



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Watson

**Respondents:** (R1) Hemingway Design Limited (In Creditors Voluntary Liquidation)

(R2) Mr D Draycott

(R3) Irwell Insurance Company Limited

**Heard at:** Leicester

**On:** 27 July 2018  
10 August 2018 (Reserved)

**Before:** Employment Judge Ahmed (sitting alone)

## Representatives

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

**Respondents:** (R1) No appearance or representation  
(R2) In person  
(R3) Mr G Graham of Counsel

## RESERVED JUDGMENT

1. These proceedings are stayed pending determination of the issue as to whether the Third Respondent is liable to the Claimant under the Third Parties (Rights Against Insurers) Act 2010.
2. The application that the claim be struck out as having no reasonable prospect of success is dismissed.

## REASONS

1. This Preliminary Hearing follows an earlier hearing on 22 January 2018 at which an order was made to join Irwell Insurance Company Limited as the Third Respondent in these proceedings. Since that hearing, and following the service of the claim upon the third Respondent, this Hearing has been listed to determine whether the claim should be struck out as having no reasonable prospect of success and/or whether the proceedings should be stayed.
2. The background to the present hearing is set out in the judgment and reasons of 22 January 2018 and sent to the parties on 20 March 2018. It is unnecessary to repeat them here.

3. The factual scenario relevant for the purposes of today is that Mr Neil Watson brings a claim of unfair dismissal and disability discrimination against Hemingway Design Limited (“Hemingway”), his former employers who are now in creditors voluntary liquidation. He also brings a claim of disability discrimination against Mr Darren Draycott, the former Managing Director of Hemingway, as a named Respondent. Mr Watson was employed by Hemingway as a Product Administrator from 1 February 2011 to 17 January 2017. He resigned in circumstances in which he claims that he was constructively and unfairly dismissed. He relies on an alleged breach of the implied term of trust and confidence. Mr Watson alleges that he was placed under unacceptable levels of work pressures and began to suffer from stress, anxiety and depressive symptoms in June/July 2016. Hemingway was a small family business. What emerged today was that Mr Watson and Mr Draycott are in fact related.

4. As a claim for unfair dismissal can only be made against the employer, Mr Watson’s prospects of recovering any monetary award from the first Respondent is remote. The claim for disability discrimination is against both Hemingway and against Mr Draycott personally. The Tribunal will of course need to be satisfied that the conduct of Mr Draycott was such that he is personally liable rather than the employer. That will involve determining highly disputed facts as will the claim against Hemingway.

5. The only way in which Mr Watson can achieve any meaningful award of compensation is if he can tap into an insurance policy taken out with the Third Respondent (hereinafter “Irwell”) . Prior to liquidation, Hemingway had taken out a policy of insurance with Irwell in respect of any employment claims that may be made against it. The policy requires the policyholder, inter alia, to seek advice from Peninsula Business Services at the earliest opportunity. If the insured did not follow that advice or do anything which could harm the case, the policy was rendered void. If all the conditions were met and there was still a tribunal award against the insured, any compensation would be met under the policy. Mr Gray-Jones argues that under the Third Parties (Rights Against Insurers Act) 2010 (“the 2010 Act”) the Claimant is entitled to the benefit of the policy if he succeeds. Irwell argue that any issue under the Act is a matter for the ordinary courts to decide not an Employment Tribunal.

## **THE LAW**

6. Sections 1 and 2 of the 2010 Act state:-

### Section 1

(1) This section applies if:-

(a) a relevant person incurs a liability against which that person is insured under a contract of insurance, or

(b) a person who is subject to such a liability becomes a relevant person.

(2) The rights of the relevant person under the contract against the insurer in respect of the liability are transferred to and vest in the person to whom the liability is or was incurred (the “third party”).

(3) The third party may bring proceedings to enforce the rights against the insurer without having established the relevant person’s liability; but the third party may not enforce those rights without having established that liability.

(4) For the purposes of this Act, a liability is established only if its existence and amount are established; and, for that purpose, “establish” means establish:-

- (a) by virtue of a declaration under section 2 or a declarator under section 3,
  - (b) by a judgment or decree,
  - (c) by an award in arbitral proceedings or by an arbitration, or
  - (d) by an enforceable agreement.
- (5) In this Act:-
- (a) references to an “insured” are to a person who incurs or who is subject to a liability to a third party against which that person is insured under a contract of insurance;
  - (b) references to a “relevant person” are to a person within sections 4 to 7;
  - (c) references to a “third party” are to be construed in accordance with subsection (2);
  - (d) references to “transferred rights” are to rights under a contract of insurance which are transferred under this section.

## Section 2

- (1) This section applies where a person (P):-
- (a) claims to have rights under a contract of insurance by virtue of a transfer under section 1, but
  - (b) has not yet established the insured's liability which is insured under that contract.
- (2) P may bring proceedings against the insurer for either or both of the following:-
- (a) a declaration as to the insured's liability to P;
  - (b) a declaration as to the insurer's potential liability to P.
- (3) In such proceedings P is entitled, subject to any defence on which the insurer may rely, to a declaration under subsection (2)(a) or (b) on proof of the insured's liability to P or (as the case may be) the insurer's potential liability to P.
- (4) Where proceedings are brought under subsection (2)(a) the insurer may rely on any defence on which the insured could rely if those proceedings were proceedings brought against the insured in respect of the insured's liability to P.
- (5) Subsection (4) is subject to section 12(1).
- (6) Where the court makes a declaration under this section, the effect of which is that the insurer is liable to P, the court may give the appropriate judgment against the insurer.
- (7) Where a person applying for a declaration under subsection (2)(b) is entitled or required, by virtue of the contract of insurance, to do so in arbitral proceedings, that person may also apply in the same proceedings for a declaration under subsection (2)(a).
- (8) In the application of this section to arbitral proceedings, subsection (6) is to be read as if “tribunal” were substituted for “court” and “make the appropriate award” for “give the appropriate judgment”.
- (9) When bringing proceedings under subsection (2)(a), P may also make the insured a defendant to those proceedings.
- (10) If (but only if) the insured is a defendant to proceedings under this section (whether by virtue of subsection (9) or otherwise), a declaration under subsection (2) binds the insured as well as the insurer.

(11) In this section, references to the insurer's potential liability to P are references to the insurer's liability in respect of the insured's liability to P, if established.

7. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 state:-

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds:-

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

## **CONCLUSIONS**

8. I shall deal firstly with the application to strike out. There are a number of established authorities which make it clear that striking out of discrimination complaints should only be undertaken in very exceptional cases (see for example **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126 and **Balls v Downham Market High School and College** [2007] IRLR 217 ). This is a fact-sensitive case and it would not be appropriate to strike out the discrimination complaints as having no reasonable prospect of success. Similarly, the question of whether there was a breach of the implied term of trust and confidence depends on findings of fact.

9. Equally, it would not be appropriate to order a deposit, insofar as any such application is pursued. There are clearly factual disputes and in the absence of such facts being established it cannot be said that the claim has little reasonable prospect of success.

10. The principle issue is whether the determination of issues under the 2010 Act is a matter that this Tribunal can and should decide or whether it is a matter for the ordinary courts.

11. In his helpful submissions Mr Gray-Jones argues that the 2010 Act was specifically passed to deal with the problems highlighted by the Law Commission on third party rights against insurers in their report in July 2011. Although I have not been provided with a copy of the Commission's report, there is no dispute that the aim of the legislation was to make it easier for third parties to bring claims without having to establish liability separately. The explanatory notes to the Act apparently state that the report's recommendations are accepted in that respect.

12. Accordingly, Mr Gray-Jones on behalf of the Claimant invites me to interpret the Act in such a way that it deals with the mischief which was designed to be addressed, namely that a third party should not have to bring separate proceedings to enforce an indemnity against an insurer.

13. Mr Graham on behalf of Irwell argues that Tribunals are creatures of statute and there is no statutory authority to give the Tribunal jurisdiction to deal with the provisions of the 2010 Act. He agrees that the issue as to liability under the 2010 Act needs to be determined but that the Tribunal is not the proper forum.

14. None of the cases which Mr Gray-Jones has referred me to, and I do not need to set them out here, are cases which involve the 2010 Act and

Employment Tribunals. Of course the fact that there are no previously decided cases is not determinative but I note that there is an absence of any previously decided cases in the Employment Tribunal under the 2010 Act. All of them are cases in the ordinary courts. Mr Gray-Jones agrees that the reference to “arbitral proceedings” in section 2(8) does not refer to Employment Tribunals.

15. The issue between the Claimant and Irwell has nothing to do with an employment contract but rather a contract of insurance. The Claimant’s claims against Mr Draycott and Hemingway arise out of an employment relationship. Irwell was never the Claimant’s employer. There is no contractual nexus between the Claimant and Irwell nor indeed between Mr Draycott and Irwell. The insurance policy seems to have been taken out by Hemingway.

16. There will no doubt be evidential issues in relation to whether Hemingway breached the terms of its insurance policy. They will be critical to the ultimate decision. Those issues are properly decided by the ordinary courts rather than an Employment Tribunal. They do not arise out of any employment relationship. The Tribunal’s jurisdiction in breach of contract cases is limited to claims under the Employment Tribunals (Extension of Jurisdiction) Order 1994. This case is nothing to do with that Order.

17. There will also be issues between Mr Draycott and his dealings with Peninsula as to whether the terms of the policy were followed and whether the conditions were adhered to. Those matters have nothing to do with any employment relationship or contract.

18. For those reasons, I consider it appropriate to stay the present proceedings.

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Employment Judge Ahmed

Date: 4 September 2018

JUDGMENT SENT TO THE PARTIES ON

6 September 2018

FOR THE TRIBUNAL

OFFICE