



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Watson

**Respondents:** (R1) Hemingway Design Limited (In Creditors Voluntary Liquidation)  
(R2) Mr D Draycott

**Heard at:** Leicester

**On:** 22 January 2018

**Before:** Employment Judge Ahmed

**Members:** Mr K Rose  
Mr M Alibhai

## Representation

**Claimant:** Mr D Gray-Jones of Counsel

**Respondents:** No Appearance or Representation

# JUDGMENT

1. The decision to refuse the Claimant's application to join additional Respondents is re-considered and hereby revoked.
2. The Claimant has leave to add 'Irwell Insurance Company Limited' as a further Respondent in these proceedings.
3. This hearing is adjourned to enable the third Respondent to be served with a copy of the claim form and an opportunity to present a Response.

# REASONS

1. This case was today listed for a 3 day hearing to determine the Claimant's complaints of unfair dismissal and disability discrimination. The first Respondent is unfortunately now in Creditors Voluntary Liquidation. The Liquidators (Bridgestones) have confirmed that it is not their intention to participate in the hearing today. Mr Darren Draycott, the second Respondent and former Managing Director of the first Respondent, did not attend the hearing.

2. On 10 January 2018 the Claimant's solicitors, Messrs Lawson West, made an application to add two more parties to the proceedings as Respondents. These were (1) Peninsula Business Services Limited ("Peninsula") and (2) Irwell Insurance Company Limited ("Irwell"). The basis of the application was that these additional parties were potentially liable for any award that could be made by the Tribunal against under the Third Parties (Rights against Insurers) Act 2010 ("the 2010 Act"). The e-mail set out the legal basis of the application.

3. The background is as follows: On or about 14 December 2017 it came to the attention of Lawson-West that the First Respondent had entered into Creditors Voluntary Liquidation. The Claimant was naturally concerned that in the event of a finding against the First Respondent, and being an unsecured creditor, he would not practically be able to recover any damages or compensation awarded if made against them.

4. The application to join the additional Respondents was dealt with on paper. In a letter of 18 January 2018 the application was refused by the Tribunal for the following reasons:

*"1. The application is made very late with no explanation for the delay. There is no reason given, for example, why the application could not have been made on 15 December 2017 when the matter came before the Tribunal [for a preliminary hearing] or shortly thereafter.*

*2. Any joinder of parties at this stage will mean the adjournment of the hearing commencing 22 January as the new parties would need to be served and given time to respond. This will result in the matter being re-listed causing delay which is contrary to the overriding objective".*

5. The reason for the refusal was therefore principally on procedural grounds rather than any determination that the 2010 Act might or might not apply. At this hearing Mr Gray-Jones of Counsel applies for a re-consideration of that decision and asks for it be revoked.

6. On 13 December 2017, Peninsula e-sent an email to Lawson West to confirm that they were coming off the Tribunal record and at the same time confirmed that they understood the First Respondent had gone into voluntary liquidation. Their e-mail arrived close to the end of the working day. It is therefore likely that it would have been considered for the first time on the morning of 14 December 2017.

7. On 15 December 2017, there was, as it happened, a pre-listed Preliminary Hearing before the same Employment Judge as today (then sitting alone) on the question of whether the Claimant was at the material time a disabled person within the meaning of the Equality Act 2010. However, Mr Gray-Jones made no reference then to any proposed amendment application.

8. On 19 December Mr Gray-Jones was asked to advise on the recoverability of the award from the insurers. On 20 December 2017, Lawson-West made a request for information from Peninsula in particular for details of the insurance policy. The following day Peninsula sent them a copy of the 'usual' insurance policy though not a copy of the specific policy between the First Respondent and Irwell. They also provided a copy of a letter from Irwell to Ms Tanya Shipman of the First Respondent, the material part of which was as follows:

“In accordance with the insurance policy taken out on your behalf, you are potentially insured against liability for legal costs incurred in defending Tribunal claims, and for certain settlements and/or awards of compensation, where the conditions of the insurance policy have been followed.

One of the insurance policy conditions is that you must seek advice promptly from Peninsula before any action is taken against an employee, or as soon as matters become known, and you must follow the advice that you are given. In this case it appears that no advice was sought from Peninsula regarding emails that were sent to Mr Watson from Mr Draycott on 24<sup>th</sup> November 2016, which may have a detrimental effect on the Tribunal claim. Further, it is also our understanding that Mr Watson had been advised by Mr Draycott to consider his position within the Company, which again was without the advice of Peninsula. Further to your telephone conversation with Amanda Fox in Peninsula’s Legal Services Department, we now write to confirm that the failure to take advice from Peninsula means that the case cannot be covered by the insurance policy. Your company will therefore be liable for the payment of any award or settlement that may be made to Mr Watson.

Although we are obliged to inform you of any areas of a claim that are subject to an exclusion or provision in respect of the insurance policy, this is not a comment on the strengths or weaknesses of the claim. These should continue to be discussed with your Peninsula Legal Services Litigation Executive. In the meantime, if you have any queries in relation to the above, then please do not hesitate to contact Amanda Fox from Peninsula on 0844 2779.”

9. On 8 January 2018, after the Christmas and New Year break, further advice from Mr Gray-Jones was sought and supplied in relation to any potential liability on the part of Irwell. On 10 January 2018, Lawson West made the application to add them as a party.

10. In the light of the above information, which regrettably was not been given earlier as it is clearly material to the issue of delay in making the application, it is clear that there is a valid explanation for the delay in making the amendment application. Accordingly, insofar as the first ground for the refusal of the amendment application is concerned, that is no longer a valid reason. Had a fuller explanation been given earlier it is possible the decision might have been different. In any event both the Employment Judge and the tribunal as a whole are now satisfied that the application was made as soon as reasonably practicable. Given that the substantive hearing cannot proceed today the remaining reasons for a refusal of the amendment are also no longer valid.

11. In the circumstances it is in the interests of justice to reconsider the decision made on 18 January 2018. Whilst that decision was made by an Employment Judge on paper, happily as the same Employment Judge is also a part of this Tribunal, the provisions of Rule 72(3) of the Employment Tribunal Rules of Procedure 2013 do not cause any difficulty.

12. The original decision is therefore revoked and the application has been considered afresh.

13. The basis of the application for an amendment is that Irwell is potentially liable to the Claimant under the provisions of Section 1 of the 2010 Act. The first Respondent is the ‘relevant person’ under Section 6(2)(d) of the Act having entered into Creditors Voluntary Liquidation on 14 December 2017.

14. Having regard to the terms of their letter to the insured, Irwell denies any potential on two grounds:-

14.1 Because the First Respondent (their insured) failed to comply with relevant policy conditions, namely that they must seek advice promptly from Peninsula before any action was taken against an employee.

14.2 that under the exclusion sections of the policy, Irwell are not liable for any claim or indemnity where the policy holder is bankrupt.

15. Mr Gray-Jones submits that the second argument has no substance because of the anti-avoidance provisions contained in the 2010 Act. That is a matter which requires more detailed consideration.

16. In relation to the failure to comply with the insurance policy conditions, Mr Gray-Jones takes issue with any alleged breach. He argues that Peninsula continued to represent both Respondents even after any alleged breach so it could not have made any difference.

17. Mr Gray-Jones then set out at considerable length both in his skeleton arguments and oral submissions today why the claim is likely to succeed under the 2010 Act. We do not propose to make any comment on the merits or otherwise of those submissions as they must be arguments for another day.

18. Rule 34 of the Employment Tribunal Rules of Procedure 2013 states:

“The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included.”

19. We are satisfied that there are “issues between that person” [Irwell] and the Claimant which are in the interests of justice to be determined.

20. Turning to the question of whether the amendment should be granted, we have taken into consideration the guidance given in **Selkent Bus Company v Moore** [1996] IRLR 661. The amendment is certainly a ‘major’ alteration by the addition of an entirely new party. The question of time limits does not arise in this case. We have already dealt with the timing and the manner of the application. The balance of hardship clearly favours the Claimant as he would lose the opportunity to join a party which would have the means to pay any compensation ordered.

21. In those circumstances the application for an amendment to join Irwell as a further Respondent is granted. The application to join Peninsula is withdrawn.

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Employment Judge Ahmed  
Date: 19 March 2018

JUDGMENT SENT TO THE PARTIES ON

20 March 2018

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FOR THE TRIBUNAL OFFICE