EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ugonna Nwachukwu	**v**	Longrich International (UK) Limited

Heard at: Watford Employment Tribunal (by CVP) **On:** 31 August 2021

Before: Employment Judge Dobbie

Appearances
For the Claimant: Leonard Ogilvy (Legal Representative/Consultant)
For the Respondent: Maurice O'Carroll (Counsel)

RESERVED JUDGMENT

1. The Respondent's application to strike out the Claimant's claims under rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is dismissed.

2. The Claimant's claim for holiday pay is dismissed upon withdrawal.

3. The Claimant's claim for failure to provide a statement of terms and conditions under s.1 Employment Rights Act 1996 (ERA) is dismissed upon withdrawal.

REASONS

Parties

1. The Claimant asserts that she was employed by the Respondent from 22 October 2019 to 19 August 2020 as a Company Lawyer, operating in the UK.

2. The Respondent is a private limited company carrying on business in the distribution of medical and dental supplies in the UK. It has a single director, namely Esther Ajala.

3. The Respondent asserts that it never had a contract with the Claimant and that she instead had a contract *for services* with a separate company, namely Longliqi International (Nig) Limited.

Issues

4. The substantive claims remaining (following some having been dismissed upon withdrawal) are for:

   (a) unlawful deduction from wages and/or breach of contract arising out of a period of approximately 10 months when the Claimant contends she worked for the Respondent as an employee; and

   (b) expenses in the sum of £7,000.00.

5. The issues on the Respondent's application to strike out (dated 16 August 2021) were whether any or all claims should be struck out because:

   (a) they have no reasonable prospects of success on the basis that the Claimant was never an employee of the Respondent and that she has named the wrong Respondent in her claim form;

   (b) for non-compliance with Tribunal rules; or

   (c) for non-compliance with the requirement to obtain an ACAS Early Conciliation certificate and state its number in the ET1 claim form.

6. The application based on the failure to obtain an ACAS certificate and transcribe its number onto the ET1 form was withdrawn after the Respondent was made aware that the Claimant had complied with these requirements. Further, the Respondent did not advance any submissions or provide any evidence of the Claimant's purported breach of orders.

Facts

7. Ascertaining the facts of the case has proven difficult on the evidence provided. I was provided with two separate bundles of documents from the Claimant, which were broadly the same and amounted to over 300 pages each. I had a separate bundle from the Respondent totalling 571 pages. I received skeleton arguments from both sides. I also read a three-page witness statement from the Claimant and a four-page statement with 140 pages of annexed evidence from Mrs Esther Ajala of the Respondent. There was much duplication of documents across the various sources.

8. I did not hear any oral evidence but had submissions from both parties who were both legally represented.

9. The evidence provided was not always in chronological order and various documents (emails and messages) were not entirely clear in terms of the dates of them or who they were sent to and from. No oral evidence was provided which might have explained the documents provided. Therefore, I have been very careful not to make findings of fact that might hamper and bind a future Tribunal considering the matter. The hearing was only listed for two hours and I was unable to read all the material in advance (which I informed the advocates of at the outset of the hearing). I have however now read all documents provided and make the following limited findings of fact:

10. On 22 October 2019, a letter addressed "to whom it may concern" and signed by Mr Jia Dian "President, International Market, Longrich Group" stated that "at a Board Meeting of Longliqi International (Nig) Limited … [the Claimant] was appointed as the Company Lawyer representing the interests of the company in the United Kingdom". The letter bears the logo for Longrich (the brand) and has "LONGLIQI International (NIG) Limited" at its header. However, it is signed by "President, International Market, Longrich Group" as stated.

11. The Respondent describes Longliqi International (Nig) Limited (a company registered in Nigeria) as being "an overseas independent affiliate company of the respondent". The precise nature of the affiliation is unknown. Mrs Esther Ajala stated in her witness statement that the Respondent has a franchise to distribute Longrich products "manufactured by Longrich Biosciences China". Further, that the Respondent "is also occasionally engaged to fulfil distribution commitments on behalf of other Longrich entities outside the UK – including for Longliqi International (Nigeria) Limited".

12. In late 2019 and into mid 2020, the Claimant was tasked with finding a warehouse for Longrich Bioscience Great Britain Ltd to rent. It is not clear who tasked her with such. During this task, the Claimant interacted with Esther Ajala, Director of the Respondent, presumable because the Respondent would be deriving some benefit from the use of the warehouse. Ultimately, the lease was entered into with Longrich Bioscience Great Britain Limited and the Claimant signed the lease on behalf of that company (the lease did not state the status of the Claimant in relation to Longrich Bioscience Great Britain Limited).

13. On 22 May 2020, the sum of £18,290.67 was said to have been paid from "Longrich UK" to a company called Acculux UK Limited for the lease on the warehouse. Acculux UK Ltd was a company the Claimant had some affiliation with or control over and she passed the monies onto the landlord of the warehouse (or though estate agents) for finalising the lease. The letter stating that the £18,290.67 was to be paid to Acculux UK Ltd had the same header and logo as the letter dated 22 October 2019, but was signed by Mr Alex Jia "VP Longrich Group".

14. On 19 June 2020, Mr Alex Jia, described as "VP Longrich Group, CEO International Market" signed a letter stating "we the above named Company hereby authorize Mrs Ugonna Nwachukwu, a lawyer based in the United Kingdom to act on our behalf on the following matters: 1. The registration of the Longrich brand and business in Germany…2. The Registration of the Longrich brand in Ireland…" The Letter bore the Longrich logo and in the header was "Longliqi International (Nig) Limited. However, as stated, it was signed by the "VP Longrich Group, CEO International Market", Mr Alex Jia.

15. Into July and August 2020, a copy of the Claimant's contract was going back and forth between herself and a man known as "Leo". I have been provided with various emails (some of which have dates in Chinese) and WhatsApp messages. From these it is not possible to ascertain when the contract negotiations commenced. I have also been provided with numerous emails which do not have the date or recipients shown on them.

16. On or around 14 August 2020, the Claimant received a draft contract from "Leo" and signed it that day. It is entitled "Legal Services Contract Agreement" and is said to be between the Claimant and "Longrich International", which is described as "the Client". There is no legal entity of the name Longrich International.

17. The written contract is backdated to 4 March 2020. The Respondent asserts that the contract was being negotiated as between Longliqi International (Nig) Ltd, not the Respondent (Longrich International (UK) Ltd).

18. I have been provided with screenshots of messages between the Claimant and a man named "Leo". I am told "Leo" is actually called Cao Yue, but he prefers to go by the name of "Leo". Cao Yue is a director of Longrich Bioscience Great Britain Limited. From the communications provided, it would appear that Cao Yue was negotiating the Claimant's contract or acting as the go between for another Longrich entity in negotiating a contract with that entity.

19. The written contract states that the Claimant's duties included "advising on all matters in the best interest of the Longrich Bioscience Great Britain's UK Market" and various other duties on behalf of "the Client" (namely "Longrich International").

    (a) Clause IV stated: "In consideration for the Services provided, the Attorney is to be paid on a monthly basis upon receipt of an increase on a date to be agreed to by both parties… Per annum £30,000 (Thirty Thousand Pounds) Part time". It is not clear whether the word "increase" is an error, and should have stated "invoice".

(b) Clause V stated that "The Attorney is to be reimbursed for ONLY the expenses: incurred while carrying out the duty of the Attorney for the Client."

(c) Clause IX of the contract states that the Claimant was an "independent contractor".

(d) Clause IX(c) states: "Attorney has the right to hire assistants as subcontractors or to use employees to provide the Services under this agreement of which will be introduced to the Managing staff of the Client" and clause XI(e) states that "the Services required by this Agreement shall be performed by the Attorney, Attorney's employees or personnel…"

(e) Clause X stated: "Government licences. The Attorney represents and warrants that all employees and personnel associated shall comply with Government, and local laws, requiring any required licences, permits and certificates necessary to perform the Services under this agreement."

(f) Clause XII stated: "The Attorney may assign rights and may delegate duties under this Agreement to other individuals or entities acting as a subcontractor"

(g) Clause XIV granted the Claimant one week's paid holiday in every six months.

20. On 18 August, the Claimant received a WhatsApp message signed off from "Longrich Management" stating "Longrich HQ requires that when maintaining legal counsel in any Country, the lawyer we are employing is expected to submit their legal lawyer certificate in that Country… Based on the representation you made to us in the past, we have therefore, offered you a contract as our UK lawyer."

21. On 19 August 2020, the Claimant sent a letter entitled "complaint and termination of my oral agreement crystallised via various emails sent between parties". The letter was addressed to "Longrich Bioscience Great Britain", Longrich International (UK) Limited (the Respondent) and "Longliqi International Limited". The letter thereafter refers to "the Company" without specifying which entity the Claimant considered the contract to be with. At paragraph 12, the Claimant stated "I hereby give you notice of termination of my employment…" and in the letter the Claimant asserts various legal claims available only to workers and employees (as defined under s.230 Employment Rights Act 1996) and a breach of contract.

22. On 1 September 2020, Atlantic Solicitors wrote to the Claimant on behalf of Longliqi International Nigeria Limited and its "principals, representatives, staff, agents and employees…" complaining of misrepresentation by her in respect of her status (i.e. not having a practising certificate from the

Solicitors Regulation Authority). The letter further states that the Claimant was engaged as a consultant, not an employee.

23. On 20 October 2020, the Claimant's lawyers replied to Atlantic Solicitors, identifying Longliqi International Nigeria Limited as "Your client" and stating:

> "We understand that our clients engaged in oral negotiations with regards to the appointment of our Client as company lawyer to your client. The outcome of those negotiations was contained within the appointment and confirmation letter, i.e. that our Client was recognised as your client's "company lawyer" and would register a company in the UK on behalf of your client… The remuneration for our Client's work was agreed to be in the region of £30,000 per annum, payable in or around July 2020… Additionally, our Client has incurred expenses in the region of £7,000 whilst conducting work for your client… Our client considers that her expenses were also agreed as part of the contract between the parties and that these are duly payable to her."

24. The Claimant was never paid in respect of her work and has not been reimbursed for any expenses.

Law

25. The threshold for striking out a claim for having no reasonable prospects of success is high. In Ezsias v North Glamorgan NHS Trust [2007] ICR 1126, the Court of Appeal held that where there are facts in dispute, it would only be "very exceptionally" that a case should be struck out without the evidence being tested.

26. In Blockbuster Entertainment Limited v James [2006] IRLR 630, the Court of Appeal described strike out as a "draconian power" that should not be exercised lightly.

27. In Balls v Downham Market High School & College [2011] IRLR 217, the EAT held that striking out is a power that should be exercised only after a careful consideration of all the available material, including the evidence put forward by the parties and the documentation on the employment tribunal's file. Further, "no reasonable prospects of success" does not mean the claimant's claim could fail or is likely to fail, and it is not a test that can be determined by considering whether the other party's version of disputed events is more likely to be believed. It is a high test and the tribunal should be satisfied that there must be *no* reasonable prospects of success before striking out.

28. The law in respect of employment status is complex and developing rapidly.

29. Under section 230(1) ERA, an employee is defined as: "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".

30. Under section 230(2) ERA, a contract of employment means: "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

31. Under s.230(3)(b) ERA, a worker is defined as someone who works under "any other contract, whether expressor implied, and (if it is express, whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer…"

32. To bring a claim for breach of contract in the employment tribunal, a claimant needs to demonstrate that they were an employee within the meaning of s.230(1) ERA (and that such employment has terminated) as is required under the Employment Tribunals Extension of Jurisdiction Order (England and Wales) Order 1994.

33. To bring a claim for unlawful deduction from wages, a claimant needs to demonstrate that they were a worker within the meaning of s.230(3)(b) ERA.

34. As described by Lady Hale in Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32:

> "Our law draws a clear distinction between those who are … employed and those who are self-employed but enter into contracts to perform work or services for others. … Within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. … The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else."

35. In Byrne Brothers (Formwork) Ltd v Baird and others [2002] IRLR 96 the EAT stated that the definition of "worker" is to lower the "pass mark". This essentially allows those who fail to reach the high pass mark necessary to qualify as employees to still qualify as workers if the requisite features of such a relationship are present.

36. The irreducible minimum requirements of establishing worker status are:

    (a) The existence of a contract between the parties;

    (b) The contract requires the individual to carry out the services personally; and

    (c) The employer is not the customer or client of any business undertaking or profession carried on by the individual.

37. To establish employee status, each of these three elements must be present, but in addition, there must be other indicia of employment status, which include control and other matters, which taken overall indicate a relationship of employment as opposed to worker or self-employed status.

Conclusions

38. To strike out the Claimant's claim for having no reasonable prospects, I would need to be satisfied that the claims had no reasonable prospects, not merely that the prospects were low or that the claims were likely to fail. I am unable to reach any such conclusion in the present case because:

    (a) The parties did not address me on the issue of worker status, focusing solely on employee status and the alleged lack thereof between the Claimant and the Respondent. Accordingly, even if I were to find that the Claimant was not an employee of the Respondent (which I am not) the claim for unlawful deduction from wages would still be at large. In any event, I have not heard enough evidence to take a view on whether the Claimant was an employee of the Respondent, as set out below.

    (b) There are significant disputed facts which have not been tested with live evidence and cross examination. Therefore, I have been unable to make the findings of fact which would be necessary to enable me to make the necessary determinations in law to decide whether the claims have no reasonable prospects of success. The Respondent has not raised or proven any "knock-out blow" demonstrating that the Claimant was not an employee or worker of the Respondent. Reviewing all documents provided to me, to consider the matters in the round, I find that there are certainly various matters which tend to suggest there was no contractual relationship between the Claimant and the Respondent, including the language used to describe the Claimant's working relationship with the various entities in the communications provided, the fact that she had very few dealings (it would seem) with the Respondent or Esther Ajala and the Claimant's solicitor's own account of the negotiations between the Claimant and Longliqi International (Nig) Ltd (as set out above) in the letter dated 20 October 2020, which appear to accept that any legal relationship was between the Claimant and Longliqi International (Nig) Ltd, not with the Respondent. However, I am unable to say on the basis of these that there are no reasonable prospects of success. There could be an adequate explanation for each of the above matters. Without hearing full evidence on this, it is not possible to find that the Claimant has no reasonable prospects of success in her claims against the Respondent.

    (c) The Claimant asserts that a contract was reached through oral and written communications. The Respondent accepts this at paragraph 10 of its Grounds of Resistance, but states that such

contract was with Longliqi International (Nig) Ltd, not with the Respondent, and that it was a contract for services as a self-employed contractor. The draft written contract was said (by the Respondent) to be negotiated on behalf of Longliqi International (Nig) Ltd. However, I have heard no evidence from Longliqi International (Nig) Ltd, and indeed no live evidence at all. I therefore cannot accept at face value the Respondent's submissions. This is especially so when the written contract itself is said to be between the Claimant and "Longrich International". I would need to hear evidence on the communications between the relevant actors to form a view as to whether a contract was ever formed between the Claimant and the Respondent. Irrespective of whether the written contract was ever properly concluded and binding, a contract might already have existed based on the oral and written discussions. Most contractual discussions appear to be between Cao Yue (who goes by the name of Leo) and the Claimant, not between the Respondent (or Esther Ajala, its director) and the Claimant. However, whilst this tends to suggest the Respondent is not the correct party to any contract, it is not possible to say that there is no reasonable prospect of the Claimant establishing worker or employment status as against the Respondent.

(d) There is clearly a link between the Respondent and the various other entities, including Longliqi International (Nig) Ltd and Longrich Biosciences Great Britain Ltd. However, I have been unable to make findings of fact as to the precise nature of the relationships between these entities, having heard no live evidence. Further, it is plain from the documents that at times, officers or employees of one of the entities acted on behalf of the others (as agent perhaps). This is evidenced by the contractual negotiations conducted by Cao Yue in respect of the written draft contract. Cao Yue is the director of Longrich Biosciences Great Britain Ltd but is said to be negotiating on behalf of Longliqi International (Nig) Ltd with respect to the Claimant's contract (according to the Respondent). In the same way the Respondent asserts that Cao Yue was negotiating on behalf of Longliqi International (Nig) Ltd (perhaps as an agent) he could have been acting in the same capacity for the Respondent. The mere fact that Cao Yue is not an officer of the Respondent does not mean that there is no contract with the Respondent. I have not heard from Cao Yue or anyone from Longliqi International (Nig) Ltd. As stated, I have heard no oral evidence at all.

(e) Longliqi International (Nig) Ltd may dispute the facts presented by the Respondent. Further, it is plain that the director of the Respondent, Esther Ajala was involved with obtaining a lease of a warehouse (which lease was taken out by Longrich Biosciences Great Britain Ltd). Accordingly, whilst I have been presented with some documents to demonstrate the officers of each of the entities involved, demonstrating that they are separate legal entities with

separate officers, and I have been presented with some documents which I am told demonstrate that the entities are not subsidiaries of the other entities, there is considerable cross over in the agents or employees of the entities acting for other entities. It is therefore entirely possible that the negotiations over the written contract were conducted by Cao Yue on behalf of the Respondent or some entity other than Longliqi International (Nig) Ltd.

(f) Cases such as Uber BV and Ors v Aslam and ors [2021] UKSC 5 and Autoclenz v Belcher [2011] UKSC 41 demonstrate that status (as a worker or employee) is dictated by substance over form. Therefore, the wording adopted in the written contract and other communications is not definitive of the Claimant's status. There are matters within the written contract (if binding) and prior communications which tend to suggest the Claimant was not an employee or worker of any entity and was indeed self-employed. However, there are also certain matters which would point the other way (including the provision of paid holiday under the written contract). Of course, the power to carry out the services through others (i.e. not personally) could be a knock-out blow which defeats even worker status in certain situations (subject to the fetters on the right to substitute, as explored in the case of Pimlico Plumbers Ltd and another v Smith [2018] UKSC 29 and the Court of Appeal decision it upheld). The written contract appeared to grant such a right. However, I have heard no evidence in respect of this to be able to ascertain whether that was a genuine right and/or, if the written agreement was not binding, whether the Claimant was entitled to use others to carry out the services under the prior agreements which both parties agree were contractually binding (albeit that the parties dispute which entity the contract was with).

(g) In respect of the Respondent's argument that the Claimant's own claim form states that she was employed by Longrich International (Nig) Ltd (not the Respondent) which the Respondent described as being fatal to her claims, I accept that this is a serious weakness in her claim. However, she did issue the claim against the Respondent and she appears to be unclear as to the relationships between the corporate entities, describing one as the subsidiary of the other. On balance, I find that this does not render the claim as having no reasonable prospects of success, but it is one of the factors which accumulates to a finding that the claims against the Respondent have little reasonable prospects of success, as below.

(h) All in all, I am unable to find that the claims against the Respondent have *no* reasonable prospects of success and therefore I refuse the Respondent's application to strike out the claims. The matter is not susceptible to strike out due to the numerous disputed facts. However, I do find that the claims have little reasonable prospects

of success as against the Respondent. Accordingly, I have made a deposit order in a separate order.

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Employment Judge Dobbie

Date: 07 October 2021

Sent to the parties on: ...11.10.2021.
THY
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For the Tribunal Office