EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr T Sami	**v**	**(1) NANOAVIONICS UK LIMITED** **(2) NANOAVIONIKA UAB t/a NANOAVIONIKA LLC** **(3) AST & SCIENCE LLC** **(4) MR A AVELLAN**

Heard at: Watford via CVP **On**: 25 August 2020

Before: Employment Judge Bartlett (sitting alone)

Appearances

For the Claimant: in person
For the Respondents: Miss Carse, of Counsel

JUDGMENT

1. The claimant's claims against **AST & SCIENCE LLC** have no reasonable prospect of success and are struck out.

2. The claimant's claims against **NANOAVIONIKA UAB t/a NANOAVIONIKA LLC** and **MR A AVELLAN** have little reasonable prospect of success and deposit orders in the amount of £150 in respect of each claim are made.

3. The claimant's applications for specific disclosure and further and better particulars are refused.

REASONS

Background

4. The Claimant submitted two ET1s, the first dated 27 August 2019 in respect of claims against R1, R2 and R3 under claim number 3321885/2019 and the second dated 19 October 2019 in respect of claims against R4 under claim number 3322446/2019. R4 has been used to describe Mr A Avellan despite

the fact that he is a respondent to the second claim only in light of the expectation that the claims would be consolidated.

5. The claimant was employed by R1 as a sales director from 2 January 2019 until 24 May 2019. The respondent alleged that the claimant was dismissed for performance related reasons this is disputed by the claimant who alleges that this and other acts were discriminatory/harassment.

Issues

6. The preliminary hearing was listed to determine:

   6.1 whether or not some or all of the claims against R2, R3 and/or R4 have no reasonable prospect of success and should be struck out;
   6.2 whether or not some or all of the claims against R2, R3 and/or R4 have little reasonable prospect of success and deposit orders made.

7. In addition, the claimant made two applications:

   7.1 an application for specific disclosure; and
   7.2 an application for further and better particulars.

8. At one point in the hearing Ms Carse indicated that the respondent had submitted that the claimant's claim against R4 was out of time. However the skeleton argument referred to an abuse of process argument in respect of the second claim and did not make an out of time argument. The claimant started setting out the relevant dates and the respondent conceded that the second claim was not out of time.

Have some or all of the claims against R2, R3 and/or R4 no reasonable prospect of success such that they should be struck out and have some or all of the claims against R2, R3 and/or R4 little reasonable prospect of success such that a deposit order should be made?

9. I am aware that the tests for strike out and deposit orders are different and I have, as set out below, applied the relevant tests.

10. At the start of the hearing the claimant argued that the tribunal should not consider making strike out or deposit orders in respect of the claim against R4 because he had not received 14 days notice of the preliminary issues and the issues to be determined at that hearing. I determined that the tribunal was able to give consideration to strike out and deposit orders in respect of the claim against R4 for the following reasons:

    10.1 I did not have the benefit of having copies of any of the tribunal's notices of hearings in this case. However for the purposes of the applications I was prepared to accept the claimant's assertion that a notice of hearing sent out on 20 August 2020 was the first time that a notice of hearing included the second case number and therefore the claim against R4. I accept that this was not 14 days notice;

10.2 Rule 37(2) requires that the party has been given a reasonable opportunity to make representations. I find that the claimant did have a reasonable opportunity to make representations as can be seen by the lengthy and detailed correspondence that he sent to the tribunal prior to the hearing and he was able to put his case fully at the three hour CVP preliminary hearing (the whole three hours were used).

11. Rule 37 sets out:

"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;

(b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c)for non-compliance with any of these Rules or with an order of the Tribunal;

(d)that it has not been actively pursued;

(e)that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)

(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...."

12. Rule 39 sets out:

"Deposit orders

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order…"

13. Ms Carse's submissions can be very briefly summarised as follows:

13.1 the claimant was employed by R1 and had no employment relationship with any of the other respondents;
13.2 there is no basis upon which R2/R3 can be held to be agents of R1. To be an agent R2/R3 would as corporate entities needed to have entered into fiduciary duties with R1 in respect of R1's relationship with the claimant. Such an assertion is not supported by evidence;
13.3 the claimant does not suffer prejudice by the striking out of claims against R2/R3 because R1 accepts liability in respect of any acts or omissions that are found to have been carried out by R2 and/or R3;
13.4 references in clause 14.6 of the claimant's employment contract defining R2 and R3 as employers is only for the purposes of confidentiality obligations and cannot be used to establish an employment relationship;
13.5 In relation to the claim against R4, this should have been included in the first claim;
13.6 the claimant appears to argue that R4 knowingly helped in a discriminatory dismissal by not conducting an appeal. The acts complained of by the claimant occurred between 7 and 22 June 2019. The claimant had already been dismissed by this time and therefore it was not possible for R4 to aid another to do an act which that other has already done;
13.7 the claimant's claim is internally inconsistent because he claims R4 who is non-Lithuanian committed acts of discrimination against non-Lithuanians.

14. The claimant submitted a very lengthy skeleton argument and I asked him questions at the preliminary hearing so that I was clear about his submissions. The claimant submissions can be very briefly summarised as follows:

14.1 the claimant asserts that he was told during his dismissal meeting that his dismissal was authorised and approved by R4;
14.2 he was employed by R2;
14.3 in the alternative R2 was an agent of R1. He relied on document 7G page 18 which was a power of attorney in which Mr Buzas delegates power to sign employment contract termination documentation in respect of the claimant to Mr Linas Sarguatis of R2;
14.4 Mr Buzas was the CEO of R2 and the sole Company's House director of R1. The claimant was paid by R2 and R1 was entirely subsumed within R2 which is based in Vilnius, Lithuania;
14.5 he was a worker of R3 and falls within the protection afforded to workers under the Equality Act 2010;
14.6 R4 was the chairman of R2 and was not involved in R1 except as a person who exercised significant control;
14.7 the claimant should be viewed as a contract worker with R1 the umbrella company and the end user R2

14.8 R2 and R3 have contravened section 112 of the Equality Act 2010.

15. I asked the claimant to give a brief outline of his financial situation so I could take into account his personal financial circumstances. He provided the following information and I agreed to let him follow-up in writing as to his expenses:

    15.1 he is currently employed by Rolls-Royce plc. His salary was £51,000 pa gross and is now £46,000 gross following a pay deferral. He is close to signing but has not signed a subcontracting contract which would provide £1700 pm which would be paid through a company;
    15.2 his wife is a student and does not have an income though she did until 2 months ago;
    15.3 he has approximately £500pm more income than expenditure but his circumstances are complex and finely balanced.

16. I find that the claimant's contract of employment clearly sets out that the employment relationship is between the claimant and R1. I recognise that clause 14 sets out obligations relating to confidential information and quite commonly this refers to other companies in the corporate group including R2. I do not find that this supports the claim that R2 was an employer or an agent. I have reviewed the offer letter and whilst this was sent by R2 it clearly sets out that the employer will be R1.

17. I accept the claimant's evidence that he was paid through R2, that at the time of his employment the claimant and Mr Buzas were the only employees of R1. I also accept the respondent submissions that R1 has now grown to 6 employees, has taken a permanent lease and is continuing its plans to grow the UK business. The claimant voiced his concerns that R2 may close R1 leaving the claimant prejudiced. I recognise that this can and does happen.

18. I find that the claimant's submissions relating to him being a "contract worker" do not assist him. I remind the parties of section 41 of the Equality Act and the limited protection provided to contract workers. Further, I consider that the claimant's claims are so tenuous that they have no reasonable prospects of success.

19. I find that the claimant's submissions that he was a worker of R2 and R3 have no reasonable prospects of success. The claimant's claim discloses merely that he may have carried out some activities for other companies in R1's group. These were not substantial duties when his employment with R1 is taken as a whole and I find the argument that he was a worker for these purposes wholly artificial in light of his employment relationship with R1.

20. Therefore the only issue remaining is whether or not R2 and R3 were in a relationship of agency. Both parties referred me to the judgement of the Employment Appeal Tribunal in **Yearwood v Metropolitan Police Commissioner [2004] ICR 1660 [39]**. I find that the term 'agent' as used within the statute refers to the common law of agency and the question is whether R2 and/or R3, as corporate entities, entered into fiduciary duties with the First Respondent in respect of the its relationship with the Claimant. I

found **Yearwood** to be of limited relevance because it is largely concerned with whether or not agency can arise in the very specific circumstances of police officers and their relationships whereas in this case the issue is whether or not there is agency between corporate entities.

21. I find that there is no reasonable prospect of the claimant establishing that R3 acted as the agent of R1 in respect of R1's relationship with the claimant. Very little has been identified which could establish such a relationship except that R3 and R1 are in the same corporate group. I make the same findings in relation to section 112 of the Equality Act 2010. Therefore, the claimant's claims against R3 are struck out.

22. In respect of agency between R2 and R1, I accept that there was a specific power of attorney granting authority to a director of R2 to execute documentation terminating the claimant's employment. I am not satisfied that this is sufficient to establish agency in relation to the alleged discriminatory acts. However when I take into account that there has been some granting of authority, that R2 or R2's management team may exercise some control over R1's actions (particularly due to R1's limited size and resources), I do not find that there are no prospects of the claimant establishing such agency. However I consider that there are little reasonable prospects of the claimant establishing agency because, taking his claim at its highest, the claim against R2 is based on mere assertions and ignores the employment relationship between the claimant and R1. I make the same findings in relation to section 112 of the Equality Act 2010 and I consider that the claimant has little prospects of success in establishing that R2 knowingly aided R1 contravened the Equality Act 2010. Therefore I have decided not to make a strike out order in respect of the claimant's claims against R2 but I make a deposit out order as set out above.

23. I have considered the claimant's evidence about his difficult financial circumstances. Taking that into account, I make an order that the claimant must pay a deposit of £150 in respect of the claims against R2.

24. In relation to the claims against R4 I make the following findings:

    24.1 The claim against R4 has two elements which are alleged to be a breach of section 112 of the Equality Act 2010:

        24.1.1 R4 approving the termination of the claimant's employment (which is alleged to be a discriminatory act).

        24.1.2 A failure to carry out an appeal process in respect of the claimant's termination during the period 7 to 22 June 2019.

    24.2 I do not find that the claimant's claim against R4 was an abuse of process. Lodging a claim against another party at a later date is not inherently an abusive act. The claimant gave reasons which related to what he was told by ACAS as to the delay;

    24.3 I do not find that there are no or little reasonable prospects of success of the claim that, given the intertwined nature of the management teams in the group structure, R4 knew about the termination of the claimant's employment. However, section 112 sets out the following:

" (1)A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).

(2)It is not a contravention of subsection (1) if—

(a)A relies on a statement by B that the act for which the help is given does not contravene this Act, and

(b)it is reasonable for A to do so."

24.4 I find that s112 of the Equality Act 2010 requires that R4, a non-Lithuanian, knowingly helped R1 and/or R2 act in contravention of the Equality Act 2010 and the claimant must establish that R4 cannot benefit from s112(2). I find that there is little reasonable prospects of success of the claimant establishing all of these elements, particularly when the wider circumstances of the claim are considered which is a dispute surrounding a relatively short period of employment and a dismissal which is alleged to be for poor performance/discriminatory. Therefore I make a deposit order in the amount of £150 as set out above.

25. Claims **3321885/2019 & 332446/2019** are consolidated.

Case management

26. A considerable part of this preliminary hearing was spent discussing case management issues particularly the particularisation of the claims and response. As set out above I refuse the claimant's application for further and better particulars from the respondent and the respondent did not pursue a claim further and better particulars against the claimant.

27. One of the documents the claimant submitted in the bundle for the preliminary hearing contained three tables which set out the elements of his three claims namely direct discrimination, indirect discrimination and harassment. These were very helpful documents and I consider that they provide most of the information that a respondent could reasonably require. Ms Carse set out a few minor areas about which the respondent would like further clarification. I agreed with the parties that this should be dealt with by correspondence between the parties. I reminded all parties that requiring further and further information from each other did little to progress the case and was not in the interests of the overriding objective. It is important that all parties keep in mind what the core of this claim is about and focus on that. There is very little to be gained and a lot to be lost by any side relying on a large volume of claims.

28. A one day case management hearing was scheduled for 25 June 2021 which was the first available date.

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Employment Judge Bartlett

Date: 26 August 2020

Sent to the parties on: 16/9/2020

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For the Tribunal Office