



EMPLOYMENT TRIBUNALS

Claimant

Miss E. E. Macato

Respondent

v Francis Menassa (1)
Sotiria Menassa (2)

PRELIMINARY HEARING

Heard at: London South, Croydon

On: 9 August 2017

Before: Employment Judge Sage

Appearances

For the Claimant: Mr. Milford of Counsel

For the Respondent: Mr. Panesar of Counsel

JUDGMENT

1. *The proceedings are stayed for three months.*

REASONS

Requested by the Respondent.

The Claimant's application for a stay.

1. This is the Claimant's application for a stay of the proceedings before the Tribunal pending determination of the High Court proceedings. The Claimant's submissions were in writing and oral and in outline they were as follows:
 - a. An application for a stay was sought under rule 29 of the Employment Tribunal Rules 2013 on the basis that the claim before the Tribunal included an application for a claim for failure to pay the national minimum wage under Section 23(4A) of the Employment Rights Act 1996. She indicated in the ET1 that that she may wish to proceed to the High Court and lodged proceedings on a protective basis (see page 22 of the bundle). The matters have since moved on and the Claimant has secured insurance and has a CFA in place; the claim was lodged on the 24 July 2017 (see page 324), the pre-action letter at page not being responded to.

- b. It was stated that the value of the High Court claim was vastly more valuable it would be appropriate to stay the Tribunal proceedings pending the High Court proceedings.
- c. The Claimant referred to the case of **Bowater PLC v Charlwood [1991] EAT804** where it outlines the correct question to answer which is “**in which court is this action most conveniently and appropriately to be tried bearing in mind all the surrounding circumstances including the complexity of the issue, the amount involved, the technicality of the evidence and the appropriateness of the procedures?**”. The case of **GFI Holdings Ltd v Camm UKEAT/0321/08** stated at paragraph 16 that “**it is generally desirable to dispose of High Court proceedings first where there are issues in both sets of proceedings which are substantially the same**”. It was stated in this case that where the issues are substantively similar the High Court should deal with the matters first. It was stated at paragraph 24 of that case that “**if the Tribunal proceedings were to precede the High Court proceedings, it follows that the High Court might find itself bound by findings made by the tribunal as to the nature of the termination and the reasons for the termination, thereby limiting the High Court’s freedom to make findings in respect of the same factual issues; and I therefore conclude that the Tribunal have made some clear and fundamental errors in their determination**”. It was submitted that the EAT found there was an overlap and concluded that the High Court should deal with the matter first and concluded that there was an issue of ‘act estoppel’ and could result in embarrassment being caused to the High Court.
- d. The last case relied upon was the case of by the Claimant was **Mindimaxnox LLP v Gover and Ho UKEAT/0225/10** at paragraph 27 onward dealt with matters that were seen to be persuasive when considering an application for a stay. The issue as to whether the case involved complex factual matters was not seen to be a central question the second issue was embarrassing the High Court at paragraph 32-3 where it stated that it was desirable for the High Court to dispose of matters first where the issues are substantially the same as it would impinge on the Judge who would find it “**difficult not to be bound by the findings**” and as a conclusion the Tribunal Judge erred in not granting the stay. The fourth issue referred to was at paragraph 37 which is the consideration of considerable overlap and it was stated that “**the Judge ought to have decided that this matter should be left to the High Court**” as it was concluded that the “**factual material is the same in both jurisdictions. It seems to me that where there is considerable overlap it is appropriate to cede to the High Court and the Judge was wrong not to regard this as a compelling reason for rejecting the application for a stay**”. It was also a persuasive factor that it is not in accordance with the overriding objective to have concurrent proceedings over exactly the same factual territory.
- e. The Claimant submitted that there is only one option and that is to stay the Tribunal proceedings and allow the High Court claim to proceed first

due to the considerable overlap. Counsel then took the Tribunal to page 324 of the bundle where he referred to the overlap in the disputed facts relating to the hours worked, whether wages paid were less than the National Minimum Wage, if so can the Respondent rely on section 57 of the Regulations in respect of the family exemption. It can be assumed that these will be exactly the same factual issues before the Tribunal. Even if the National Minimum Wage claim were stripped out of the Tribunal claim (see page 150) there is still a claim under the Working Time regulations for rest breaks which will need a determination on the hours of work which will be a matter before the High Court.

- f. In relation to the claim for unfair dismissal and discrimination, at paragraph 19.8 of the ET1 this refers to an oppressive work schedule and for the purposes of these claims these facts are directly in issue. The issue of whether the Claimant is a Domestic Worker is before the Tribunal and they will have to decide how she was treated generally and make a finding as to whether the Respondent can rely on the Family Worker Exemption defence. The Court of Appeal has said that 'onerous duties' may be inconsistent and may be evidence of discriminatory treatment and therefore there is a close overlap of facts. All observations of fact are directly in play which may embarrass the High Court.
- g. The second issue is the disparity of value of the claim it is not quite an elephant and a mouse (more like a (large) dog and a rat), it is appropriate for the High Court claim to go first.
- h. The Third issue is the matter of stress, that is not the reason to allow the Tribunal claim to go first. If the Respondents are right and the High Court finds she did work 8 hours a day and was treated as a family member, her claim for discrimination is unlikely to proceed. The stress is at best a neutral point.
- i. The fourth point is that the First Respondent is the defendant in the High Court proceedings and is disputing the High Court's jurisdiction in a letter dated the 7 August 2017, the Claimant does not yet know on what grounds. This puts the Claimant in a difficult position, unless and until they know if the High Court has jurisdiction they cannot withdraw the claim.
- j. If the Tribunal claim goes first she will be forced to pursue a less valuable claim, we say therefore the High Court proceedings should take precedence. If the High Court does not have jurisdiction, then there is no harm done. The proper outcome should be for a stay to be granted.

2. The **Respondent's response** was oral and was as follows:

- a. The Respondent says the claim should not be stayed. Huge anxiety and stress has been caused to the Respondents, the claims against them are race discrimination and unfair dismissal and they are hugely personal and go into great details, these are hanging over the Respondents heads. There is no reason why claims that have been put in and are in train, should not be heard. We say in the interests of justice they should

proceed to determination and not be stayed. The matters raised in the High Court proceedings are part of the Tribunal claim. A considered decision was made when the Claimant lodged this matter at the Tribunal, there is no reason why it cannot proceed to hearing and to date the case has been delayed.

- b. The Claimant states the value of the High Court claim as compared to the Tribunal claim is not determinative, however it is the Respondents who are accused of discrimination and the ET1 at page 189 refers to servile and degrading conditions and this is expanded in the list of issues. The weight of the allegations is hard to underestimate. They have had allegations of domestic slavery hanging over them for over a year. Even if the High Court actions go first, this will not deal with the claims for unfair dismissal and race discrimination. The High Court claim will be determinative but the Claimant has not said that she will withdraw the claim. The Respondent states that this trumps the financial value.
- c. With regard to the overlap, it is said you have a wholesale overlap but it is a small Venn diagram. At page 326 is the High Court claim and it is devoid of personal allegations of servile and inhumane conditions (page 336-340) these are incredibly personal allegations dating back to 2012, this small section is still live. You are in an unusual position of being asked to stay proceedings, it is distinct from cases shown to you, this case has been before you for a long time. Unfair dismissal and discrimination will still be before you.
- d. The claim before the High Court and the claim before the Tribunal involves a claim where the schedule of loss (pages 81-84) based on working hours of 24 per day of £214,297.08. It is the Claimant trying to back two different horses in the same race, to the detriment of the Respondent. The stress of allegations of subjecting the Claimant servile and inhumane conditions, that is the nature of this claim. The matter before the High court is not dispositive of these claims.
- e. The Claimant decided to bring claims in the Tribunal, she had advice from a City firm and from Counsel, if you put someone in the Respondents' shoes, proceedings have been put in train they should be heard.

3. The Claimant's reply:

- a. It is accepted that bad treatment is not pleaded before the High Court, that is because it is a reply point in response to the Family Worker exemption. This will be argued and therefore there will be overlap.
- b. Counsel was happy to confirm that if and when the claim can proceed in the High Court, the Claimant will withdraw the claim.
- c. With regard to the respective value of the claim before both jurisdictions, the schedule of loss my Learned Friend took you to was a 24-hour calculation, but our pleaded case is 18 hours. My Learned Friend also

did not strip out the total wage deduction which is £85,000, the disparity remains.

Decision

4. Having considered the submissions of both parties and the case law referred to above I consider that the stay should be granted. In granting the stay I considered the following factors to be relevant:
 - a. The ET1 when presented included a claim under the National Minimum Wages Act and it was included as a protective measure (paragraph 21-2) and the Claimant reserved her right to pursue the matter in the High Court.
 - b. The Claimant also pursued claim of unfair dismissal and race discrimination where distressing allegations are made against (presently) two Respondent's. It is not underestimated how stressful legal proceedings are for all parties involved but that is only one factor and I accept that it is not determinative.
 - c. The Claimant has now presented a claim before the High Court for a claim in the region of £236,000 (page 327) for the wages claim and the value of the claim before the Tribunal (when the wages claim is stripped out) is £85,000. The Claimant now seeks to stay the Tribunal proceedings to all the High Court proceedings to be heard first.
 - d. I have considered the test in the **Bowater** and the **GFI** cases referred to above at paragraph at 1(c) where it was stated that it was generally desirable to dispose of High Court proceedings first where both sets of proceedings are substantially the same. I conclude from the above submissions that the proceedings before the Tribunal and the High Court are substantially the same. Although the High Court claim did not on the face of the proceedings touch upon the issue of servitude (which relate to the claims for unfair dismissal and discrimination), I am satisfied that these factual matters will be before the High Court by way of reply to the Respondent's defence and will be factual and legal issues that will be determinative of the whether the Family Worker Exemption applies.
 - e. I conclude therefore that there will be a significant overlap in the issues as referred to above at paragraph 1(e) and having considered the ruling in GFI conclude that the High Court claim should proceed first. To conclude otherwise would bind the High Court by findings of fact made by the Tribunal therefore limiting their ability to reach their own findings in respect of the same issues. I have also considered the guidance in *Mindimaxnox* referred to above at paragraph 1(d) and conclude from that case that to allow the tribunal proceedings to go first would place the High Court into a straightjacket due to the significant overlap in the subject matter of the both sets of proceedings and therefore conclude it is appropriate for the Tribunal proceedings to be stayed.

- f. In reaching this decision I have also borne in mind that the High Court proceedings may be determinative of all the matters in this case; the Claimant has submitted that if the High Court concludes that the Claimant only worked an eight-hour day and was treated as a family member, the claim for discrimination before the Tribunal is unlikely to proceed. However, if the Tribunal claim proceeds first, the Claimant will be denied of the right to pursue the more valuable claim. It is noted above at paragraph 4a that the Tribunal claim was presented as a protective claim indicating that she reserved her right to pursue High Court proceedings, the delay in pursuing this matter has been explained above at paragraph 1(a). The Claimant's intentions to pursue this matter before the High Court had been clearly set out and the Respondent was on notice that this was her intention. To deny the Claimant to right to pursue her claim more valuable claim in the High Court would not be consistent with the overriding objective.
 - g. Taking into account all the above factors and that it is desirable to avoid concurrent legal proceedings, I conclude that it is appropriate to stay these proceedings to allow the High Court proceedings first.
5. The stay will initially be in place for a period of **three months** however the parties have liberty to apply to extend the stay by agreement for a further period of **three months**.

CASE MANAGEMENT SUMMARY

Judicial mediation

1. I raised the possibility of this case being considered for an offer of judicial mediation as this was one of the issues raised by the Respondent at the commencement of the hearing. It was suggested that notwithstanding the stay, the parties should still consider whether mediation may be appropriate. The Claimant was content to consider mediation, if offered by the Regional Judge. The Respondent wished for 7 days to consider this.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Amended claim and response

- 1.1 The Claimant and Respondent are given leave to amend their claim and response form as discussed in the hearing (the Claimant's ET1 was seen at page 150 paragraph 3 and 28-9 and the ET3 was seen at page 44 bundle in respect of amendments to paragraph 22 and 30). The parties were ordered to send each other a duly amended claim and response within 7 days.

2. List of Issues

- 2.1 Although not discussed, it was confirmed that the parties have agreed the issues in this case and the issues were seen at pages 334 of the bundle.

3. Statement of remedy/schedule of loss

- 3.1 The claimant has provided a schedule of loss.

4. The issue of who is the proper Respondent.

- 4.1 The Respondent raised the issue of whether the Second Respondent could be dismissed from proceeding as it was clear from the contract of employment in the bundle that the First Respondent was named as the employer (page 175). There was no evidence to suggest that the Second Respondent was the employer. The Respondent submitted that it was otiose to have the Second Respondent named and it was in the interests of justice to have the claim pursued against the First Respondent alone.
- 4.2 The Claimant indicated that they would be happy to remove the Second Respondent from the claim for unfair dismissal but asked for 7 days to confirm in order to discuss this matter with the Claimant.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Sage
10 August 2017