EMPLOYMENT TRIBUNALS

Claimants: **Mr Kevin Harris**

Respondents: **(1) HCL Great Britan Limited**
(2) Roc Search Limited
(3) Green Lantern Accountancy Limited

Heard at: **London East Hearing Centre**

On: **25 November 2019**

Before: **Employment Judge John Crosfill**

Representation

Claimant: **In Person**

Respondent: **(1) Ms M Stanley of Counsel**
(2) Mr N Singer of Counsel
(3) No appearance

JUDGMENT

The judgment of the Employment Tribunal is that:-

1. **The name of the Second Respondent is amended to Roc Search Limited**

2. **All claims against the Second Respondent have no reasonable prospects of success and are struck out.**

3. **Any claim brought against the First Respondent for unlawful deduction from wages under Part II of the Employment Rights Act 1996 OR as a breach of contract under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 has no reasonable prospect of success and is struck out.**

REASONS

1. The claims arise from a period of work done by the Claimant on a project by the First Respondent HCL Great Britain Limited for Credit Suisse. The Claimant has brought 2 claims one issued in the Central London Employment Tribunal against the Second and Third Respondent and one in East London which was accepted against the First and Second Respondents.

2. The hearing before me had was listed to consider joinder of the proceedings, who the correct respondent was in respect of any claims and whether all or some of the Claims had little reasonable prospect of success. The file in the Central London case, Case 2201746/2019 was transferred to East London in advance of the hearing by the Central London tribunal.

3. As a first stage I sought to identify the claims and the parties. I was provided with a contract between Green Lantern Accountancy Limited 'R3' and Roc Search Limited 'R2' dated 29 October 2018. That contract is typical example of type of contract used in the recruitment industry to supply contractors to third parties. In such arrangements the 'Client' requires some service to be provided and contracts with the recruitment company for the provision of that service, in turn the recruitment company sources and individual often referred to as 'the consultant' to provide those services. However, it has become increasingly common for recruitment companies to require individuals looking for work to offer their services through another company. Such companies are usually referred to as umbrella companies. An umbrella company acts as the employer of the Consultant. It enters a contract with the recruitment company and receives a fee in respect of the Consultants work. After deducting an administrative charge it passes on that fee to the Consultant less deductions of tax and national insurance. At various points that arrangement has been beneficial as it might allow the Consultant to claim for travel and subsistence costs free of tax.

4. Having had regard to the contractual document I was provided with I expressed a provisional view that the arrangement that the Claimant had was such a typical arrangement as I described above. The Claimant confirmed that he was paid by Green Lantern Accountancy Ltd. He complained that they had taken no part in the proceedings and thought they were likely to disappear. He suggested that he had signed some document of some description when he had attended the premises of Roc Search Ltd. At the time of my decision I had not seen any such document. Since my decision the Claimant has forward a document to be signed by him. That document contains details of his assignment. It is very clear from that document that the contract for provision of the Claimant's services was to be made by the 'Service Provider' in this case Green Lantern Accountancy Ltd. The Claimant has also provided a copy of correspondence relating to the provision of a NEST pension. The provider of the Pension is identified as Green Lantern Accountancy Ltd. Whilst I had already made a decision I have taken the Claimant's provision of these documents as amounting to an application for reconsideration. Far from undermining the decision that I made these documents reinforce my findings of fact.

5. I find that as a matter of fact the Claimant's engagement with the First Respondent was, as is entirely typical, through the following chain of contracts. The Claimant was employed by Green Lantern Accountancy Ltd. That company paid him and organised his pension for him. I have seen the contract between Green Lantern Can see Ltd. It is clear from that contract that Green Lantern Accountancy Ltd undertook

to supply the Claimant services to Roc Search Ltd in order that he could be supplied in turn to HCL Great Britain Ltd.

The proper legal test – Rule 37

6. The power to strike out a claim at a preliminary stage before a final hearing is found in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (hereafter "the employment tribunal rules") and in particular in rule 37 the material parts of which read as follows:

> *"(1) At any stage of the proceedings, either on its own initiative or on the application of the party, a Tribunal may strike out all or part of the claim or response on any of the following grounds –*
>
> *that it is scandalous or vexatious or has no reasonable prospect of success……"*

7. The power to strike out a claim under Rule 37(1)(a) on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances ***Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly*** **[2012] IRLR 755**, at para 30. In discrimination claims where findings of fact can depend upon whether or not it is appropriate to draw inferences of discrimination from primary facts particular care needs to be taken before striking out a claim ***Anyanwu v South Bank Students' Union*** **[2001] IRLR 305, HL.** The same cautious approach should be applied in a claim brought under S47B ERA 1996 ***North Glamorgan NHS Trust v Ezsias*** **[2007] IRLR 603**.

8. It will generally not be appropriate to strike out a claim where the central facts necessary to prove the case are in dispute. It is not the function of a tribunal such an application to conduct a mini trial. The proper approach is to take the Claimant's case at its highest as it appears from his (or her) ET1 unless there are exceptional circumstances ***North Glamorgan NHS Trust v Ezsias***. Such exceptional circumstances could include the fact that the Claimant's case is contradicted by undisputed contemporaneous documents or some other means of demonstrating that 'it is instantly demonstrable that the central facts in the claim are untrue' ***Tayside***.

9. In ***Balls v Downham Market High School*** **[2011] IRLR 217** Lady Smith reminded tribunals that the test is not whether the claim is likely to fail but whether there are no reasonable prospects of success. That however is not the same thing as there being no prospects of success at all - see ***North Glamorgan NHS Trust v Ezsias*** at para 25 citing ***Ballamoody v Central Nursing Council*** **[2002] IRLR 288**. Another way of putting the test is that the prospects are real as opposed to fanciful see ***North Glamorgan NHS Trust v Ezsias*** para 26.

10. ***QDOS Consulting Ltd and others v Swanson*** **UKEAT/0495/11/RN** provides authority for the proposition that orders under rule 37 should be made only in the most obvious and plain cases and not in cases where there is a need for prolonged and extensive study of documents and witness statements. Those propositions may also be found in the authorities above. HHJ Serota QC prior to stating those propositions drew attention to the similar position under the Civil Procedure Rules. He said (at para 45):

> *[45] It may be instructive to compare the position of striking out under the Employment Tribunal Rules with striking out as provided for in the Civil Procedure Rules. I note that there is a close affinity between striking out under CPR 34.2(a) [sic –there is a typo in the report], which enables the court to strike out the whole or part of a statement of case that discloses no reasonable grounds for bringing*

or defending a claim overlaps with Pt 24, on summary Judgment. Rule 24(2) entitles a court to give summary Judgment against a Claimant or Defendant on a claim or issue where there is no real prospect of succeeding on the claim or issue, or successfully defending the issue. The notes to CPR 24 in the White Book make this clear:

> *"In order to defeat the application for summary Judgment, it is sufficient for the Respondent to show some prospect; ie some chance of success. That prospect must be real; ie the court will disregard prospects that are false, fanciful or imaginary. The inclusion of the word 'real' means the Respondent has to have a case which is better than merely arguable. The Respondent is not required to show their case will probably succeed at trial; a case may be held to have a real prospect of success even if it is improbable. However, in such a case the court is likely to make a conditional order."*

11. Care needs to be taken when assessing whether a case has no reasonable prospects of success to avoid ***focussing*** only on individual factual disputes. A case may have some reasonable prospects when regard is had to the overall picture and all allegations taken together see ***Qureshi v Victoria University of Manchester*** **[2001] ICR 863**

12. The statements of principle derived from the cases referred to above do not in any way fetter the discretion of a tribunal to strike out a case where it is appropriate to do so ***Jaffrey v Department of the Environment, Transport and the Regions*** **[2002] IRLR 688 at para 41**.

13. In ***Chandhok & Anor v Tirkey*** **UKEAT/0190/14/KN** Mr Justice Langstaff made the following comments:

> *"20. This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in Madarassy v Nomura [2007] ICR 867):*
>
> *"…only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*
>
> *Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike-out a claim should be sparing and cautious. Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a Tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the* pleadings, would affect the decision."

14. ***ED & F Man Liquid Products Ltd v Patel and another*** **[2003] EWCA Civ 472** concerned an application to set aside a default judgment. The Defendant contended that the test was the same as that for summary judgment made under Part 24 of the

Civil Procedure Rules. The test to be applied under that rule is whether a claim or defence has "no real prospect of succeeding". There is no material distinction between this test and the test under Rule 37 of the ET procedure rules. The Court of Appeal explain what is meant by the requirement to take a case at its highest. Potter LJ giving the judgment of the Court said, at para 10 (with emphasis added):

> *"…..where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable.."*

15. Even where the test of no reasonable ***prospects*** of success is met there is a separate question to be asked as to whether the Tribunal should exercise its discretion to strike out the claim ***Hasan v Tesco Stores Limited*** **UKEAT/0098/16**. It will not be appropriate to strike out a claim that might have reasonable prospects of success if permissibly amended.

Discussion and conclusions

16. I then turned to explore the claims brought against each of the Respondents. Ideal firstly with the claims brought against Roc Search Ltd. The Claims had been clarified at an earlier Case Management Hearing conducted on 23 September 2019 by Employment Judge Burgher he drew up a list of issues. There was no application to amend the claim made before me nor was it suggested that the list of issues was inaccurate.

17. The Claimant had indicated on his ET1 that he was bringing claims for sums of money and consequential losses. The Claimant explained that there had been delays caused by First Respondent failing to make payment following the termination of his assignment. He also complained that he had not been given the correct contractual notice.

18. A claim for unlawful deduction from wages or a claim for breach of contract both require a Claimant to show that there is a contract in place between them and the person who they say has breached that contract and owes them money and/or damages. In the present case it is quite clear to me that there is no contract of any description between the Claimant and Roc Search Ltd. The contract under which the Claimant was paid was between him and Green Lantern Accountancy Ltd. It is that company and no other which is liable to the Claimant for any sums contractually due to him in respect of his work undertaken for the First Respondent. The contract between Roc Search Ltd and Green Lantern Accountancy Ltd expressly excludes the right of any third party to enforce the terms of the agreement. I conclude that any claim against Roc Search Ltd for pay or notice pay have no reasonable prospect of success.

19. I considered whether I should exercise my discretion to strike out the claims. I consider that it is clearly right to do so. The money claims simply cannot succeed against this respondent. Ms Stanley urged me to retain Roc Search Limited as a respondent for

the purposes of obtaining access to witnesses and disclosure. As Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides other avenues for obtaining witness orders and third party disclosures I reject the suggestion that a party should be put to the cost of attending a multi-day trial simply because another party seeks disclosure or wants to call witnesses.

20. I explored the discrimination claims. The Claimant has brought claims of direct race discrimination and alleges a failure to make reasonable adjustments for a disability. Notwithstanding the absence of any contractual relationship the Claimant may rely upon Section 41 or Section 109 and/or Section 110 of the Equality Act 2010 to fix others with liability for their unlawful acts.

21. Employment Judge Burgher had been unable to ascertain who each of the Claimant's claims was aimed at. I asked the Claimant how he put his direct discrimination claims. He told me that his complaints were about his treatment by a Mr Torabi and Mr Ragu and a decision to require him to do a 'credance' check.

22. He told me that both Mr Torabi and Mr Ragu were employed by HCL Great Britain Limited. As such that company would be liable for their actions. Roc Search Limited would only be liable if it could be shown that those two individuals were acting as its agents. Given the function of Roc Search Limited as a recruitment agency it is quite impossible to see how such a claim could be maintained. The two individuals were not delegated to do a task that Roc Search Limited would otherwise carry out. As such I find that allegations 2.1 to 2.7 have no reasonable prospects of success.

23. After some hesitation he also said that it was HCL Limited that had asked him to do a credence check. That is consistent with HCL's pleaded case. As such if there was any discrimination it was by HCL and not Roc Search Limited. Again, there can be no sensible claim that HCL or its staff were acting as agents for these purposes and allegation 2.8 has no reasonable prospects of success.

24. The Claimant's reasonable adjustment claim turned on his suggestion that there was a practice of requiring him to work in the Offices of HCL/Credit Suisse rather than working at home. I asked who had directed where he worked and the Claimant told me it was Mr Ragu who had insisted that he worked in the office. It was not alleged that Roc Search Limited imposed any requirements about where the Claimant worked. As such it is impossible for any claim against Roc Searcy to succeed in their own right. It is also impossible how it could be said that any individual at HCL imposing a practice on the Claimant was acting as an agent of Roc Search Limited. The claims have no reasonable prospects of success.

25. The Claimant raised a further allegation which had not been recorded in the list of issues which was a suggestion that the failure to pay him notice pay and wages was itself an act of direct discrimination. I asked the Claimant whether he was alleging that the failure by Roc Search Ltd to pay Green Lantern Accountancy Ltd was because of his race. The Claimant suggested that HCL Great Britain Limited might have acted out of racial motives but he did not suggest that Roc Search Ltd did. As such, even had it been pleaded, there could be no claim under the Equality Act 2010 in respect of any delay in making payment against Roc Search Ltd.

26. Finally I deal with the question of whether the termination of the Claimant assignment was a discriminatory act for which Roc Search Ltd might be liable. This question was not found in the list of issues nor was it particularly clear in the claim form

but given that I was invited to strike out claims I considered it fair to ask whether if it was alleged it would have reasonable prospects of success. The decision to terminate the assignment on the case of each party was taken by HCL Great Britain Ltd. Nobody says that the decision was taken by Roc Search Ltd. Roc Search Ltd cannot be said to have acted as the agent of HCL Great Britain Ltd. As such any such claim would have no reasonable prospect success.

27. Recognising that I have a discretion whether or not to strike out a claim once I have found that it has no reasonable prospect success I asked myself whether it would be just and equitable to do so in this case. The proper Respondent for the Claimant's claims under the equality act is HCL Great Britain Ltd. It is that company he blames for his treatment alleging that its Asian workforce treated him badly and ultimately took the decision to remove him from the contract. That claim, subject to showing it has more than no reasonable prospect success, can proceed. Releasing Roc Search Ltd from these proceedings does not affect any other party's ability to bring order defend them. I have considered whether an amendment could cure the Claimant's case but he has not pointed to any act whether of Roc Search Limited in its own capacity or any other person acting as an employee or agent of Roc Search that could fix it with any liability. I consider that all of the claims should be stuck out as against Roc Search Limited they have no reasonable prospects of success.

28. Ms Stanley accepted that in respect of HCL Great Britain Limited the position was less clear. She accepted that it was arguable that the Claimant was a contract worker for the purposes of Section 41 of the Equality Act and that if he was HCL Great Britain Limited might be liable for the discrimination claims. The sole matter that she asked me to consider was whether the money claims could be pursued against HCL Great Britain Limited.

29. For much the same reasons as I have set out in respect of the same claims against Roc Search Limited I see no route whether the Claimant could say that he was an employee or worker for HCL Great Britain Limited. He has no contract with that company at all. As such if the claims were brought as claims for breach of contract or for unlawful deductions from wages there could be no liability. The claims, put like that, have no reasonable prospects of success and I see no reason why they should not be struck out.

30. The Claimant has been clear that he considers that HCL withheld monies deliberately. If that was because of race then a claim might be advanced against HCL for any loss and/or injury to feelings. It is far from clear that that is the way the claim has ben brought but nothing in this judgment is intended to deal with a claim on that basis.

Employment Judge John Crosfill

Date: 20 December 2019