# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr J Bewsher**

**Respondent:** **NHS Business Services Authority**

**Heard at:** **Leicester** **On:** **Monday 14 May 2018**

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

**Representation**

**Claimant:** **In Person**
**Respondent:** **Ms H Patterson of Counsel**

**JUDGMENT** having been sent to the parties on 11 June 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## The Claim

1. The Claimant, who was employed as Director of Special Projects in the NHS Greater East Midlands Commissioning Support Unit, brings a claim for breach of contract against the Respondent. (His claim form also contained a claim for a protective award under sections 188 -190 of the Trade Union and Labour Relations Consolidation Act 1992 but this was subsequently withdrawn.)

2. The contractual claim relates to payments made to the Claimant following the termination of his employment by reason of redundancy. His case is essentially that the Respondent applied the wrong terms to his redundancy package and that this constituted a breach of his employment contract which caused him significant financial loss. He maintains that his redundancy payment was lower than it should have been and that he also suffered a 'pension shortfall'. His claim form calculates his loss as £75,078 (although his witness statement puts the figure far higher, at over £217,000). The Respondent denies the claim, arguing that the Claimant has received all monies due to him under his contract.

## Agreed facts

3. The following facts are agreed by the parties.

4. The Claimant's employment contract incorporated the NHS Standard Terms and Conditions of Service (known as "Agenda for Change'). These terms and conditions included a number of provisions relating to contractual redundancy payments. Clause 16.23 is of particular relevance to this case. It provides:-

   'Claims for redundancy payments or retirement on grounds of redundancy must be submitted within six months of the date of termination of employment. Before payment is made the employee will certify that:

   - they had not obtained, been offered or unreasonably refused to apply for or accept, suitable alternative health service employment within four weeks of the termination date;
   - they understand that payment is only made on this condition and undertake to refund it if this condition is not satisfied.'

   (By way of background Miss Patterson explained to me that this provision is designed to stop individuals receiving large redundancy payments from the NHS, only to return to a new job within the organisation a few weeks later.)

5. The NHS changed its redundancy policy on 1 April 2015. New rules (which had contractual effect) were introduced in relation to the size of redundancy payments and also to related pension entitlements. These were less favourable to highly paid employees, like the Claimant, who earned over £80,000 per annum. However, the new provisions included a clause in identical terms to clause 16.23, with the result that it was still necessary for the employee to provide a certificate before a redundancy payment could be made. (The 'old' version can be found at page 157 of the hearing bundle and the 'new', post 1 April 2015 version, at page 172). For convenience both versions will be referred to as 'Clause 16.23' in this judgment.

6. Transitional arrangements were contained in the Pay and Conditions Circular (Agenda for Change) 2/2015, which also had contractual effect. This document provided that where formal redundancy consultation started before 1 April 2015, the old terms would apply (para 16.33). However, where such consultation began after 31 March 2015 then the new terms would govern the calculation of redundancy pay and pension entitlements (para 16.34).

7. A reorganisation of the part of the NHS in which the Claimant worked took place on 1 April 2015. A redundancy consultation exercise took place in relation to the Claimant's role and he was ultimately dismissed by reason of redundancy on 18 May 2016.

8. Prior to the Claimant's dismissal a dispute arose in relation to the application of the transitional provisions to the Claimant's case. The Respondent took the position that in his case formal consultation began after 31 March 2015. He was therefore informed by the Respondent that it would be calculating his redundancy package on the basis of the new terms.

9. The Claimant disagreed with this approach. He argued that formal redundancy consultation began on or around 18 March 2015, so that the old, more favourable terms should have applied. He raised a grievance about the matter. This was unsuccessful, as was a subsequent appeal. As a result, when the Claimant was dismissed, the Respondent applied the new redundancy terms to calculate the sums due to him. Payment of these

amounts was made to the Claimant some six weeks after the termination of his employment.

10. The Claimant decided to challenge the Respondent's position and instituted the current proceedings for breach of contract on 7 October 2016. He was unrepresented at the time, although he subsequently had the benefit of legal advice.

11. The Respondent's representatives, Capsticks Solicitors LLP, presented a response to the claim on 10 November 2016. The Respondent denied liability, reiterating its position that formal consultation commenced after 31 March 2015. The parties are agreed that if the Respondent is correct, and the new terms apply to the Claimant, then he has been paid all that is due to him under his contract. The only issue of substance between them is therefore when formal redundancy consultation began.

**The Tribunal's contractual jurisdiction**

12. The power of the tribunal to hear contractual claims is granted by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 (the '1994 Order'). However, that power is limited, both in terms of the type of claim that can be brought in the tribunal and the size of any award.

13. So far as the limits on the type of claim are concerned, Article 3 of the 1994 Order states, so far as relevant, that:-

    'Proceedings may be brought before an employment tribunal in respect of a claim by an employee for the recovery of damages [for breach of his contract] if…
    (c) the claim *arises or is outstanding* on the termination of the employee's employment'. (Emphasis added)

14. The phrase 'arises or is outstanding' is not defined in the 1994 Order. However, guidance on its meaning was given by Rimer J in Peninsula Business Services Ltd v Sweeney EAT/1096/02. In that case Mr Sweeney, who had resigned from his employment with Peninsula, brought a contractual claim in the employment tribunal, alleging that Peninsula had failed to pay him all the commission he had earned up to the date of termination of his employment. His contract provided that commission was only payable at the end of the calendar month following payment by the customer of 25% of the relevant fee. In light of that provision the employment tribunal found that none of the commission claimed had actually become due until *after* his resignation and the question therefore arose as to whether, in those circumstances, the tribunal had jurisdiction to hear the claim, given the wording of Article 3(c).

15. At first instance the employment tribunal decided that Mr Sweeney had a contractual right to the commission claimed and, adopting a purposive approach to the language of Article 3(c), held that the matter fell within the tribunal's jurisdiction. That decision was overturned by the Employment Appeal Tribunal (EAT). The EAT's principal finding was that Mr Sweeney had no contractual right to commission. However, it then went on to hold that, even if there had been a contractual right to commission, the employment tribunal's approach to the question of jurisdiction had been flawed. The

correct position was that the employment tribunal simply had no power to hear the claim. Rimer J dealt with the point in the following terms:-

> '*Peninsula's argument is simple. As at the date of, and immediately after, the termination of Mr Sweeney's employment, the claimed commission was not due to him and so he had no right either to claim payment or to complain that, in omitting to pay him the commission, Peninsula had committed any breach of contract. The earliest point in time at which Mr Sweeney could have been entitled to advance [the contractual claim] was at varying later dates, when different amounts of commission actually became payable to him.*
>
> *In those circumstances Peninsula submitted that the claim in respect of commission neither 'arose' nor was 'outstanding' on the termination of the employment. Nothing happened at the moment of or immediately after such termination to cause such a claim to 'arise'; and although as at the date of termination Mr Sweeney had a prospective claim for payment of commission, that claim cannot be said to have been 'outstanding' at that time, a concept which can sensibly only refer to an unsatisfied claim which has already fallen due for payment.*
>
> *'… In this case it appears to us plain that, as at the date of resignation, the claimed commission was [not] outstanding… In our view, a claim will only be 'outstanding' at [the date of termination] if it is in the nature of a claim which, as at that date, was immediately enforceable but remained unsatisfied… That necessarily presupposes that as at that date, there existed a claim which was capable of being brought.*
>
> *It is also obvious that no claim for commission can be said to have 'arisen' on the date of Mr Sweeney's resignation…he was only entitled to sue for commission… once it had fallen due for payment… and that only happened after the effective date of termination. It is true that, at that date, he could be said to have had a prospective right to the payment of commission. But since he could not sue for payment until the right had matured into an actual right, we do not regard that as giving the tribunal jurisdiction'.*

16. The judgment in the Peninsula case also referred to the case of Miller Bros v Johnston [2002] ICR 744, EAT. The issue in that case was whether a claim by an employee under a compromise agreement entered into shortly *after* the termination of his employment was enforceable in the employment tribunal. The Employment Appeal Tribunal (Mr Recorder Langstaff QC presiding) held that it was not. The claim neither arose in a 'temporal sense' on the date of termination nor was it then outstanding. It only arose some days after the termination. In Rimer J's view, Mr Sweeney's commission claim was no more outstanding than the claim in Johnstone.

17. The 1994 Order contains additional limits on a tribunal's contractual jurisdiction but the only one relevant in this case is found in Article 10. This restricts the amount which a tribunal can award to a maximum of £25,000.

18. The response submitted by the Respondent in the current proceedings made reference to the £25,000 cap on awards. However, there was no mention of Article 3(c) or to any argument that the claim fell outside the tribunal's jurisdiction on the ground that it was a contingent claim.

**The progress of this claim**

19. The parties were notified that a Preliminary Hearing in this case would be held on 7 February 2017. By this stage the Claimant had instructed lawyers (Price Bailey Legal Services LLP). A list of issues was submitted to the tribunal by the Respondent for use at the Preliminary Hearing. However, this contained no reference to the argument that the claim was contingent and therefore outside the tribunal's jurisdiction.

20. The preliminary hearing went ahead on 7 February 2017 as planned. The Claimant was represented at the by a Mr Adkin of counsel, the Respondent by Mr Hick, Solicitor, of Capsticks. Judge Solomons, who conducted the hearing, made the point that '…breach of contract claims are capped at £25,000 and it may be that if the Claimant is seeking to recover more that he will take proceedings in another jurisdiction.' However, it is clear from the minute of the hearing that the Respondent did not raise any other jurisdictional issues or mention Article 3 (c).

21. There was a further Preliminary Hearing on 19 September 2017. As before, both parties were represented. It appears that there was no mention of clause 16.23 and Judge Ahmed, who conducted the hearing, recorded the discussion in the following terms:

    '*It is agreed that this case falls within the scope of Article 3 of the Employment Tribunals Extension of Jurisdiction Order [and therefore falls within the jurisdiction of the Employment Tribunal] in that it is a claim 'arising or outstanding on the termination of the employee's employment' because the trigger point for losses sustained by the Claimant (if any) flow from the termination of employment.*

    *… I discussed with Ms Harvey (Solicitor for the Claimant) the Tribunal's jurisdictional limit as to breach of contract claims. The Claimant is acutely aware of this. The Claimant appreciates that if successful his damages will be capped at the £25,000 limit applicable to breach of contract claims in the Employment Tribun*al.'

22. The case was set down for a final hearing to start on 14 May 2018. On 1 May 2018 the Claimant's Solicitors came off the record, to save the Claimant any further expense. In the meantime, the Respondent had sent the papers to Miss Patterson of Counsel. She spotted that there was a jurisdictional issue and accordingly, on 3 May 2018, just two days after the Claimant's lawyers came off the record, the Respondent notified the Tribunal that it would be applying for a strike out of the claim on the ground that Article 3 (c) of the 1994 Order was not satisfied and so the tribunal had no jurisdiction to hear the claim.

23. The letter went on to explain that it was the Respondent's case that under clause 16.23 of Agenda for Change, a redundancy payment only falls due for payment once the employee has certified that they have not obtained, been offered or unreasonably refused to apply for or accept, suitable alternative health service employment within four weeks of termination. As a result, so the argument went, at the date of termination (which is the relevant date for the purposes of the 1994 Order) a redundant employee does not have an

absolute right to a redundancy payment. On the contrary, at this stage his or her right is merely contingent or provisional – that right only crystallises and a redundancy payment is only payable if the employee does not obtain suitable alternative employment (or if he satisfies one of the other clause 16.23 conditions) within the next four weeks and then certifies that to be the case. Accordingly, it was the Respondent's position that the Claimant's right to a redundancy payment did not arise and was not outstanding on the termination of his employment, as Article 3 of the 1994 Order demands. As a result the tribunal had no power to hear the claim.

24. In support of this argument the Respondent referred to two employment tribunal decisions, Lawlor v Ashford and St Peter's Hospital NHS Foundation Trust ET 2301323/17 and Pritchard v Bexley Care Trust ET 1100945/11, copies of which were sent to the Claimant. Both cases dealt with contractual claims for redundancy payments under the Agenda for Change terms and conditions and in particular with the impact of Clause 16.23 on the tribunal's contractual jurisdiction. In both cases jurisdiction was declined. Although the Respondent accepted that these decisions were not in any way binding on this tribunal, it was suggested that they set out the correct approach.

25. The Claimant, who was no longer legally represented, objected to the Respondent's application to strike out his claim by e-mail of 9 May 2018. He pointed out that the argument should have been apparent to the Respondent from the outset, yet no mention of it was made in the response; nor was the point taken at the Preliminary Hearing before Judge Ahmed, even though Article 3 was discussed in express terms. In those circumstances he regarded the making of the application 'as a threat and a tactic to force me to withdraw my claims.' He also added that it was 'noteworthy that the application for strike out …was made only 2 days after my representatives confirmed that they were not representing me at the Final Hearing.' He went on to say that he intended to make an application for costs against the Respondent and its representatives 'for their unreasonable conduct in this claim'.

**Procedure at the hearing**

26. The strike out application was initially considered by Judge Britton who ordered that it should be determined at today's hearing. Accordingly, the first matter I had to decide was whether I should allow the application to go ahead, particularly given the Claimant's strong objections.

27. In the event I decided that I had no discretion in this matter. The employment tribunal is a creature of statute. As such it has no inherent common law jurisdiction and its powers are limited to those that are granted by Parliament, as set out in the 1994 Order. According to the Respondent, the current claim fell outside those powers. If that was indeed the case, then clearly I would be exceeding my statutory authority if I were to go ahead and determine the substantive claim. I therefore decided that I had no choice but to allow the application to go ahead so that could this jurisdictional issue could be determined. That having been said, I would have expected the Respondent – which was legally represented throughout - to have raised the point at a much earlier stage in the proceedings. To do so at the last minute was far from satisfactory and resulted in the Claimant believing that he was being ambushed, at the very moment he had dispensed with legal advice.

28. Having made that decision, I decided to adjourn the hearing for one and a half hours. There were two reasons for this. Firstly, I noted that, in addition to the two employment tribunal cases referred to above, the Respondent was relying on Peninsula Business Services Ltd v Sweeney EAT/1096/02 (referred to above) to support the application. The Claimant had only been given a copy of that case on the morning of the hearing and had not yet had a chance to read it properly. Secondly, I thought it only fair, particularly given the size of his claim and the fact that the Article 3 issue had been raised by the Respondent at such a late stage, to give him a final chance to contact his former lawyers to discuss the matter and in particular to consider whether the employment tribunal was still his preferred forum for resolution of his claim.

29. On resumption of the hearing the Claimant confirmed that he had spoken to his lawyers and that he wished to proceed with his claim in the employment tribunal and that he had had sufficient time to read the Peninsula case.

30. I then proceeded to hear oral submissions from both parties. In the Respondent's case these were supplemented by a brief skeleton argument. There was an agreed bundle. No witness evidence was heard, although the Claimant provided me with a lengthy witness statement. However, this dealt with the substantive issue (i.e. as to when formal redundancy consultation began). It did not deal with the issue of jurisdiction.

**The Respondent's oral submissions**

31. On behalf of the Respondent, Miss Patterson re-stated the argument set out in paragraph 24 above, namely that as at the date of termination (which is the crucial date for Article 3(c) purposes) the Claimant had no immediate right to sue for a redundancy payment. It was only if he subsequently satisfied the conditions in clause 16.23 and certified that to be the case that his rights would crystallise and payment become due. Citing the Peninsula case, she submitted it was abundantly clear from the case-law that in these circumstances the tribunal lacked jurisdiction to hear the claim. It had simply not arisen, nor was it outstanding at the relevant time, (i.e. termination of the Claimant's employment).

32. I raised with Miss Patterson the fact that, when giving judgment in Peninsula, Rimer J stated in express terms that his comments on the jurisdictional issue were not necessary for the EAT's decision and as such were 'obiter dicta' (i.e. not binding on me). However, she argued that they were of considerable persuasive value.

**The Claimant's oral submissions**

33. The Claimant raised a number of issues. Firstly, if I were to grant the Respondent's application it would mean that, going forward, if the NHS refused to make any redundancy payments in clear breach of the Agenda for Change conditions, then no employment tribunal would have jurisdiction to determine the ensuing claims. He suggested that could not possibly be the case.

34. Secondly, two of the cases referred to by the Respondent (the Peninsula decision and the employment tribunal decision in Pritchard) were relatively old (2003 and 2011 respectively).

35. Thirdly, he pointed out that the facts in the cases referred to by the Respondent were rather different to those in the present case. So, for example, in the Peninsula case the EAT's decision was that the claimant had no contractual right to commission in any event so that the comments on jurisdiction were not central to the EAT's decision. By contrast, in his case no-one disputed that his contract gave him a right to a redundancy package, (unless of course he accepted suitable alternative employment within 4 weeks of termination). Instead the dispute related to the size of the package. Moreover, that dispute was apparent on termination – as was apparent from the fact that at that stage he had not yet exhausted the Respondent's grievance process.

36. Finally, he re-iterated his complaint that the Respondent had not raised the jurisdictional issue in the response nor in either of the two Preliminary Hearings held in this case, even though the point was discussed at the Preliminary Hearing before Judge Ahmed. Instead the first he knew of it was a matter of days before the final hearing and I should bear that in mind when making my decision.

**My decision**

37. Having considered the matter, I accepted the arguments made by Miss Patterson on behalf of the Respondent. The 1994 Order places considerable restrictions on the tribunal's jurisdiction to hear contractual claims, including those set out in Article 3(c). That article is drafted in simple, straightforward language, stipulating that the claim must 'arise or be outstanding' on the termination of employment. It was always open to Parliament, if it had so wished, to draft the Article to cover claims 'arising from or as a result of' such termination' – in which case the Claimant's claim would no doubt have been covered. However, it chose not do so and we must deal with the Article as it stands.

38. That being the case, it is clear from the language of Article 3(c) (and also from the comments of the EAT in Miller Bros v Johnstone) that it focuses on a precise moment in time, namely the date of termination of the Claimant's employment. It is at that point that we must assess the matter; it is not possible to consider the termination process as a whole by taking into account events before and after termination. Taking that approach, it is apparent that at the date of termination the Claimant's right to redundancy pay was contingent, not absolute. It was conditional upon him satisfying the conditions in Clause 16.23, which he could not do until at least four weeks later. In those circumstances and, bearing in mind the remarks of Rimer J in the Peninsula decision (which as explained below were, in my view, highly persuasive), his claim was clearly not 'immediately enforceable' as at the date of termination. Nor could he have sued for his redundancy payment as at that date – he was only entitled to sue for it once it had fallen due for payment, which would only occur when the necessary certificate was forthcoming some four weeks or so later. In those circumstances his claim did not arise and was not outstanding on termination and his claim must be dismissed for want of jurisdiction.

39. So far as the arguments made by the Claimant are concerned, I will deal with each of those in turn. His first point, namely that if the tribunal has no jurisdiction in this case then its jurisdiction would be ousted in all other cases involving breaches of the Agenda for Change redundancy payment rules, is

accurate - but ultimately not decisive. It is a fact that the employment tribunal's jurisdiction in contractual matters is extremely limited, with the result that litigation in the civil courts is often the only means of obtaining redress. This case (and others like it) fall into that category. So, whilst I can well understand why the Claimant finds it difficult to accept that claims relating to redundancy payments under the Agenda for Change terms referred to in this judgment cannot be heard in the specialist forum of the Employment Tribunal, that is indeed the current position. Disputes such as his have to be determined in the civil courts. Whether that is a sensible state of affairs is a matter for Parliament rather than for this tribunal.

40. The Claimant's second point refers to the age of the cases relied upon by the Respondent. Whilst I can understand that to a lay person this may well appear to be a valid argument, it is nonetheless clear that in our common law system age is not, in itself, a bar to the precedent value of a case.

41. His third point concerned the relevance of the case-law cited to the tribunal. It is true that the statements in the Peninsula case on which the Respondent relied were not central to the EAT's decision and so did not create a binding precedent. However, that does not mean that the comments can lightly be disregarded. On the contrary, they were made by Mr Justice Rimer who later, as Lord Justice Rimer, sat in the Court of Appeal. They were also made after the jurisdictional point had been argued fully before him. Given those factors I decided that they were highly persuasive.

42. In addition, I regarded the Johnston case (in which the jurisdictional point was directly in issue) as being binding upon me unless it could be distinguished on its facts and I could see no reason for doing so. Whilst it is true that, in the instant case, it was apparent on termination of the Claimant's employment that there was a dispute between the parties about the correct amount of any redundancy payment, the fact that such a dispute exists does not necessarily mean that there is also a claim which is capable of being brought. In this case it was quite the contrary; at the date of termination the dispute merely related to a *prospective* claim, there was no immediate right to sue. Indeed, the Claimant accepted that what happened in the four weeks following termination was crucial. Had he found suitable alternative employment within that period no redundancy payment would have been due. That being the case, the Claimant's position was very similar to that of the employee in Johnston. Neither claim had arisen, or was outstanding, on termination. The two situations were therefore materially identical and so, following Johnston, I decided his case could not be brought within the wording of Article 3(c).

43. The Claimant's last point referred to the fact that the Article 3(c) point was not raised until very late in the day and to the unfairness which he felt this created. It is indeed regrettable that the issue arose at such a late stage and Ms Patterson struggled to explain how the point had been missed by the Respondent's solicitors, even though Article 3(c) was discussed in express terms at the Preliminary Hearing before Judge Ahmed. Nonetheless, as explained above, the point raised went to jurisdiction and so, in my view, had to be determined solely in light of the power granted by the 1994 Order and the wording of Article 3(c) in particular, whatever the criticisms levelled at the Respondent's conduct of the proceedings.

44. Finally, I note in passing that the two employment tribunal judgments referred to in paragraph 24 above reach the same conclusion as I have done, namely that the tribunal does not have jurisdiction to hear disputes in relation to redundancy payments where Clause 16.23 of Agenda for Change (or its post April 2015 equivalent) applies. However, as I hope is apparent from these reasons, I have formed my own judgment on the point.

Postscript

As previously explained to the parties, the Judge regrets that it has taken her rather longer than she would have liked to provide these written reasons. This has been due to her retirement over the summer and the fact that it has therefore been necessary to complete these reasons (and a number of other judgments) in her own time.

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Employment Judge Milgate

Date: 20 September 2018

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE