EMPLOYMENT TRIBUNALS

Claimant: Dr K Sidahmed

Respondent: Glenworth House Ltd

Heard at: Nottingham **On:** 21 December 2016

Before: Employment Judge Britton
Members: Mr G Austin
Ms H Andrews

Representation
Claimant: Mr D Robinson-Young, Counsel
Respondent: Ms S Omeri, Counsel

JUDGMENT ON A PRELIMINARY POINT

The application to amend the current claim to include one of breach of contract (failure to pay notice pay) is dismissed.

REASONS

Introduction

1. Today, the first issue for this tribunal to determine is the status of the breach of contract (failure to pay wages in lieu of notice) claim (BoC). For reasons which were made plain at the commencement of the substantive hearing in this case on 22 August 2016, the Boc claim was "parked" so to speak because inter alia there was a lack of clarification as to the position of the Trustee in Bankruptcy (TiB) of the Claimant as to that claim. There was also the issue of whether there was an existing claim in any event, and if not as to whether the existing claim should be amended to include a BoC claim for notice pay.

2. The issue required an urgent case management discussion on 16 November 2016, which had been the day when the Tribunal intended to make its decision on the mainstream claims, because of the still uncertain status of the BoC claim viz the (TiB). It was decided to postpone the Tribunal's decision making and list a live hearing. Later that day, there was a perfected assignment by the TiB to the Claimant. That day we listed today for submissions on the BoC issue.

The BoC: procedural background

3. So what is the status of BoC claim; should it be permitted to proceed? The Claimant says that he instructed his original solicitors (Ringrose & Co) to include a

breach of contract claim in the claim (ET1) when it was submitted to the Tribunal as long ago as 21 February 2014. By then the Claimant had been declared bankrupt on 31 January 2014 although that was not disclosed on presentation of the claim: and it may well be from the history of the case that Ringrose were unaware.

4. The box for "notice pay", in other words BoC, was ticked on page 5 of the ET1 as a claim, as indeed erroneously was that to claim a redundancy payment. We say erroneous because the Claimant lacked the necessary 2 years qualifying service to bring such a claim. Stopping there, the BoC claim could only be brought by the TiB, or upon it having been assigned as a chose in action by the assignee. But it was not brought by the TiB and it had not been assigned by him. But of course the Tribunal, and as is clear the Respondent, was unaware of any of this at that time and so the jurisdictional point was overlooked. Also the particulars of claim headed "Background and Details of Claim" attached to the ET1 only pleaded the disability and whistle blowing claims. Those particulars had been drafted by Ringrose & Co. No mention was made of the redundancy and BoC claims. In due course a response (ET3) was presented having been prepared by DAC Beachcroft, solicitors. The Respondent pleaded its defence to the disability and whistle blowing claims. No mention was made about the BoC and Redundancy claims, doubtless because they were not pleaded in the particulars to the ET1.

5. The matter then proceeded to a telephone case management discussion held on 28 May 2014 by Regional Employment Judge Swann. Mrs Sally Hubbard (a partner at Ringrose & Co) represented the Claimant. Mr H Lock, solicitor, appeared for the Respondent. Mrs Hubbard had completed the Tribunal's pro forma agenda including identifying the issues. No mention was made of the BoC or redundancy claims. As the redundancy claim is in any event otiose and was never pursued it does not need to be further referred to

6. The issues were defined by REJ Swann; essentially relating to disability discrimination and detrimental treatment including dismissal for whistle blowing. In his published record of that TCMD he made no mention of any other claims. He made orders by way of directions for the progress of the identified claims. It is clear he was not told there was any breach of contract claim.

7. On 2nd June 2014 Ringrose & Co ceased to act.

8. This case was then dogged by delays and suffice it to say this ended in a strike out of the claims by Employment Judge (EJ) Camp. On application from the Claimant's then solicitors (Andrews & Co) on 19 December 2014, at an attended preliminary hearing EJ Camp restored the claims subject to compliance with the unless element of his Orders. The Claimant was represented by Mr H Trory of Counsel. Mr Lock appeared for the Respondent. EJ Camp issued his Judgment and Orders on 22 December.

9. At (1) he made an unless order; deadline 12 noon 23 December 2013. The Claimant was required to provide;

"the tribunal and the respondent with the claimant's trustee in bankruptcy's written permission for the claimant to pursue all and any complaints he makes in these proceedings that vest in the trustee…"

10. If he did not, as part of the unless orders the struck out claims would not be reinstated.

11. On the 22 December the TiB wrote to the Claimant's then solicitors inter alia stating "I give permission for Dr Sidahmed to proceed with his claim." But it was still not made clear as to what claim ie in particular BoC. Nevertheless this was treated as sufficient compliance with the orders and the claims were reinstated. However did this include the BoC claim in the sense of was there one?

12. This brings us to EJ Camp's reasons for his judgement and orders of the 19th December published separately also on the 22nd.Of crucial importance is the following at paragraph 27:

"About three-quarters of the way through the hearing before me, it was suddenly revealed that the Claimant was and has been, since late 2013, an un-discharged bankrupt".

13. Then having pointed out as per settled authority that the Claimant could only claim for injury to feelings, being bankrupt, if he succeeded on the discrimination and detrimental elements of the whistle blowing claims and the claims having not been brought by the TiB, he said this:

The Claimant may also have some sort of claim for damages for breach of contract and also for redundancy. My understanding is that any such claim would vest in the claimant's trustee in bankruptcy and therefore could not be proceeded with as things stand."

14. Thus there could not have been a clearer signal, if one was needed, to the Claimant's solicitors that if there was supposed to be a breach of contract claim, then that needed to be made plain and thought given as to whether it was currently a nullity as it had not been brought by the TiB, and if so how to proceed.

15. There was next a TCMD before EJ Ahmed on 1 December 2015. Because of the lack of progress, principally delays by the Claimant, he listed or an attended open PH to consider strike out. Inter alia he also directed:

> *"1.4 To identify those issues which are to proceed to a final hearing:*
>
> *1.5 Which elements of the claim and the complaints the Claimant is entitled to proceed with given that that at the material time or at the issue of proceedings the Claimant appears to have been an undischarged bankrupt (it is noted that the Claimant has now been discharged from bankruptcy, the date of discharge is not known today but will be confirmed in the Claimant's witness statement.)"*

16. The Claimant was represented at that TCMD by Mr P Armitage, solicitor at Andrews and Co. So yet again the Claimant's solicitors knew they needed to clarify whether a claim of BoC was being brought and its current status; that is of course if they had instructions to bring a claim. Privilege has not been waived in this case as such.

17. Thereafter there was correspondence from the TiB in which no mention was made of the BoC claim at all, ie Bp560 in the main bundle.

18. On the 20th April this presiding judge presided at the open attended PH as listed by EJ Ahmed. The Claimant was represented by Mr S Flynn of Counsel. Mr Lock again appeared for the Respondent. This judge recorded that the parties had agreed

the way forward. No reference was made to any breach of contract claim.

19. So on four separate occasions the Claimant has had lawyers (including once Counsel) represent him and on no occasion have they said that there was in fact a breach of contract claim.

20. At the start of the hearing on 22 August[1], Mr Robinson-Young, by way of a written submission sought leave to amend to introduce a claim for breach of contract on the premise that if the history as now rehearsed meant that there was no such claim, then the amendment should be permitted. The submission was not straightforward. It is encapsulated at paragraphs 6 and 7, having pointed out that the box for BoC had bee ticked in the ET1 he said:

> *"6) Unfortunately this aspect of the Claimant's original application to the Tribunal appears for whatever reason to have bee overlooked. It did not disappear. It has never been specifically withdrawn. My submission is that once a claim is made, in order that the claim or part of it to be dismissed the Claimant must first inform the tribunal that his claim or part of it is being withdrawn under rule 51, only then is the matter dismissed under rule 52.*
>
> *7) This application to amend is made on the basis that the tribunal is not with me in my previous submissions and considers that the claim has not been pursued and therefore in order that a claim for Notice Pay can be made, an amendment to the pleadings as they currently stand must be made."*

21. In summary he then set out the basis of the application by way of addressing the well known principles in **Selkent Bus Co Ltd v Moore (1996) ICR 836 (1996) IRLR 66** per Mummery J as he then was. But he did not address whether the BoC claim was a nullity absent it having been brought by the TiB, if it had not been abandoned for want of prosecution and if consent was now forthcoming. As at 22 August, if the Claim had been originally brought and had not been abandoned, there was still not a claim that could be presented before the tribunal because consent of the TiB had still not been obtained. It was not in fact obtained by way of a perfected assignment until late on 16 November.

The nature of the application today

22. Mr Robinson-Young has put in further written submissions. These deal with first the issue of whether strike out for want of prosecution is engaged, and second starting at paragraph 15 with whether the application to amend should be granted if the BoC claim does not currently exist.

23. We have considered extensive submissions from both sides for the best part of today. Essentially Mr Robinson-Young conceded that if there was meant to be a breach of contract case on presentation of the ET1 on 21 February 2014, then there was no such claim. The tribunal had no jurisdiction to entertain it because it was not presented by the TiB or by somebody to whom the right to bring that claim had been legally assigned by him.

24. Thus Ms Omeri submitted, with which the Tribunal agreed, that taking the Claimant's case at its highest, which is that his lawyers had been instructed at the

[1] By now Lace Law, solicitors, were acting for the Claimant: Mr Armitage had moved to that firm from Andrews and Co.

onset to bring such a claim, then of course they could have moved swiftly to obtain the consent of the TiB to bring that BoC claim. They never did until post 22 August 2016.

25. It thus means that Counsel for the Claimant has to approach this matter on the basis that there was not a claim that could be presented to the tribunal until late 16 November 2016. Thus he agrees that the position is that an amendment to the existing claims would be needed to bring the BoC claim. Thus we are back with the basis of the submissions in August previously referred to and as further elaborated upon today and thus the engagement of the Selkent principles.

Consideration of the application to amend

26. As there was no preceding claim it being a nullity, the application is for addition of a wholly new claim. It is not a simple relabeling. Thus it is a first essential to consider why the application was not made earlier and why it is now being made. The time limit for bringing such a claim is 3 months from the date the cause of action accrued. In this case time ran from the effective date of the termination of the employment which was 22 November 2013. Thus a first point for consideration is as to whether it was not reasonably practicable to have brought the claim within the three month's time limit and if not, whether it has been presented within a reasonable time thereafter[2].

27. The obstacle in this case would be getting the consent of the TiB. But the Claimant was declared bankrupt on the 18 November 2013: over two months before the presentation of the claim. And if leave was then being sought, why not make that clear on presentation of the claim to protect the position; and if there was still a delay make that plain to REJ Swann back at the TCMD on the 28th May 2014?

28. Of course Ringrose cased to act on 2 June 2014. Andrews and Co were not instructed until the 30 October 2014. We note that in the interim the Claimant filed various statements with the Tribunal. That received on the 13 August was stated to include "1) Full particulars of the claim" and "2) Agreement of the issues". No mention was made of a BoC claim. The same applies to the 27 page statement dated 28 September and also that of the 16 October 2014.Even the statement relied on for the substantive hearing commencing on 22 August 2016, and in summarising the claims being brought on the last page Para 80, made no such reference. So at first blush what this suggests is that Mr Robinson-Young understandably tried to rescue the position by making the application to amend at the hearing on 22 August as a BoC claim in this case would potentially provide a prospect of some compensation if all else failed. That is not a critiscm of him: he has presented a difficult argument in the best traditions of the Bar.

29. Be that as it may: as Ms Omeri pointed out, the Claimant has now had solicitors throughout the period from 30 October 2014 when Mr Armitage was instructed first at Andrews and Co and then latterly at Lace Law. So a period of nearly two years until the first hearing took place in August when nothing was apparently done to clarify there was a BoC claim, and thus apropos EJ Camp make that plain to the Tribunal and the Respondent and pursue/ obtain assignment of the chose in action of the BoC claim with the TiB. Why?

30. We have heard no evidence from the Claimant or his solicitors; but

[2] Art7 (a) and (c) Employment tribunal's Extension of Jurisdiction (England and Wales) Order 1994.

nevertheless we remind ourselves that Dr Sidahmed has made plain that he instructed his solicitors from the onset to bring the BoC claim. Second we assume, as nobody before us has said to the contrary, that he disclosed from the outset to them that he had been made bankrupt. Thus he is inevitably hoisted on the petard of pinning the reason for the delays on the failure of his lawyers.

31. He is hoisted on this petard, because of the well known principle as enunciated in **Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53 CA** and thence followed in **Wall's Meat Co Ltd v Khan 1979 ICR 52, CA,** per Brandon LJ. Thus prima facie by the exercise of reasonable diligence this BoC claim could have been rescued a long time ago: and absent evidence to the contrary, this did occur because of the fault of the Claimant's lawyers. Thus his remedy is to look to them.

32. Having so observed, Counsel for the Claimant does not require that we proceed further. He had already made plain the difficulty the Claimant would be in at law if he could not rescue the claim otherwise and was left in the difficult position of prima facie lawyers' fault.

33. It follows that the application to amend is dismissed.

_____

Employment Judge Britton

Date: 13 February 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

14 February 2017

.....
FOR THE TRIBUNAL OFFICE