EMPLOYMENT TRIBUNALS

Claimant:	**Dr M Egyed**
Respondent:	**Totally PLC**
Heard at:	**London Central Employment Tribunal**
On:	**13 June 2024**
Before:	**Employment Judge G Smart** **In public by CVP video**
Representation	
Claimant:	For herself
Respondent:	Mr. Julian Allsop (Counsel)

JUDGMENT

The Judgment of the Tribunal is:

1. The Claimant did not and never had a contract to perform any work either personally or otherwise with the Respondent.

2. Consequently, the Claimant was not a worker or employee of the Respondent under s83 Equality Act 2010, neither was she an employee of the Respondent at common law for the purposes of any breach of contract claim she sought to add to the case as an amendment.

3. The Claimant was also not an applicant for employment to the Respondent. She was an applicant to a subsidiary company Vocare Limited.

4. It was not in the interests of justice for the Tribunal, to substitute or add Vocare Limited as a Respondent to these proceedings.

5. Consequently, neither the Claimant's claim nor the amendment sought have any reasonable prospects of success. The claim is consequently struck out under rule 37 (1) (a) of the Tribunal rules 2013.

Written reasons have been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 by email from the Claimant dated 21 June 2023. These are provided below.

REASONS

Issues

1. From the case management orders of Judge M Martin sent to the parties on 8 February 2024, the issues to be determined were:

    1.1. Whether the Claimant can pursue her claim against the named Respondent;

    1.2. Whether the Claimants application for leave to amend her claim to add a claim for breach of contract.

    1.3. Whether all the claims should be struck out on the basis that the claims have no reasonable prospects of success and/or alternatively that the Claimant should be ordered to pay a deposit to pursue all or any of these claims on the grounds the claims have little reasonable prospect of success.

    1.4. Whether the Claimant's medical condition amounted to a disability within the meaning of s6 of the Equality Act 2010.

2. At the start of the preliminary hearing, which was listed for one day, due to the fact I needed to read into the case and three witnesses were being called to give evidence, it was agreed that the primary issues to be determined was who contracted with who at the material times, what any relevant relationships were between the relevant organisations and the Claimant, and consequently whether the Claimant's claims could continue against any of them. Therefore I also needed to decide:

    2.1. Was the Claimant entitled to proceed with her claim against the Respondent as a worker, employee or applicant under s83 of Equality Act 2010?

    2.2. Whether the Claimant had any contract with the Respondent as an employee at common law to bring a breach of contract claim she sought to add to her case.

3. Also, at the start of the hearing, I asked the Claimant whether she wanted to apply to add Vocare Limited as a party to the proceedings given that it wasn't in dispute that the Claimant's contract to do work, whatever type of contract that was, was with Vocare Limited. In fact, the Respondent's witnesses even stated that Vocare was the correct Respondent. The Claimant did not want to make an application or join Vocare to the proceedings.

4. At the point of submissions, I asked again if the Claimant wished to apply to add Vocare Limited as a party to the proceedings. She again declined. I enquired as to why she was declining and she said that the Totally was at fault. I asked if Vocare was still trading and/or whether it was in financial difficulties. The Claimant answered that it was still going and she had no knowledge of any difficulties.

5. I explained the effect of the Claimant's choice if I were to find, after hearing the evidence, that the Respondent is not the right person to bring the claims against, namely the case would stop here and go no further. The Claimant said she understood.

6. Consequently, there was no live application to add a party before me from either party and indeed the Claimant did not want to add Vocare as a Respondent despite the Respondent stating that Vocare would be the correct Respondent in this case for reasons the Claimant did not divulge.

7. The Claimant's position about the Respondent therefore had not changed since the case management hearing before Judge Martin.

Evidence and other documents

8. I had before me a bundle of documents that had been agreed between the parties of 461 pages. Another earlier version of the bundle had been provided of 456 pages. However, that had omitted the list of issues for the case in general. It was agreed that I should use the longer 461 page bundle. Containing the list of issues.

9. I heard evidence from the Claimant herself and for the Respondent, I heard evidence from Nicola Gilbert, Senior HR Business Partner and Stefan Cadogan, Head of Recruitment Operations, all of whom provided sworn witness statements and were cross examined.

10. I also had before me a cast list and a skeleton argument from the Respondent.

Background and Findings of fact

11. The Claimant brings claims of disability discrimination against the Respondent by ET1 presented on 8 November 2011.

12. The Claimant made the following claims in her ET1:

    12.1. Disability discrimination;
    12.2. Race discrimination;
    12.3. Personal injury because of the discrimination alleged.

13. On 31 January 2024, there was a case management hearing before Judge M Martin. At that hearing, after clarifying the issues between the parties, the Judge was concerned that the Claimant had named the wrong Respondent.

14. The Claimant accepted in her ET1 that from 9 April 2018 until 16 October 2023 which she stated was her last shift, she had a contract for services with Vocare limited and was self-employed in her words.

15. The Claimant was a Doctor in Emergency Care. In the bundle, namely page 97, there is a contract which purports to be between Vocare Limited and the Claimant. The Claimant accepted in cross examination that she was engaged by

Vocare Limited at all material times up to and including 17 October 2023 when it lost the contract.

16. On 28 December 2020, the Claimant's contract for services was renewed at page 111 in the contract. This does state the name Totally Plc on the front sheet, but on the next page the client and party to the contract is clearly identified as Vocare.

17. It was not in dispute that Vocare Limited became part of the Totally Group of companies in 2021. It was also not in dispute that Totally Group's emergency care offering was provided by two subsidiary companies - Vocare Limited and Greenbrook Healthcare as per Mrs. Gilbert's statement paragraph 3.

18. As per page 362 in the bundle, whether Vocare or Greenbrook were involved was site specific and the contracts for either subsidiary would deal with the whole service for a site. There was no overlap where Greenbrook and Vocare would work at the same site based on the evidence I was taken to.

19. The Claimant said in her own words during questioning that Vocare was a *"wholly owned subsidiary"* of the Respondent. She therefore, in my judgment, fully understood the relationships between all the organisations involved in this case especially Vocare and Totally Plc.

20. It was also not disputed that Vocare and Greenbrook made up the division of the Totally Group called Totally Urgent Care, which was not in itself a legal entity.

21. The following facts are also relevant:

    21.1. The Claimant's name badges said either Vocare or Totally Urgent Care not Totally Plc;

    21.2. The Claimant submitted invoices to and was paid from Vocare as shown by remittance advice and invoice lists at pages 355 – 356 in the bundle.

22. It was not in dispute and was confirmed by the Claimant during questioning that she had not performed any work for Imperial post TUPE transfer. The Claimant therefore had no relationship with Imperial.

23. Neither party argued that the contract did not accurately reflect the terms of the relationship between Vocare and the Claimant. Having heard all the evidence, I find this contract to be a true reflection of the relationship between those individuals.

24. In May 2023, the Claimant had applied for permanent employment. She claims this application was made to Totally Plc. I reject that argument. The application was made to Totally Group not Totally Plc as a legal entity. In the "about us" section of the advert, the advert states that the application is to Totally urgent Care, which the Claimant knows is made up of Vocare and Greenwood, not Totally Plc.

25. The Claimant was successful in that application and received an offer. The offer is from Vocare Limited as clearly stated at page 166 in the bundle.

26. On 26 July 2023, the Totally Group lost the contract for provision of emergency care because it had been awarded to Imperial College Healthcare NHS Trust of which St Mary's Hospital was a part.

27. It was also not in dispute that until the 17 October 2023, Vocare had a contract to deliver services at the urgent treatment centre at Saint Mary's hospital.

28. On 17 October 2023, Vocare ceased providing the service at St Mary's hospital and those activities transferred to Imperial on 18 October 2023 under a TUPE transfer.

29. I do not doubt the Respondents case about the TUPE transfer because I was taken to a number of letters indicating that a TUPE consultation had taken place with the election of appropriate representatives for information and consultation purposes at pages 164 and 235 – 240 in the bundle as per Mrs Gilbert's statement at paragraph 6. This was not challenged by the Claimant and no claims are made under TUPE.

30. This case therefore involved a number of relevant organisations. These were:

    30.1. Totally PLC – The Respondent;

    30.2. Vocare limited – the company the Claimant had a contract with and who is a subsidiary of the Respondent;

    30.3. Greenbrook healthcare – another subsidiary of the Respondent;

    30.4. St Mary's hospital – the location the Claimant worked; and

    30.5. Imperial College Healthcare NHS Trust ("Imperial") - who won the contract for urgent care from Vocare Limited.

31. However, a problem arose with Identification documentation and other due diligence pre-employment checks and the offer was subsequently withdrawn because the due diligence checks were not satisfactorily performed before the TUPE deadline of 20 September 2024 when the workers in scope for transferring to Imperial were fixed.

32. I enquired of all witnesses who the decision makers about the Claimant's situation were and how the recruitment process worked. The Claimant did not know who the decision makers were employed by, which is not surprising given she was not a member of management or HR, and the Respondent's evidence was as follows:

    32.1. Alice Noakes was said to have taken the decision to withdraw the offer of the Claimant's employment. She was employed by Vocare Limited.

32.2. Amelia Phillips the talent Acquisition Partner who dealt with the application administration process and sent the offer out was a Vocare employee.

32.3. All of the HR team involved in the recruitment process for the Claimant's application for permanent employment were said to be employees of Vocare Limited. One of the HR team were employed by Greenbrook, but they were not said to be involved in the Claimant's situation.

32.4. The HR team was centralized for the group in one location, but the various HR teams would only support the Company they were employed by. Therefore, even though there was a centralized HR team, Vocare HR team would support and be employed by Vocare, the Greenwood HR Team would support and be employed by Greenwood etc.

32.5. Dr Khan who was involved in the on boarding process and ID checks for the Claimant's offer of permanent employment was a Vocare employee. He was the medical lead for St Mary's hospital at Vocare. He gave authority to recruit the Claimant as confirmed by email at page 156 in the bundle.

32.6. Mr. Cadogan who heads up the recruitment function is also a Vocare employee. He explained that the authority to recruit was performed at site level and not centrally. Totally Plc had nothing to do with the decision to recruit the Claimant.

32.7. All jobs for subsidiaries were advertised under the banner of Totally Group or Totally Urgent Care. The applications would then be submitted centrally, sorted and referred to the correct HR and management teams for the relevant subsidiary providing the service the job was needed for.

32.8. Email addresses may have been Totally addresses, but that was so that all group employees regardless of the subsidiary they worked for had emails on a single email platform for ease of email administration.

33. The only part that Totally Plc was involved with, was that it was the named organisation on DBS checks despite these being sent to and actioned by Vocare employees. This was explained by Mr. Cadogan that the Parent company had to be named on the DBS check for legal reasons. This was not challenged by the Claimant.

34. Having weighed the evidence I received from both the Respondent's witnesses, and the documents in the bundle, I believe their evidence and find that all decisions made about the Claimant's application, vetting, ID checks and subsequent offer withdrawal were made solely by Vocare employees.

The relevant law

35. In the employment Tribunal, a Claimant can only bring a discrimination complaint if it falls within one of the causes of action within part 5 work as per section 120 of the equality Act 2010.

36. The Claimant brings her claim under s39 as either an applicant or employee. The interplay between applicant and employee is important because if a person is already an employee and they apply for a job with that same employer whilst still employed, then the correct provisions are the employment provisions under s39 (2).

37. If, however, the Claimant has no contract of employment with the person advertising the role, then the applicant provisions apply to the situation under s39 (1) where the Respondent becomes a potential future employer rather than an actual employer of the Claimant (See **Clymo v Wandsworth London Borough Council [1989] IRLR 241**.)

38. Section 83 of the equality Act 2010 contains the definition of employment for the purposes of that Act and says where relevant:

*"**83 Interpretation and exceptions***

(1) This section applies for the purposes of this Part.

(2) "Employment" means—

(a)employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;
(b)…
(c)…;
(d)…

(3) …

(4)A reference to an employer or an employee, or to employing or being employed, is (subject to section 212(11)) to be read with subsections (2) and (3); and a reference to an employer also includes a reference to a person who has no employees but is seeking to employ one or more other persons."

39. The Tribunal has the ability to hear common law breach of contract claims only if the Claimant was an employee at common law and only if the damages or other sum sought were outstanding upon the termination of that employment as below:

*"**Extension of jurisdiction***
3. Proceedings may be brought before an industrial Tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a)the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b)the claim is not one to which article 5 applies; and

(c)the claim arises or is outstanding on the termination of the employee's employment."

40. There can be no substitute for applying the words of the statute to the facts of each case **Clyde & Co v Bates Van Winkelhof, [2014] UKSC 32.**

41. For a person to be employed either as an employee or worker, there must be a contract in existence between the parties for there to be a contract of service or to personally perform work in the first place after **Cotswold Developments Construction limited and Williams [2006] IRLR 181.**

42. This is the same whether the status relied upon is a statutory worker, employee under an enactment or an employee at common law.

43. For there to be a contract between two parties there must be:

    43.1. A legal offer that is either express or implied.

    43.2. An acceptance of that offer.

    43.3. An intention to create legal relations about it.

    43.4. There is a meeting of minds when understanding the requirements of the contract.

    43.5. And that consideration (usually, in the case of an employment contract, the provision of work and the payment for that work) is given under the contract by both parties to the contract.

44. Contracts to do work can be verbal, written or both.

45. Contracts of employment are unique contracts that are distinct from commercial contracts for goods or services, but usual contractual principles apply generally to them.

46. The burden of proof is on the Claimant to prove she fitted the definition of employee in s83 and to prove any other jurisdictional issues.

47. After **Autoclenz v Belcher [2011] UKSC 41,** the reality of the situation must be the focus, not just the words of the contract even if they are agreed between the parties to be applicable.

48. A contract will be a sham if either both parties intend to deceive another **Consitent group Limited v Kalwak [2008] EWCA Civ 430**, where both parties intended the clause not to apply **Redrow homes (Yorkshire) Limited v Buckborough and Sewell [2009] IRLR 34** or where the written clause does not reflect the true relationship between the parties **Protectacoat Firthglow Limited v Szilagyi [2009] EWCA Civ 98.** The true relationship may of course change over time, so the Tribunal needs to look at the contract at the time it is breached, or a party wished to insist on performance of the clause.

49. Generally, parent companies are not liable for the acts of their subsidiaries because they are separate legal entities. That is unless there is a relationship of agency and principal or any of the other ancillary provisions of the Equality Act 2010 apply for example s111 or s112.

50. When determining agency for the purposes of s.109 Equality Act 2010 the common law test applies: **Ministry of Defence v Kemeh [2014] ICR 625**. When determining whether a person is an agent on behalf of a principal the Tribunal must take into account what they are authorised to do on behalf of the alleged principal.

51. I also have the power in the Tribunal rules to make a case management order under rule 29 to add and substitute parties under rule 34 as follows:

> *"**Addition, substitution and removal of parties***
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> *34. The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included."*

52. The Tribunal rules allow me to strike out a claim if it has no reasonable prospect of success under rule 37:

> ***"Striking out***
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> *37.— (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—*
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> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*
> *(b) …*
> *(c) …*
> *(d) …*
> *(e) …*
>
> *(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."*

53. In **Cox v Adecco UKEAT/0339/29 [2021] ICR 1307** at [28] HHJ Taylor held as follows when describing the general approach to strike out:

> *"28 From these cases a number of general propositions emerge, some generally well understood, some not so much.*

(1) No one gains by truly hopeless cases being pursued to a hearing.

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.

(3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.

(4) The claimant's case must ordinarily be taken at its highest.

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing.

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer.

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances."

Discussion and conclusion

54. Applying **Belcher** and **Protectacoat,** I am content that the written contracts the Claimant entered into with Vocare Limited, represented the true intention of the parties. There was insufficient evidence to suggest they did not.

55. At all material times, the Claimant was engaged by Vocare Limited and no one else. This is proven by the two contracts I was taken to, listing these as the parties to them, the fact that the Claimant both invoiced and was paid by Vocare and the almost total absence of any documentary or other evidence suggesting the

Respondent was either her employer or had any contractual relationship with the Claimant.

56. There is no evidence of any offer of employment or engagement from the Respondent to the Claimant.

57. Following **Bates Van Winkelhof**, looking at the statutory wording, for s83 and s39 (2) Equality Act 2010 to bite, there must be a contract in place between the Claimant and the alleged discriminator for any of the definitions of employee under that section to be proven.

58. After **Cotswold Developments,** in deciding if the prerequisite contract between the parties existed, there is no evidence of any offer and acceptance involving the Respondent. The offer of the permanent position applied for and withdrawn was from Vocare. The employees making all the decision about it were employed by Vocare. The authority to advertise the role was from Vocare. The decision to withdraw the offer was made by a Vocare employee.

59. I have considered the guidance in **Cox** and taken into account the fact the Claimant is a litigant in person and may not have formulated her pleadings correctly or missed an obvious point.

60. Considering the above and looking at **Kemeh,** I considered whether there was a hidden agency relationship between the Respondent as parent company and Vocare as its subsidiary because this argument seemed a fairly obvious line of enquiry from the pleadings.

61. I find no evidence that there was any agency relationship. There is no evidence that any of the Respondent's employees or indeed any directors or other senior individuals gave authority to Vocare or any of its officers or employees to step into its shoes and recruit employees on its behalf or that it had a sufficient degree of control over the subsidiary for these recruitment purposes.

62. At all times I find that Vocare was recruiting for itself as a separate legal entity to the Respondent. The fact that there were some centralised functions for the whole group was insufficient in my view to create an agency situation absent evidence of specific authority to recruit on the Respondent's behalf employees that would be employed by the Respondent.

63. I find no evidence that any other ancillary provisions of the Equality Act 2010 would also cause the Respondent to be liable for Vocare's acts, omissions and/or decisions.

64. Consequently, in my judgment given the above conclusions, the Claimant can only succeed in her discrimination claims if she was an applicant for employment under s39 (1) with the Respondent Totally PLC being the prospective future employer.

65. The documentary evidence is clear. The Claimant did not apply to the Respondent for a position, she applied to Totally Group via its division Totally

Urgent Care, which I find the Claimant knew was not a legal entity and comprised the overall group brand for Vocare and Greenwood.

66. The offer of employment from the permanent job application came from Vocare Limited. At no point did the Respondent as a company take any part in advertising the role, accepting applications for the role, offering the job to successful applicants, interview for the role or undertake any administration, processing or due diligence for the role. All of that process was led and undertaken by Vocare Limited and its employees.

67. Consequently, the Claimant was never an applicant to the Respondent.

68. Given that no contractual relationship existed between the Claimant and Respondent, she did not ever in fact apply to it for employment and there was no agency relationship for the Claimant's application or work done for Vocare Limited, she cannot succeed in any discrimination claim as pleaded against the Respondent, or indeed in any alleged claim of breach of contract she wants to amend her claim to include. The Tribunal has no jurisdiction to hear such complaints.

69. The Claimant's Claim and suggested amendment therefore have no reasonable prospect of success against the Respondent and the claim is struck out under rule 37.

70. I considered whether it would be in the interests of justice to add Vocare as a party to the proceedings of my own volition under rules 29 and 34.

71. I have declined to do so because the Claimant does not want Vocare joined to the proceedings, neither party has applied to join Vocare to the proceedings and, in my judgment, it cannot be in the interests of justice to force the Claimant to argue a case against Vocare she clearly does not want to pursue or to drag Vocare into proceedings to defend a case the Claimant isn't bringing and has no desire to bring against it.

72. I am content the Claimant knew and understood the potential consequences of her choice not to pursue Vocare Limited despite not being legally represented or qualified. Consequently, Vocare will not be added to the proceedings.

73. That deals with all the claims before the Tribunal and the Claimant's claims therefore fail in their entirety and this case goes no further.

Employment Judge G Smart
28 August 2024

REASONS SENT TO THE PARTIES ON

28 August 2024

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FOR THE TRIBUNAL OFFICE

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