EMPLOYMENT TRIBUNALS (ENGLAND & WALES)

BETWEEN

Claimant Mr D Barrasso

Respondent New Look Retailers Limited

HELD AT: London Central on 8/1/2019
Employment Judge: Mr J S Burns

Representation
Claimant: Mr C Milsom (Counsel)

Respondent Mr S Keen (Counsel)

JUDGMENT (following an open preliminary hearing)

The unfair dismissal claim is struck out.

REASONS

Introduction

1. The matter had been listed to consider as preliminary issues (i) whether the Claimant was precluded by an employee shareholder agreement under section 205A ERA 1996 from pursuing his unfair dismissal claim, and (ii) whether certain communications were admissible. The second issue had fallen away by the time of the hearing so I had to decide only the first issue.

2. I heard evidence from the Claimant, who was plainly an honest and straightforward witness, but who had forgotten signing or had failed to pay sufficient attention to what he had signed at the relevant times.

3. I heard evidence from Wendy Stroud, the Respondent interim HR director. She had not had any significant first-hand involvement in the relevant facts and had taken over responsibility after most of the relevant events only in February 2017 when Ann-Marie Murphy was about to go on maternity leave.

4. I then heard evidence from Ms Murphy, who used to be the Respondent's Group HR director, until she left her employment with the Respondent on 31/11/2017. She had been formally summoned to the Tribunal at the request of the Claimant, and attended unwillingly.

5. I received written skeleton arguments from both Counsel, written chronologies, and was referred to various authorities. There is a substantial joint bundle of 388 pages.

Facts

6. The Claimant started employment with the Respondent on 1/11/2012. He signed a service agreement in 2014. By June 2014 he had been appointed UK Managing Director.

7. In June 2015 it was agreed that the Respondent would be sold to Top Gun BidCo Ltd, which was subsidiary of Brait. As part of the transaction the Claimant was offered the opportunity to be granted 7000 Ordinary D shares in BidCo. In exchange for the shares the Claimant would be required to become an employee shareholder as contemplated by section 205A ERA, the relevant provisions of which are as follows:

> *205A Employee shareholders*
> *(1) An individual who is or becomes an employee of a company is an "employee shareholder" if—*
> *(a) the company and the individual agree that the individual is to be an employee shareholder,*
> *(b) in consideration of that agreement, the company issues or allots to the individual fully paid up shares in the company, or procures the issue or allotment to the individual of fully paid up shares in its parent undertaking, which have a value, on the day of issue or allotment, of no less than £2,000,*
> *(c) the company gives the individual a written statement of the particulars of the status of employee shareholder and of the rights which attach to the shares referred to in paragraph (b) ("the employee shares")…, and*
> *(d) the individual gives no consideration other than by entering into the agreement.*
> *(2) An employee who is an employee shareholder does not have—*
> *(c) the right under section 94 not to be unfairly dismissed, or*
> *(d) the right under section 135 to a redundancy payment.*
> *(6) Agreement between a company and an individual that the individual is to become an employee shareholder is of no effect unless, before the agreement is made—*
> *a. the individual, having been given the statement referred to in subsection (1)(c), receives advice from a relevant independent adviser as to the terms and effect of the proposed agreement, and*
> *b. seven days have passed since the day on which the individual receives the advice.*
> *(7) Any reasonable costs incurred by the individual in obtaining the advice (whether or not the individual becomes an employee shareholder) which would, but for this subsection, have to be met by the individual are instead to be met by the company.*

8. The section 205(1)(a) agreement (page 295 of the bundle) was signed on 25/9/2015. The share allotment under section 205A(1)(b) was confirmed on 7/10/2015 (325). By 31 March 2016 these shares were worth over £7 million,

so they were clearly worth at least £2000 in October 2015, and probably far more than that. A compliant section 205(1)(c) statement was provided on 26/8/2015 (page 287,- hereafter referred to as "*the 26/8/2015 statement*"). The independent legal advice required by section 205(6) was provided by Kingsley Napier solicitors on 3/9/2015, (293) which was more than the requisite 7 days before the employee shareholder agreement was signed on 25/9/2015. Kingsley Napier's costs of so advising were paid by the Respondent as required by section 205A(7).

9. It is not in dispute that these section 205A requirements were met and that the Claimant became an employee shareholder by October 2015 at the latest.

10. Before entering into these arrangements the Claimant and other directors had been concerned about the prospect of losing their statutory employment rights. The Claimant attended a meeting in about mid-2015 where this issue was raised. Chief Executive Anders Kristiansen and Mike Iddon assured the attendees, including the Claimant, that the employee shareholder arrangement was intended simply to avoid tax and that, after the tax advantages had been obtained, the employment rights would be re-instated. These assurances were vague and did not go into the specifics as to how and when the rights would be restored.

11. Deloittes accountants also produced a document at the time which contained various proposed steps which the Respondent the Claimant and others could take could take during the process. This included (263) "*Stage 8 Shortly thereafter, the same individuals enter into contractual variations to their employment agreements to re-instate the statutory rights given up when acquiring employee shareholder status'*

12. By the time the Claimant received independent legal advice from Kingsley Napier both he and the legal adviser had been provided (as part of the suite of documents about which he was to be advised) with a further draft document which it was proposed that the Claimant should sign, and which he and the Respondent subsequently executed as a Deed on 25/9/2015. (302) The document (hereafter referred to as "*the 25/9/2015 Deed*") provided to the Claimant a right, as a matter of contract, to be paid the equivalent of an unfair dismissal award under section 94 ERA 1996 and a statutory redundancy payment under section 135 ERA 1996, provided that, within three months of termination, the Claimant wrote to request the Respondent to appoint an independent ET judge to determine as expert whether the Claimant had been unfairly dismissed and or was entitled to a statutory redundancy payment.

13. The Respondent wished to introduce new service contracts for senior directors including the Claimant so as to impose new restrictive covenants and make sure that all directors were on similar standard terms. Ms Murphy became responsible for progressing this in January 2016. She drafted a standard letter (332) which was intended to be sent out by Anders Kristiansen which reads inter alia "*as you will remember, during the*

Employee Shareholder Process you waived some of your statutory employment rights in order to fulfil the criteria for becoming an employee shareholder. I am now pleased to enclose an up-to-date director's employment contract that reflects your continuous service with New Look and your previously agreed terms and conditions. I also enclose a copy of the contract which reinstates contractually the statutory employment rights that were previously waived"…

14. The letter was intended to enclose (i) the 25/9/2015 Deed and (ii) a new draft service contract.

15. In fact, the letter was not sent out to all directors, because the process became bogged down and Ms Murphy had to attend meetings with directors to explain and discuss the new contract with them to try to persuade them to sign it.

16. The Claimant cannot recall receiving a copy of the letter but did meet with Ms Murphy and received the new draft service contract which he and the Respondent then executed as a Deed in March 2017, (335;- hereafter referred to as "*the 3/17 contract*".)

17. Ms Murphy's evidence in paragraph 6 of her witness statement and in her oral evidence was that she believed at the time that "*the new contracts were being issued by the respondent to re-instate employment rights (the right to claim unfair dismissal and to a statutory redundancy and maternity payment) which had been temporarily waived when the directors signed their respective employee shareholder agreements"*.

18. However, in cross-examination she agreed that in those cases in which she did not send a letter and had a meeting with a director she would have used the draft letter as an aide memoire to prompt her in the discussions. She also prepared a summary document showing the changes which the new service contract would introduce (331A). The latter does not refer to any change in the position regarding the presence or absence of the rights to claim unfair dismissal or a statutory redundancy payment or maternity rights.

19. The 3/17 contract does not contain any express and direct reference to the Claimant being an employee shareholder under section 205A. However, it contains inter alia the following clause: 27.5 "*This agreement supersedes any previous written or oral agreement between the parties in relation to the matters dealt with in it. This agreement, along with the side letter dated 26 August 2015 reinstating certain contractual rights, contains the whole agreement between the parties relating to the employment at the date the agreement was entered into…"* (348) The clause continues with additional standard wording excluding reliance on antecedent representations and to limit remedies for misrepresentation to a claim for breach of the contract itself.

20. The Claimant agreed in cross-examination that the reference to the "*the side letter dated 26 August 2015"* was a simple drafting/typographical error and

what was intended and should have been written in clause 27.5 instead was "*the side letter dated 25 September 2015*" – i.e. the 25/9/2015 Deed. This was because the 26/8/2015 statement (287) confirms the removal of employment rights and does not reinstate them and it is only the 25/9/2015 Deed which purports to re-instate them (albeit only in the limited sense of a contractual right to go to an expert instead of to the Employment Tribunal).

21. The Respondent subsequently dismissed the Claimant in circumstances in which he regards as unfair in February 2018. He was sent a letter by Wendy Stroud on 22/2/2018 in which he was advised that he *"was entitled to a statutory redundancy payment of £2445"* (as well as a non-contractual discretionary redundancy payment of £42307.71). This was done because Ms Stroud did not know or had forgotten at the time that the Claimant was an employee shareholder.

22. His solicitors sent a letter before action threatening to bring a claim of inter alia unfair dismissal. The Respondent's lengthy rebuttal letter dated 2/3/2018 did not take the point that the Claimant had signed away his right to claim unfair dismissal in the ET. This point was taken by the Respondent for the first time only in its Grounds of Resistance served in September 2018, by which time it was too late for the Claimant to invoke the referral to an expert provided for by the 25/9/2015 Deed. This was done either because the in-house lawyer who wrote the rebuttal letter did not want to alert the Claimant to his contractual rights before they expired, or because he/she also did not know or had forgotten at the time that the Claimant was an employee shareholder.

23. The Claimant is plainly a sophisticated and highly intelligent businessman who at the time of signing the relevant agreements was at or near the top of the Respondent's business and, on his own evidence, was familiar with dealing with and understanding complicated contracts including contracts more complicated than those under discussion above.

24. However, the Claimant told me that he had forgotten about the details of the 26/8/2015 statement and 25/9/2015 deed when he issued his tribunal claim. He thought he must have left his copies in the office when he was dismissed. He remembered these documents again only when he saw them in the bundle.

<u>Consideration and conclusion</u>

25. The antecedent explanations and assurances by Anders Christiansen and Mike Iddon and the production of the Deloitte's document in mid-2015 were followed in about August 2015 by a suite of documents about which the Claimant had a full opportunity to be independently legally advised, and which suite included the draft which became the 25/9/2015 deed. The Claimant, acting reasonably, should have been fully aware by the time that he signed the employee shareholder agreement that it was by means of a contractual referral to an expert (only) that the Respondent intended to "re-instate' and was "reinstating" the statutory employment rights at the same

time as the Employee shareholder agreement of the same date was taking them away.

26. The January 2016 letter at 332 was unclear because it suggested, on one reading at least, that it was the 3/17 contract itself which would re-instate contractually the statutory employment rights, whereas the true position was that the new contract would simply preserve the 25/9/2015 deed, which had already done such re-instating as the Respondent intended to do. However, the letter is of limited significance because it was not sent to the Claimant.

27. Seeing that Ms Murphy based her oral explanations (in early 2017 to the Claimant about the proposed 3/17 contract) on the draft letter 332 ,which refers to "*reinstating contractually the statutory employment rights that were previously waived'* (emphasis added) and on a "changes document' (331A), which did not include any changes to the status quo pertaining to the right to claim unfair dismissal, I do not find that Ms Murphy would in any event have given clear oral assurances to the Claimant that the 3/17 contract would fully re-instate his statutory right to claim unfair dismissal in the ET.

28. In any event any reliance by the Claimant on the letter at 332 or on Ms Murphy's utterances is excluded by the concluding wording of clause 27.5, and if, despite this wording, the Claimant could set up a claim for breach of contract or misrepresentation, it would not restore his right to claim in the tribunal.

29. I have to interpret the meaning and effect of the 3/17 contract insofar as it bears on the issue under discussion.

30. I was referred by Mr Keen to Lord Hoffman's speech in ICS v West Bromwich and others 1998 1 All ER 98 in which he summarised the proper approach to the interpretation of contractual documents as follows;
Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749. The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191 , 201: "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

31. Mr Milsom's main submission is that the 3/17 contract terminated the Claimant's employee shareholder status.

32. Firstly, he submits this follows from the fact that the Claimant and the Respondent (in the form of Ms Murphy) both thought that the the contract would restore fully his statutory rights to go to the ET. I do not accept this submission on the facts. The best evidence of what businesspeople thought they were agreeing to at the time is what, in context, they would have reasonably understood from the words used in the written contract. The words used do not support the submission.

33. Mr Milsom submitted further that seeing that the opening sentences of clause 27.5 of the 3/17 contract supersede all previous agreements except the side letter dated 26/8/2015, (which was intended to read 25/9/2015 rather than 26/8/2015) it follows that the 26/8/2015 side letter (287) and or the employee shareholder agreement (295) were superseded. Hence the section 205A status should be deemed to be void or superseded from the date the 3/17 contract was signed.

34. I do not accept this submission either. The 26/8/2015 statement was a statement and not an agreement as referred to in clause 27.5. The 3/17 contract does not deal with or refer to employer shareholder status or to the subject matter of the employee shareholder agreement. Hence these matters are not matters referred to as superseded.

35. In any event it is plain in context that what was mutually intended at the time, by the 3/17 contract and by clause 27.5 in particular, was that the Claimant would continue to have the benefit of the 25/9/2015 deed and would not

have restored to him the statutory employment rights to go to the ET. If this was not so there would have been no need to preserve the 25/9/2015 deed. It was certainly not within the contemplation of anyone that the contractual right to go to an expert should run alongside the statutory right to go to the ET over the same matters. Such an interpretation would result in an absurdity contrary to the actual intention at the time.

36. Both Counsel agreed that section 205A did not spell out how an employee shareholder agreement or section 205A status could be terminated. I mooted that one possible way would be if the parties to it entered into a subsequent inconsistent agreement. I do not however find that the 3/17 contract was such a document. Hence I reject Mr Milson's main argument. It is not necessary for me to speculate hypothetically about other ways in which shareholder status can be terminated.

37. Mr Milsom submitted that section 205A was a controversial provision which had attracted unfavourable comment from text-book-writers, and that it was *"dead in the water"*, and contrary to the basic human right embodied in the Human Rights Act and in ILO documents, (that an employee should be protected in his employment and have a remedy for unfair dismissal). Hence, he submitted, I should adopt a purposive interpretation of section 205A as requiring, in order for the employee shareholder status to continue, that both parties should intend and agree that it continued when termination of employment occurred. He continued that the evidence showed that neither party believed at the time of termination that employee shareholder status applied to the Claimant, hence the Respondent stating that he was entitled to a statutory redundancy payment, and not taking the status point until September 2018.

38. I reject these submissions. There are numerous well-recognised limitations on the right to claim unfair dismissal. For example, an employee who has entered into a COT3 agreement, or who does not have two year's service, or who was employed abroad, or has agreed in a contract that he is not an employee but self-employed, may well find that he or she cannot claim unfair dismissal. Section 205A is just another way in which the right can be lost. It is hedged around with safeguards and is a section which is likely to affect mainly sophisticated businesspeople (such as the Claimant in this case) who are likely to be well-placed to make informed decisions from a relatively strong bargaining position.

39. It appears to me in this case, for example, that the Claimant went into the arrangement in consideration for valuable shares and hence that the arrangement was, potentially at least, to his considerable advantage overall.

40. In any event Mr Milsom's submission (that it should be a condition for continuing employee shareholder status that both parties should intend and agree that it continued when termination of employment occurred), (i) would require me to read numerous additional words into the section which were not included by Parliament and (ii) would result in a nonsense because in

most cases the employee wishing to claim unfair dismissal at least would never agree at that stage that it did continue, for obvious reasons.

41. In any event the parties did not both agree at the time of termination that the claimant was not an employee shareholder. They both appear to have simply overlooked the matter temporarily. The letter before action and the Respondents rebuttal do not comment on the issue either way.

42. In summary I find that at the time of dismissal the Claimant was an employee shareholder as contemplated by section 205A and that as a consequence of section 205A(2) he cannot claim unfair dismissal.

43. Hence his claim for this is struck out as having no reasonable prospect of success.

J S Burns
9/1/2019

Employment Judge
London Central

For Secretary of the Tribunals

Date sent to the Parties:
10 Jan. 19