



# EMPLOYMENT TRIBUNALS

**Claimants:** Mr D Hardisty  
Mr M Lenton

**Respondents:** (R1) Venture X (Northern) Limited  
(R2) Venture X Holdings Limited  
(R3) Corona Corporate Solutions Limited

**Heard at:** Nottingham **On:** 24 October 2019

**Before:** Employment Judge Batten (sitting alone)

## Representation

**Claimants:** Mr P Gilroy, one of Her Majesty's Counsel  
**Respondents:** R1 and R2: Mr G Molyneaux, Counsel  
R3: Ms A Mayhew, Counsel

**JUDGMENT** refusing the respondents' applications for strike out, alternatively Deposit Orders and refusing the third respondent's application to be removed from the proceedings having been sent to the parties on 2 November 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### The proceedings

1. On 7 May 2019, the claimants submitted claims of unfair dismissal and unauthorised deductions from wages against the first and second respondents. In late May 2019, the claimants learned of an asset sale by the first and second respondents to the third respondent. On 27 June 2019, the claimants applied to amend their claims to extend the unfair dismissal claims to include a claim of automatic unfair dismissal in relation to a transfer of an undertaking under the Transfer of Undertakings (Protection of Employment) Regulations 2006 and to include the third respondent.
2. On 23 August 2019, the first and second respondents filed their responses to the claims. On 2 September 2019, at a case management preliminary hearing, it was agreed that the third respondent should be invited to enter

a response and attend the next preliminary hearing. On 27 September 2019, the third respondent filed its response.

3. The claimants have since withdrawn their complaints of unauthorised deductions from wages and those complaints have been dismissed upon withdrawal.

### **The preliminary hearing**

4. This preliminary hearing was tasked with considering:
  - (1) whether the claims against the third respondent should be dismissed, it being contended that they have no reasonable prospects of success;
  - (2) whether the claims against the first respondent, Venture X (Northern) Limited, should be dismissed, it being contended that they also have no reasonable prospects of success; and
  - (3) in the alternative, whether any of the specific allegations or arguments brought by the claimants have little reasonable prospects of success and therefore the claim should be liable to a deposit.
5. For this preliminary hearing, the Tribunal was provided with 2 bundles of documents: one prepared by the claimants' representative and the other prepared by the first and second respondents' representative. The Tribunal was given with a witness statement from Mr Lenton, one of the claimants, and a witness statement from Mr Jack on behalf of the first and second respondents. Counsel for each party submitted a skeleton argument and Counsel for the claimants submitted a bundle of authorities as did Counsel for the third respondent. The Tribunal heard detailed submissions from each representative.

### **Relevant factual background**

6. The claimants were employed by the first respondent and/or the second respondent as Directors and shareholders.
7. In July 2018, the first and second respondents entered into discussions with the third respondent about a proposed sale of the second respondent. The claimants were unaware of those discussions or proposals at the time. In the period from August to October 2018 the first and second respondents also entered into discussions with a third party private equity company. The claimants were aware of these later discussions. However, a dispute arose over a potential sale of the claimants' shares which might form part of a proposed deal with the third party private equity company.
8. On 8 November 2018, the claimants were called to what they understood to be a "clear the air" meeting. At the meeting, the claimants were suspended. Letters confirming the claimants' suspensions had been prepared in advance, by both the first respondent and the second respondent. The letters included vague allegations of gross misconduct and no details of such were given.

9. Subsequently, on 14 December 2018, Mr Lenton was dismissed summarily for gross misconduct and Mr Hardisty was dismissed on 14 January 2019 also for gross misconduct. The reason for the different dismissal dates was because Mr Hardisty had been signed off, sick, in the interim.
10. In between the two dismissals, on 2 January 2019, a 'heads of terms' written agreement came into being between the second respondent and the third respondent and others. An asset purchase was agreed and completed on 31 May 2019.

### **Applicable law**

11. Rule 37 of the Employment Tribunal Rules gives a Tribunal the power to strike out all or part of a claim or response, at any stage of the proceedings upon the application of a party. The power to strike out should be rarely exercised.
12. Rule 39 of the Employment Tribunal Rules gives a Tribunal the power to make a Deposit Order in circumstances where the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success.
13. Regulation 7(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 provides that a dismissal of an employee can be an automatically unfair dismissal if the sole or principle reason for the dismissal is the transfer. The proximity of the dismissal to the transfer can be a relevant factor in determining the reason for dismissal.

### **Conclusions**

14. There is a considerable dispute between the parties over the factual detail in this case and no love lost between the parties. The parties' representatives agreed that, for the purposes of this preliminary hearing, the Tribunal was not tasked to make findings of fact nor to hear evidence, and that the Tribunal should approach the respondents' applications by taking the claimants' case at its highest.
15. The Tribunal was told that the documents presented at this preliminary hearing formed a small proportion of the disclosure expected - it is clear from the requests for disclosure there is potentially considerably more to come. Nevertheless, the Tribunal was referred to certain documents in the course of submissions

### **The third respondent**

16. The claims pursued against the third respondent arise because of the proximity of the claimants' dismissals in December 2018 and January 2019 to a transfer of an undertaking in May 2019. It is the claimant's case that their dismissals were because of the transfer and to facilitate it. The claimants argue that they were dismissed after a dispute arose, that preparatory steps had been taken in relation to the transfer as far back as

July 2018 and that information about the proposed transfer had been deliberately kept from the claimants.

17. Counsel for the third respondent contended that no transfer of an undertaking was in contemplation or agreed at time of the claimants' dismissals. The third respondent relies on the fact that there was a period of 5 months between the dismissals and the asset sale taking place. In the third respondent's response it is pleaded that, after the initial approach in July 2018, no meaningful discussions took place until the end of November or beginning of December 2018 and that the heads of terms were subject to due diligence. The third respondent says that it was not aware of the claimants prior to their dismissals and that the third respondent played no part in the claimants' dismissals. It was also suggested that another company in the Corona group of companies had from time to time been involved in the discussions and negotiations which led to the transfer. In addition, submissions were made to the effect that the structure of the sale that eventually took place might suggest that no transfer was in contemplation at the time of the claimants' dismissals, because what had previously been reduced to writing was heads of terms for a share sale.
18. From the information available at this preliminary hearing, the Tribunal took the view that there is a significant lack of clarity about the nature of the negotiations or discussions which took place from July 2018 and up to May 2019. The Tribunal considered that it could not say with any certainty what the nature/subject/objective of the talks were at any particular time nor how the third respondent or another company in the Corona group were involved at any particular time or to what end. This matter will require consideration of all the evidence and fact finding by the Tribunal at a final hearing.
19. The question of whether there was a transfer of an undertaking and whether such was the sole or principal reason for the claimants' dismissals is a legal question which, in this case, will depend upon careful findings of fact. The reason for the claimants' dismissals will be the set of facts known to the employer or beliefs held by that employer which caused it to dismiss the claimants. Before, and around the time of the claimants' dismissals and after those dismissals, the respondents were engaged in talks. Ultimately, what resulted was a transfer of an undertaking, an asset sale. It is unclear whether that asset sale was proposed at the outset or, if not, when it came to be considered/discussed and agreement was reached.
20. Counsel for the first and second respondents referred the Tribunal to the case of *Spaceright Europe Ltd v Baillavoine and others* [2012] ICR 520, pointing out that the circumstances in which a dismissal could come within TPUE Regulation 7(1) had been narrowed by amendments under the 2014 Regulations. Counsel submitted that, in *Spaceright*, the Court of Appeal held that a dismissal could come within the old limb (b) of Regulation 7(1) even if the transfer had been agreed and so by implication the Court of Appeal did not consider that a dismissal could come within limb (a) if the transfer had yet to be agreed.

21. Counsel for the third respondent referred the Tribunal to the case of *Kavanagh v Crystal Palace FC 2000 Ltd* [2013] EWCA Civ 1410 which she said was authority for the proposition that the transfer in this case could not be the reason for the claimants' dismissals because, at the time of the dismissals, no agreement had been reached in relation to the transfer, in that no agreement was in existence. The written agreement for an asset sale was concluded in May 2019 which is 5 months after the dismissal of Mr Hardisty. However, the Tribunal considered that there were talks for some time before May 2019 and quite possibly proposals to that end were formulated as far back as July 2018. An agreement between the respondents would likely have been reached some time before the agreement was incorporated in a legal document and signed off. The third respondent was involved, as stated in its pleaded response, from November 2018. In the circumstances, the Tribunal considered that the claims against the third respondent could not be said to have no reasonable prospects of success. The timing of the agreement which produced a transfer is not certain. The claims against the third respondent shall not therefore be struck out.
22. The Tribunal also considered that it was not appropriate to make deposit orders in relation to the claims against the third respondent. Demonstrating little reasonable prospects of success is a less rigorous test than that required for strike-out. However, taking the claimants' case at its highest, and in light of the above conclusions, the Tribunal could not conclude that the claim against the third respondent had little reasonable prospects of success. There is, in the Tribunal's view at this stage, a realistic prospect of succeeding against the third respondent.

#### The first respondent

23. The claimants' original claims of unfair dismissal, submitted on 7 May 2019 were brought against the first and second respondents. The claimants' case is that they were employed by both companies and the Tribunal was shown contracts made between the claimants and each of the first and second respondents. In the case of the first respondent, the contract shown was entitled "Service Contract" and for the second respondent, the document is headed "Contract of employment". The Service Contract refers to particulars which the first respondent is required to provide in accordance with the Employment Rights Act 1996 amongst other legislation. The Tribunal also understands that, when the claimants were dismissed, they received letters of dismissal from each of the first and second respondents.
24. The second respondent accepts that it employed the claimants. The first respondent disputes that it employed the claimants and asserts that, because it did not employ the claimants, it should be removed from these proceedings. The Tribunal considered that it cannot remove a party simply because that party denies it is the employer of a claimant, even though another party asserts that it is the true employer. The first and second respondent are connected in terms of their corporate structures and certain senior personnel. In this case there is a factual dispute about many matters and the documents do not appear to support the first and second respondents' assertions. There is a contract of employment with the

second respondent but there is also a contract with the first respondent which appears to also be a contract of employment even though not titled as such.

25. It was apparent to the Tribunal that there is significant evidence that demands proper consideration in this case. Whilst certain employment rights are not expressly included in the Service Contract, there are references to the Employment Rights Act 1996 and a list of duties akin to the claimants being employees. Both companies sought to suspend the Claimants and the wording of the first respondent's suspension letters suggests that the respondents are themselves unsure about which of them is the employer in this.
26. Further, the manner and timing of the claimants' suspension and dismissals require a detailed examination of the surrounding facts and circumstances. The claimants' suspension came just after a breakdown in a possible sale to a private equity company. The Tribunal has seen a number of quite offensive comments contained in e-mails which were appended to Mr Lenton's witness statement. The first and second respondents' personnel's attitude to the claimants as displayed in the emails paints a very concerning picture and a context which cannot be ignored. The claimants' case is that the respondents' personnel had a possible interest in dismissing the claimants, a task which certain individuals handled personally, without apparent regard to fair procedures and despite that there was an HR department that could have handled such.
27. The claimants contend that the allegations laid them, which led to their dismissals, are about historical matters. If that is right, it may add weight to the claimants' arguments that their dismissals were a vehicle to remove them as "bad leavers" which, in turn, allowed certain individuals to obtain the claimants' shares cheaply and also to remove their objections to the substance of the respondents' discussions with other parties. A further concern is that the third respondent was in the background for some time unbeknown to the claimants. The tone and content of the respondents' emails suggests that there may have been a deliberate intention to keep the Claimants in the dark. That begs the question, why? The Tribunal therefore concluded that the circumstances surrounding the claimants' dismissals need to be looked at in detail, which is beyond the scope of this preliminary hearing and which is more appropriately done at a substantive final hearing.
28. In addition, Counsel for the claimants made submissions highlighting a number of inconsistencies between the correspondence and representations made by the respondents at this preliminary hearing. The Tribunal accepts that the submissions made are based on instructions which the representatives today had received from the respondents. Counsel for the claimants also raised matters that may go to credibility. These are all matters that can only be properly tested at a substantive final hearing with evidence given under oath after full disclosure and cannot be dealt with at a preliminary hearing.

29. In those circumstances the Tribunal concluded that it could not say that claims of unfair dismissal, brought against the first respondent have no reasonable prospects. The claims against the first respondent shall not therefore be struck out.
30. The Tribunal also considered that it was not appropriate to make deposit orders in relation to the claims against the first respondent. Demonstrating little reasonable prospects of success is a less rigorous test than that required for strike-out. However, taking the claimants' case at its highest, and in light of all the above conclusions, and taking account of the documents which the Tribunal has seen, the Tribunal could not conclude that the claim against the first respondent had only little reasonable prospects of success. There is, in the Tribunal's view at this stage, a realistic prospect of succeeding against the first respondent. Disclosure has not yet taken place and evidence needs to be heard in order to resolve what are significant factual disputes.

---

Employment Judge Batten  
Date: 5 February 2020

REASONS SENT TO THE PARTIES ON

.....  
.....

FOR THE TRIBUNAL OFFICE