EMPLOYMENT TRIBUNALS

Claimant: Mrs K A Booth

Respondents:
1. Jayne Louise Greer t/a Dennison Greer Solicitors
2. Secretary of State for Business, Energy and Innovation Strategy

Heard at: Manchester **On:** 16 August 2018

Before: Regional Employment Judge Parkin

REPRESENTATION:

Claimant: In person
1st Respondent: Mr Dennison, lay representative
2nd Respondent: No attendance

JUDGMENT AT A RECONSIDERATION HEARING

The judgment of the Tribunal is that:

1. The first respondent is entitled to resist the proceedings and her ET3 response is accepted for the limited purpose of disputing the Tribunal's award at paragraph 3 of its Judgment made on 2 May 2018, sent to the parties on 17 May 2018, relating to statutory minimum notice.

2. Paragraphs 1, 2, 4, 5 and 6 of the Judgment made on 2 May 2018, sent to the parties on 17 May 2018, are confirmed.

3. Paragraph 3 of the Judgment made on 2 May 2018, sent to the parties on 17 May 2018, is revoked, in the circumstances that the claimant's contract of employment was discharged by frustration with immediate effect on intervention in the first respondent's practice by the Solicitors Regulation Authority on 4 December 2018.

REASONS

1. This was a reconsideration hearing listed at the Regional Employment Judge's direction pursuant to the first respondent's application first made on 18 May

2018, supported by her fuller application with a draft response received on 12 July 2018, to set aside the judgment made on 2 May 2018, sent to the parties on 17 May 2018 and for an extension of time to present the response. That application was vigorously resisted by the claimant by her own letter dated 13 July 2018.

2. At the hearing, in accordance with the notice of hearing dated 25 July 2018, the Tribunal heard representations from the claimant and on behalf of the first respondent as to whether the first respondent should be permitted to seek reconsideration i.e. be granted an extension of time to present a response and to defend the claimant's claims on the merits. The Tribunal was referred to the following documents, from the first respondent:

- Letters dated 15 August 2018 from Dr G Artioukh and Adele M Murphy, Senior Accredited Psychotherapist;
- Solicitors Regulation Authority intervention and closure decision, outcome and publish date 4 December 2017;
- Letter from SRA to Ms S Thorpe-Barker dated 5 December 2017;
- Email to Tribunal dated 2 May 2018;
- Copies of case law: Notcutt v Universal Equipment (Court of Appeal) 1986 IRLR 218; and
- Warner v Armfield Retail and Leisure (EAT) UKEAT/0376/12/SM;
- an extract from the Law Reform (Frustrated Contracts) Act 1943

and, from the claimant: her email of 14 August 2018 to Sarah Barker-Smith and Sarah Barker-Smith's response again dated 14 August 2018. The Tribunal itself provided the parties with a copy of the extract from the SRA website entitled "Effect on Employees" and a full copy of the Law Reform Act of 1943.

3. To understand the basis for the reconsideration hearing, the full history of the proceedings needs to be considered. By a claim presented on 5 January 2018 the claimant claimed a redundancy payment, notice pay, outstanding holiday pay/compensation for accrued paid annual leave and unlawful deduction from wages against the first respondent, albeit there were two other respondents originally named in the proceedings, namely Dennison Greer Solicitors (which was the first respondent's practice name) and the first respondent once again but at a Liverpool address. In her claim form, the claimant pointed to the termination of her employment as a result of the intervention by the SRA in the first respondent's practice effective on 4 December 2017.

4. The fourth respondent, the Secretary of State for Business, Energy and Innovation Strategy, was subsequently joined in the proceedings on the claimant's application, on the basis that there had been no payment to her of any redundancy payment or other payments outstanding upon the termination of her employment.

5. No response was received from the first three named respondents. However, as acknowledged at paragraph 4 in the first respondent's statement

supporting the application for reconsideration and an extension of time to present a response, following the intervention and when attending her former office address at 26 King Street, Manchester sporadically for a few weeks, the first respondent received the ET1. That means she received the Notice of Claim accompanying the ET1 and the draft ET3 response form sent by the Employment Tribunal at that time, the Notice of Claim in fact being sent twice to her at the 26 King Street address, as first respondent and as Dennison Greer Solicitors, her professional practice name, and also to her personally as third respondent in Liverpool.

6. Once joined in the proceedings, the Secretary of State put in a response and then an amended response effectively disputing that the respondents were individually or as a company or firm insolvent, but acknowledging that it would make payment if the Tribunal ordered a redundancy payment against the proper employer which was then not paid.

7. Despite not presenting a response to the claim, the first respondent wrote to the Tribunal on 27 February 2018 having received a copy of the Tribunal's letter to the claimant dated 23 February 2018, saying:

> "It seems that the respondent is listed as the Secretary of State for Business, Energy and Industrial Strategy. Perhaps you would be kind enough to advise the reason?".

The Tribunal's letter dated 23 February 2018 had indeed been addressed to the Secretary of State but had clearly spelt out that the respondent was the Secretary of State "and others" and again had copied in the first respondent in her own right and as Dennison Greer Solicitors at the 26 King Street address and, as third respondent, at her Liverpool address.

8. Then on the morning of hearing, 2 M\y 2018, albeit this email did not reach the Regional Judge at the time of or subsequent to the hearing, the first respondent wrote to the Tribunal:

> "Please accept my apologies for not writing to you sooner. Unfortunately I am not able to attend the hearing today and I would ask you to pass on my apologies to all parties including of course the Tribunal. Since the intervention into my firm I have been suffering from severe depression and I am currently undergoing treatment. No disrespect is intended to the Tribunal or indeed the claimant but I do not feel able to attend. The claimant is fully aware that my assets were used to keep the Practice going over the last 2-3 years. My accountant has advised that I should file for bankruptcy which I intend to do shortly."

9. As a respondent who had not presented a response, although entitled to attend, the first respondent would only have been able to take such part in the proceedings as the Tribunal permitted.

10. The hearing proceeded on 2 May 2018 with the Secretary of State's written representations taken into account. The identity of the claimant's employer was tidied up, such that the three original respondents became a single respondent, the first respondent, and the Secretary of State became the second respondent. The claimant gave oral evidence, putting the details of her financial claims in evidence

before the Tribunal on all aspects: length of service, salary, entitlement to redundancy payment, claim for pay in lieu of statutory minimum notice (which the Tribunal calculated, requiring her to give credit for seven weeks' Jobseeker's Allowance which she received during the 9-week statutory minimum period), compensation for accrued paid annual leave and finally two days' pay. The Tribunal's Judgment was then sent to the parties on 17 May 2018.

11. As to the Tribunal's initial determination whether the respondent be permitted to seek reconsideration as a matter of principle, her representative relied upon the practical difficulties she faced and the psychiatric illness she sustained as a result of the intervention; whilst recognising she knew the proceedings, it was contended that she had not deliberately ignored them but had been unable to deal with them. The claimant disputed the respondent's inability, pointing to her ability to write to the Tribunal in February 2018 and attend separate tribunal proceedings in late March 2018, suggesting that if she was dealing with other matters she was of sound enough mind to deal with these proceedings.

12. The Tribunal had regard to the provisions dealing with reconsideration of judgments, in particular at rule 70 onwards of the Employment Tribunals Rules of Procedure 2013, read together with rule 20 on applications for extensions of time for presenting a response. It also had regard to its overriding objective at rule 2 which is essentially to seek to hold a fair hearing, which means fair to both parties.

13. The Tribunal acknowledged that the respondent may have a strong legal argument that the effect of the intervention by the SRA terminated the claimant's contract in circumstances which the first respondent had no control over, amounting to a frustration of contract. It seemed to the Tribunal that determination of that aspect was needed, otherwise the claimant may have received the benefit of a judgment on notice pay which was wrong in law.

14. Accordingly, and to the limited extent of being able to resist and challenge the finding at paragraph 3 that the first respondent dismissed the claimant wrongfully in breach of contract by failing to give statutory minimum notice and the award which follows, the respondent was entitled to a reconsideration of the judgment and the respondent's time for presenting a response to the claims was extended.

15. That did not apply to the redundancy payment award which the first respondent expressly acknowledged was due to be made in the claimant's favour and which the first respondent's only basis for not having paid was her impecuniosity. It also did not apply to the remaining monetary claims in respect of compensation for accrued paid annual leave and unlawful deductions from wages. The distinction is this: the argument that the intervention by the SRA frustrated the contract of employment on 4 December 2017 cannot avail the first respondent in respect of liabilities already incurred before that point in time. Whatever the first respondent's psychiatric difficulties (and the Tribunal fully acknowledges the turmoil which the first respondent would have been put into by the intervention), as a Solicitor of the Supreme Court she chose to ignore the proceedings which she knew had been brought against her by a former employee. The Tribunal does not condone such conduct by a professional lawyer, and the first respondent in these circumstances should not be permitted to resist those accrued financial claims many months after she was first served with notice of the claim.

16. The Tribunal then heard the parties' representations as to whether the contract of employment was frustrated by the SRA intervention. Although the first respondent was unable to point to any specific statutory provision about the effect of an intervention on employees' rights, it contended that the firm had closed immediately on 4 December 2017. Relying upon the EAT authorities of Warner v Armfield and the Court of Appeal authority of Notcutt v Universal Equipment Company and the other authorities cited in those judgments, it was clear that the doctrine of frustration applied equally to contract of employment as to other contracts. Since the business closed immediately, the respondent was unable to give notice; bank accounts and assets were frozen and she had immediately been suspended as a solicitor and was unable to offer legal services or further employment. Moreover, the SRA's letter showed that, even though the intervention was based on suspected dishonesty, there was no finding of dishonesty and thus no fault on the part of the first respondent at that stage. The claimant resisted the argument of frustration, maintaining that the professional business of Dennison Greer Solicitors had not ceased to exist and that the limited information available on the SRA website showed a continuing liability on the part of the former employer.On the substantive issue, the Tribunal concluded that the doctrine of frustration did indeed to apply to contracts of employment such as this and that the first respondent had proved that the claimant's contract of employment was frustrated upon the intervention by the SRA on 4 December 2017. It accepted the argument that that intervention so significantly changed the nature of the legal relationship between the first respondent and the claimant that the claimant's employment simply could not continue thereafter. Thus the employment was terminated not by the wrongful dismissal or breach of contract of the first respondent but by operation of law based upon the legal doctrine of frustration. Notwithstanding the basis of the intervention, at the point in time when the contract was frustrated, there was no finding of fault or wrongdoing against the first respondent but only the suspicion of these things.

17. In these circumstances, the Tribunal concluded that it was bound to revoke paragraph 3 of its original judgment on damages for breach of contract representing the lost pay in lieu of notice. Since there was no wrongful dismissal by the first respondent, there could be no consequential award of lost notice pay made to the claimant. The Tribunal's original judgment is revised to the limited extent that the order and award at paragraph 3 is revoked.

Regional Employment Judge Parkin

Date 20 August 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

24 August 2018

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