claimant is on notice that the fourth respondent will apply for costs.

35. Under TUPE the fourth respondent steps into the shoes of the previous employer and benefits from the previous judgments as well as taking on any liabilities.

The Law

36. At the hearing there was little discussion about the law and none of the respondents' representatives referred to any new cases. At the beginning of the hearing I read out the summary of the law provided by EJ Leonard- Johnston in her Judgment and repeat it here. None of the parties disputed that it was an accurate summary of the law.

37. 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.

38. 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.

39. 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).

40. In *Virgin Atlantic Airways Ltd v Zodiak Seats UK Ltd (formerly Contour Aerospace Ltd) [2013] UKSC 46*, *[2014] 1 AC 160*, Lord Sumption JSC, explained the general principles of res judicata (see paras 17–26). Three of those principles relate to cause of action estoppel, issue estoppel and the rule in *Henderson v Henderson (1843) 3 Hare 100*. According to Lord Sumption, 'cause of action estoppel' means that once 'a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings … It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings'. The term 'issue estoppel' means that 'where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties'. The rule in *Henderson v Henderson* precludes a party from raising in subsequent proceedings matters which were not but could and should have been raised in the earlier ones'. Lord Sumption added that, finally, there is 'the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles'.

Conclusions

41. The effect of a judgment of an Employment Tribunal is that it is binding as between the parties so as to prevent them from litigating the same issues over again in any future legal proceedings; such a judgment is covered by the doctrine of res judicata. The rationale of this doctrine is that there must be finality of litigation and the avoidance of multiplicity of proceedings on the same issue.

42. The main claims in the claimant's fifth claim with his current and former employers is that his original employment contract entitled him to 60 working hours per week and 14% employer pension contributions and that his current employer is not providing him with 60 hours work or paying a 14% employer pension contribution.

43. This is the basis of the current grounds of claim, and it is materially the same as the 2016 claim and his earlier claim in 2022 case number 2200562/2022.

44. In 2017 EJ Hodgson gave the claimant an opportunity to present all the evidence he had regarding these claims by ordering disclosure, followed by an unless order. The claimant had a further opportunity to present any documents he had to support his claims for hours of work and pension contributions at the OPH before me. It is possible he had a further opportunity before EJ Leonard -Johnston. The only new document he presented to me was p105, a document provided to Mitie by Wilson James on the transfer in March 2009. The claimant argued this document demonstrates that at the time of this transfer the claimant's contractual hours were 60 hours per week as per the Group 4 terms and conditions. I have been shown other documents which describe the claimant's hours subsequently to be different. I am not making any findings in relation to the claimant's hours. The claimant has not produced any documents which clearly confirm he is entitled to 60 hours of paid work per week now. A lot can happen over a period of time, particularly when there have been a number of transfers.

45. In any event, the question of the claimant's hours of work and whether he was entitled to 60 hours per week was an issue before EJ Hodgson in 2016/2017. EJ Hodgson concluded, having considered the contractual documents provided and relied upon by the claimant that the claimant's contention that the basic normal working hours were 60 was erroneous. He concluded, following an application by the respondent to strike out the claims on the basis that there were no reasonable prospects of success, that there was no arguable case of unlawful deduction from wages and that the claimant "was paid for the work that he did".

46. It is clear to me that the issue of whether the claimant is entitled to 60 hours work per week has already been held to not exist and therefore the issue may not be challenged by the claimant again in subsequent proceedings. This is a form of estoppel.

47. In relation to the claimant's pension claim EJ Hodgson dismissed the claim on the basis that the claim had no reasonable prospect of success. He concluded on the face of the documents he had seen there was no obligation to honour the 14% employer pension contribution. In addition the claimant had admitted that he had already litigated about this and failed. EJ Hodgson did not strike out on the basis the claimant had already litigated this point as an abuse of the process because the claimant had not provided all the relevant documents. However he felt he had sufficient evidence before him to conclude there was 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".*

48. This is a case where the claimant's claim for 14% pension contributions based on his original G4 terms and conditions has been dismissed on the basis it has no reasonable prosect of success. The identical claim cannot be litigated again under the doctrine of estoppel.

49. This fifth claim is clearly raising the same cause of action as the 2016 claim, which 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.

50. As stated in EJ Leonard- Johnson's judgment, 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.

51. For the reasons above I find that the Tribunal has no jurisdiction to hear the claimant's claims for 60 hours work and 14% employer pension contributions and these claims are dismissed.

52. The claimant has not previously claimed the cost of new work shoes each year and the loss of dry-cleaning vouchers. These claims remain but will be considered at an OPH on 1 November 2022 before a Judge sitting alone. I have issued a case management order in relation to the steps to be taken in preparation for the OPH.

Employment Judge Isaacson
30/08/2022

JUDGMENT SENT TO THE PARTIES ON
31/08/2022

FOR THE TRIBUNAL OFFICE

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