Case No: 2302803/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr J Duato Botam

Respondents: (1) Purosearch Ltd
(2) Heronden Veterinary Practice Ltd

Heard at: **London South Employment Tribunal (by remote video hearing)**

On: **9 December 2021**

Before: Employment Judge Ferguson

Representation
Claimant: No attendance or representation
Respondents: (1) Ms S McCracken (solicitor)
(2) Mr J Lewis-Bale (counsel)

JUDGMENT having been sent to the parties on ***21/12/21*** 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

INTRODUCTION

1. This hearing was listed to consider the Respondents' applications to strike out the claim.

2. By a claim form presented on 6 July 2020, following a period of early conciliation from 9 June to 6 July 2020, the Claimant brought a claim against the First and Second Respondents and third company, Greenwich Contracts Ltd, in which he complained of "Discrimination due to COVID-19, breach of contract, wrongful dismissal, and automatic unfair dismissal". The complaints arose out of the Claimant having been offered work via the First Respondent ("Purosearch") as a veterinary surgeon with the Second Respondent ("Heronden Vets") and the offer being later rescinded on the basis that the Claimant was also working in a Covid-19 intensive care unit in a hospital.

3. The First and Second Respondents both defended the claim. The claim against Greenwich Contracts Ltd was dismissed on withdrawal in a judgment sent to the parties on 12 December 2020.

4. The claim was originally listed for a final hearing on 28 April 2021. The First and Second Respondents both applied to strike out the claim, on 25 February 2021 and 24 February 2021 respectively. The Tribunal then converted the final hearing on 28 April 2021 to a three-hour open preliminary hearing to consider the strike-out applications. That hearing was postponed due to lack of judicial resources. Unfortunately, when it was relisted it was mistakenly listed as a one-day final hearing. The mistake was rectified by Employment Judge Burge on 16 September 2021 when she converted the re-listed hearing to an open preliminary hearing to consider the strike-out applications. She also directed the Claimant to respond to the Respondents' strike-out applications within 21 days.

5. On 16 September 2021, after receiving the letter from the Tribunal, the Claimant sent two emails to the Tribunal, one complaining about Employment Judge Burge's decision to convert the hearing to a preliminary hearing and alleging judicial misconduct, and another saying that he was "traveling for the holidays and won't have internet access while I am away, so I will not be able to read or respond to your email under after January the 7th, 2022."

6. On 23 November 2021 the Tribunal wrote to the Claimant noting that he had not applied for a postponement or provided any evidence that he could not attend the hearing, save that he had chosen to travel when he knew the hearing was listed for that date. It was confirmed that the hearing on 9 December 2021 would proceed as listed.

7. At 7.00am on the morning of the hearing the Claimant emailed the Tribunal, again complaining about the decision to convert the hearing to a preliminary hearing and indicating that he would "only attend the Final Hearing whenever it is rescheduled with time enough to prepare myself", and that would be only after he received a response to his complaint to the Regional Employment Judge about Employment Judge Burge. He said he would not have access to email again until after Christmas. It was also apparent from the Claimant's email that he believed the original preliminary hearing on 28 April 2021 had been "cancelled and swapped to a final hearing" because of his responses to the Respondents' strike-out applications.

8. The Claimant did not attend today's hearing, as he had indicated in his email. Rule 47 of the Employment Tribunals Rules of Procedure empowers the Tribunal to strike out a claim due to non-attendance. Given that the hearing was a matter for legal submissions only I did not consider strike-out on that basis alone was appropriate. I did, however, consider it was in the interests of justice to proceed with the hearing in the Claimant's absence, as Rule 47 also permits. The reason for the postponement of the hearing on 28 April 2021 was lack of judicial resources. It is unfortunate the hearing was originally relisted as a final hearing, but that was corrected on 16 September 2021 and then on 23 November 2021 the Tribunal confirmed again that the hearing on 9 December 2021 would proceed as an open preliminary hearing. The only reasons given for the Claimant's non-attendance are the fact that he disagrees with the

decision to convert the hearing to a preliminary hearing, the Claimant's wish to wait for a response to his complaint against Employment Judge Burge and a suggestion that the Claimant may be abroad and/or may have limited internet access. None of those are good reasons for his non-attendance. He has provided no evidence of any inability to attend. He appears to have simply decided not to attend in protest at the Tribunal's decision to consider the strike-out applications.

BACKGROUND AND CLAIM

9. On or around 2 June 2020 the Claimant was recruited by Purosearch for a locum position as a veterinary surgeon at Heronden Vets, two days a week from 8 June 2020 until 31 August 2020. The contractual documentation identifies an "umbrella company", Greenwich Contracts Ltd, as the Claimant's employer.

10. The Claimant says that when he was recruited, he informed the Respondents that he was also working in an ITU Covid-19 ward. On 7 June 2020 he was told he was not required to attend work because Heronden Vets had not carried out a risk assessment relating to Covid-19. On 8 June he was told that "because of the stigma that there is around COVID-19" the Respondents had decided to turn down the offer of employment and offer one week of paid leave.

11. The claim form identifies the following complaints:

    11.1. "Wrongful dismissal due to the Respondent not following properly the COVID-19 Recruitment Guidelines during the recruitment process. That is because the defendants did not perform a risk assessment before employing the claimant. Furthermore, no actual risk assessment was discussed, performed, and presented to the claimant for signature."

    11.2. "Discrimination in relation to being laid-off/ dismissed/ requested not to go to work because of concerns about COVID-19. The Respondent stigmatised the claimant when they thought that it was better to keep the claimant off work and dismiss the claimant because they thought that the claimant could have COVID-19. The situation parallels that of dismissing an employee due to human immunodeficiency virus (HIV). Moreover, the defendants did not even actually gather any evidence that the claimant had contracted COVID-19. The defendants speculated about the health status of the claimant, who was discriminated against by them after helping in the National Health Service (NHS) to save lives during the COVID-19 pandemic."

    11.3. "Automatic unfair dismissal. The Respondent did dismiss the claimant due to concerns about Health & Safety – COVID-19."

    11.4. "Breach of contract because of 1. dismissal of an employee due to concerns about COVID-19. 2. because of withdrawing or turning down a job offer after the claimant accepted it. It is a breach of contract to withdraw a job offer or turn it down after it has been accepted. The contract is made as soon as you accept the offer and both sides are bound by the terms until the contract is lawfully terminated. 3. Because Purosearch is declining to

liase with Heronden Vets to negotiate the claim. Purosearch has a duty to represent the interests of the employee and to liase with the end client (Heronden Vets) on behalf of the employee (the claimant)."

STRIKE-OUT APPLICATIONS

12. On 24 February 2021 the Heronden Vets applied to strike out the claim on the basis that it has no reasonable prospect of success. It was argued that the Second Respondent had no direct, express or implied contractual relationship, employment or otherwise, with the Claimant. As the Claimant was not an employee his complaints of unfair dismissal and wrongful dismissal had no reasonable prospect of success. As for the complaint of "discrimination", it was argued that the basis of the claim was unclear, but that Covid-19 was incapable of amounting to a disability under the Equality Act 2010 and nor was it capable of being construed or treated as any other protected characteristic under the Equality Act 2010. That claim also therefore had no reasonable prospect of success.

13. On 25 February 2021 Purosearch applied to strike out the claim. It argued that the Claimant was employed by Greenwich Contracts Ltd, who paid the Claimant contractual notice pay. There was no direct, express or implied contractual relationship, employment or otherwise, between Purosearch and the Claimant. The complaints of unfair dismissal and wrongful dismissal therefore had no reasonable prospect of success. As to "discrimination due to covid-19" Purosearch argued it was unclear whether this claim was made against it or not. It also made the same arguments as Heronden Vets, that Covid-19 was not a disability or any other protected characteristic under the Equality Act 2010. It was also argued that the Claimant had not identified any alleged breach of contract against any of the Respondents, and in any event there was no contract whether direct, express or implied between the Claimant and Purosearch.

14. The Claimant responded to both applications, on 26 February and 1 March 2021. He argued that "the defendants failed to perform a Risk Assessment before employing me, and after formally employing me, they speculated with my health status, and discriminated against me regarding COVID-19 when they breached the contract". He alleged that he was employed by Purosearch and Heronden Vets but elected to be paid via the umbrella company. He claimed that Covid-19 amounts to a disability "as much as HIV does". As to breach of contract, the Claimant did not dispute that he had been paid one week's pay, but said there was "no contractual provision in place for the third respondent [Greenwich Contracts Ltd] to accept payments from the first and second respondent, nor for the third respondent to issue to me any payment comming from either the first or second respondent."

15. The Claimant sent a further email to the Tribunal on 20 March 2021 saying that he wished to make clear he had never revealed his "Covid-19 health status" at the time of being discriminated. He said, "I want to make very clear that I very strongly believe that it is self-evident, beyond any reasonable doubt, that I was more than clearly discriminated against due to my employers perceiving that I had Covid-19, and/or because of them associating me with Covid-19 patients. have previously clearly stated that they treated me differently because of

belonging at the time to the group of people in the society called frontline workers."

16. In a further email of 23 March 2021, the Claimant referred to the definition of disability under the Equality Act 2010 and in particular the requirement for the condition to be "long term". He argued that "Long Covid" was a recognised condition and that the effects of Covid-19 could meet the definition of long term.

LEGAL FRAMEWORK

17. The Employment Tribunals Rules of Procedure provide, so far as relevant:

> **Striking out**
>
> **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—
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> …
>
> (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.
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> (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

18. The Employment Appeal Tribunal has recently given guidance on the Tribunal's duties in relation to strike-out applications against litigants in person in Cox v Adecco and ors 2021 ICR 1307. The EAT reiterated that if the prospects of a claim succeeding turn on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate. The claimant's case must ordinarily be taken at its highest. Further, there must be a reasonable attempt at identifying the claim and the issues before considering strike-out or making a deposit order. 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 and any key documents in which the claimant sets out the case. The EAT acknowledged that in some cases, a proper analysis of the pleadings, and of any core documents in which the claimant seeks to identify the claim, may show that there really is no claim and therefore no issues to be identified. The EAT went on to note that respondents, particularly if legally represented, should, 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, aid the Tribunal in identifying 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. Finally, 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.

CONCLUSIONS

19. In considering the Respondents' applications I have carefully considered the pleadings and the additional documents the Claimant has sent to the Tribunal in accordance with the guidance in Cox v Adecco. The Respondents produced a comprehensive bundle for today's hearing which includes all of the relevant documents and correspondence. In particular I have considered the Claimant's written responses to the Respondents' applications. I note that the Claimant's case must be taken at its highest. In terms of identifying the complaints and issues, where there is any doubt as to the Claimant's intended complaints I have interpreted the documents generously to the Claimant. Having said that, it is also relevant that the Claimant did not comply with the direction of 16 September 2021 to provide a formal response to the strike-out applications, and he has chosen not to attend today's hearing at which he would have had the opportunity to discuss the claim and explain his case. He has not put forward any legitimate reasons for his non-attendance.

Unfair dismissal

20. The Claimant does not have two years' service, so pursuant to s.108 of the Employment Rights Act 1996 ("ERA") he can only pursue a claim of unfair dismissal if he alleges that his dismissal was automatically unfair by virtue of one of the provisions in s.98B to s.105 of the ERA. The Claimant has not articulated a complaint under any of those provisions. The claim form says he was dismissed "due to concerns about health & safety". That is not a basis for an automatic unfair dismissal complaint. Section 100, which is entitled "Health and safety cases", states that a dismissal will be automatically unfair if the reason or principal reason is that the employee has, in various different types of situation, carried out health and safety-related activities or raised health and safety concerns. That is not the Claimant's case. The complaint of unfair dismissal therefore has no reasonable prospect of success.

21. Further, there would appear to be no basis on which the Claimant could argue he was an employee of Purosearch, who are an employment agency. As Heronden Vets were the "end user", it is possible that the Claimant would be able to establish employment status but this would be a matter for determination on the evidence. It is unnecessary to make any comment on the merits of such an argument because the claim is bound to fail for the reasons given above.

Wrongful dismissal

22. The Claimant has not disputed that the contract permitted termination on one week's notice. The Respondents have provided a copy of the contract in a bundle for today's hearing which confirms that was the agreement. Nor has the Claimant disputed that he was given one week's notice of termination and was paid for that week. Even on the Claimant's own case, therefore, he has not suffered any loss. To the extent that the Claimant argues he had a separate contractual entitlement to be paid by the First or Second Respondents, even in circumstances where he was paid by Greenwich Contracts, he has not identified any contractual provision that would give rise to a valid claim for breach of contract on that basis. This claim therefore also has no reasonable prospect of success.

Discrimination

23. The only protected characteristic mentioned by the Claimant is disability. He appears to rely on Covid-19 as a disability on the basis of the Respondents having speculated about his Covid-19 status and perceiving that he could be a carrier of the virus. Claims based on “perceived disability” are possible under the Equality Act 2010 but it would still be necessary for the Tribunal to determine whether the perceived condition meets the definition of a disability under s.6 of the Equality Act 2010.

24. The Claimant’s case is that the Respondents ended the locum agreement because of the risks associated with him working simultaneously in a Covid-19 ward in a hospital. That does not amount to an allegation that they perceived the Claimant had Covid-19 at the time. Even if it did, the concerns were simply about the risk of infection. Covid-19, in its common form as widely understood at the time, does not have long-term effects. The Claimant does not allege that he was discriminated against on the basis that the Respondents believed he had “Long Covid”.

25. The comparison with HIV is misconceived, not least because HIV is deemed to be a disability pursuant to paragraph 6 of Schedule 1 to the Equality Act 2010.

26. Even adopting the most generous interpretation of the Claimant’s case, and taking the facts at their highest, the Claimant has not put forward any complaint of disability discrimination that has a reasonable prospect of success.

27. There is some suggestion in the correspondence that the Claimant seeks to argue he was discriminated against because of his status as a “front line worker”. That is not a protected characteristic under the Equality Act 2010.

“Breach of contract”

28. The Claimant has not alleged any separate breach of contract other than that already considered under wrongful dismissal above.

Summary

29. The Claimant has not identified any complaints in respect of which the Tribunal has jurisdiction, and which have a reasonable prospect of success. The claim is therefore struck out pursuant to Rule 37 of the Employment Tribunals Rules of Procedure.

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Employment Judge Ferguson

Date: 24 January 2022