EMPLOYMENT TRIBUNALS

Claimant: **Mr A Onyenaobiya**

Respondent: **South West London and St George's Mental Health NHS Trust**

Heard at: **LONDON SOUTH** **On: 17 December 2018**

Before: **EMPLOYMENT JUDGE PHILLIPS**

Representation
Claimant: Mr Randle, of Counsel
Respondent: Mr Kennedy, of Counsel

JUDGMENT

Pursuant to Rule 37(1) of the Employment Tribunal Rules of Procedure 2013, the Claimant's Claim for an enhanced contractual redundancy payment is struck out.

REASONS

Background and procedural history

1. The Claimant was employed by the Respondent, latterly as a Modern Matron, from 1.1.1996 until dismissal, he contends on 29.08.2017 (which date is challenged by the Respondent, who says dismissal occurred on 24.5.2017). By an ET1 claim form presented on 19.12.2017, the Claimant bought complaints of ordinary unfair dismissal, unfair dismissal for making a protected disclosure (whistleblowing), detriment for making a protected disclosure, annual leave, statutory redundancy payment and breach of contract for a contractual redundancy payment. The claim as a whole arises out of the Claimant's dismissal by way of redundancy and a dispute as to alternative employment. This hearing was concerned with only the last of those claims identified, namely the breach of contract claim for a contractual redundancy payment.

2. On 2^{3rd} of March 2018, there was a preliminary hearing before Employment Judge Nash, who made orders to enable the case to proceed to a full hearing, which was and remains listed for 5 February 2019. As far as the breach of contract claim for a contractual redundancy payment is

concerned, EJ Nash recorded that the issues that arose with regard to that claim were (i) whether the Claimant was entitled to a contractual redundancy payment, (ii) if so, in what the sum; and (iii) was the Respondent entitled to withhold such payment on the basis that the Claimant did not accept an offer of alternative employment. EJ Nash also Ordered (para 3.3) that the Claimant must send to the Respondent and the tribunal, further details of his contractual redundancy payment, including (1) the basis for him saying he was so entitled; (2) how much he said he was entitled to; (3) why he says he did not refuse any suitable alternative work so as to lose his entitlement.

3. The Claimant says he complied with this Order on 23 April 2018. The Respondent disputes that the Claimant complied with the terms of the Order, and on 28 June 2018 applied for an Open Preliminary Hearing to consider a strike out of the contractual redundancy claim.

The application to strike out the contractual redundancy payment claim

Evidence

4. This hearing was listed as an open Preliminary Hearing to deal with (1) the Respondent's application to strike out the contractual redundancy claim; and (2) the Claimant's alleged failure to properly particularise that claim and to comply with the Case Management Order dated 23 March. The beginning of the hearing was delayed by an hour as the parties had only brought with them electronic versions of documents and cases, and these had to be sent to the tribunal and / or located and copied. No witness evidence was heard by me. I was informed by both legal representatives that I need not concern myself with the fact that there were a number of disputed factual matters (including the effective date of termination and whether there had been an offer made of suitable alternative employment) which would only be determined at the full hearing. This was in effect a matter of construction and interpretation.

5. I was referred to one material section of a document, namely Section 16 of an NHS document entitled "Agenda for Change". Section 16 is entitled Redundancy Payment. The Respondent's Pay and Conditions include this document, which applies [section 16.1] to employees dismissed by reason of redundancy who, at the date of termination of their contract, have at least two years continuous full-time or part-time service. There is no dispute that this document forms part of the Claimant's contract of employment. Section 16 sets out the arrangements for redundancy pay for employees dismissed by reason of redundancy. The key paragraph is at 16.26 (although Mr Randle also referred me to paragraphs 16.23 to 16.25, which he submitted supplied context to how 16.26 had to be interpreted and to which I will refer below).

6. This document states that "*claims for redundancy payment 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 have not obtained, been offered or unreasonably refused to apply for or accept, suitable alternative health service employment within four weeks of the termination date and they understand that payment is made only on this condition and undertake to refund it if this condition is not*

satisfied."

7. I had the advantage of the written submissions from the Respondent (as contained in their application seeking a strike out) supported by brief oral representations from Mr Kennedy and, from the Claimant, brief written submissions as set out in a document presented on the morning of this hearing, entitled "Claimant's Further and Better Particulars: contractual redundancy payment claim", which sets out, at paragraphs 6 to 9 inclusive, the Claimant's legal arguments on this point. These were also supplemented by brief oral submissions from Mr Randle.

The Respondent's arguments

8. The Respondent's case in respect of the contractual redundancy pay claim is as set out at paragraph 44 to 54 of the ET3 Grounds of Resistance. The Respondent considers that the employment tribunal does not have jurisdiction to consider the Claimant's claim for a contractual redundancy payment, because it says that the tribunal has no jurisdiction to hear such a claim. The Respondent refers to Article 3 of the Employment Tribunal Extension of Jurisdictions (England and Wales) Order 1994.

9. The Respondent argues that because of Article 3 (c) which refers to "the claim arises or is outstanding on the termination of the employee's employment", the tribunal's jurisdiction is limited to such claims. The Respondent asserts that the Claimant's claim in this case on the facts does not arise nor was it outstanding on the termination of his employment. The Respondent refers to the wording of paragraph 16.26 in that regard. Mr Kennedy explained 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.

10. The Respondent argues that 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 the termination date* (their emphasis)**.** Mr Kennedy submits that, at the date of termination of the Claimant's appointment, he only had a contingent right to a redundancy payment, dependent on him not obtaining suitable alternative employment within four weeks, and then certifying that to be the case to the Trust. It is only once those four weeks have passed and the Claimant has so certified (and then the Trust has refused of failed to pay) that the Claimant is entitled to advance a claim. Mr Kennedy asserts that the Claimant's entitlement to the contractual redundancy payment he is claiming did not arise on, and was not outstanding at the termination of his employment. In the circumstances the Respondent contends that the employment tribunal has no jurisdiction to consider the Claimant's claim for a contractual redundancy payment. Any such claim should be brought in the County Court. On that basis, Mr Kennedy says this claim should be struck. In making this claim the Respondent relies on Rule 37 of the Employment Tribunal rules.

11. Mr Kennedy referred me to a number of decisions: obiter dicta from *Peninsula Business Services Ltd v Sweeney* (EAT/1096/02); and the first instance decisions of *Pritchard v Bexley Care Trust* (ET/1100945/11); *Lawlor v Ashford and St Peter's Hospital NHS Foundation Trust*

(ET/2301323/2017) and *Brewsher v NHS Business Services Authority* (ET/3401036/2016). In each of the first instance decisions, an employment tribunal had determined, on the basis of an identically worded NHS contractual redundancy provision, also contained in a document entitled Agenda for Change, (albeit what appeared to be an earlier version as the references were to paragraph 6.23 in those cases), that it had no jurisdiction to hear the claim, on the basis of its interpretation of the provision.

The Claimant's arguments

12. The Claimant's lawyers, by a document presented to the Employment Tribunal at the hearing, dated 17 December 2018, submitted further details of the Claimant's contractual redundancy pay claim. They say that while the Order of EJ Nash did not specify any particular format for the provision of the relevant information and that adequate information was provided on 23 April 2018, nonetheless, for the avoidance of doubt, further written particulars are now provided. This meets one of the matters raised by the Respondent, namely that the Claimant had failed to comply with the Case Management Order of 23 March. That issue therefor falls away.

13. Further, the Claimant's written argument submits, and Mr Randle argues, that the claim for a contractual redundancy pay plainly arises out of and was outstanding on the termination of the Claimant's employment. In this regard, Mr Randle notes section 16.26 of the Agenda for Change and avers that this section refers to obtaining, being offered or unreasonably refusing work "within four weeks of the termination date", it is in respect of the four week period *prior* to the termination date and not the four week period after that date. He says this is the only reasonable interpretation of that section for the following reasons. He says (1) by section 16.23 of the Agenda for Change document an offer of suitable alternative employment must be made "*before* the date of termination" so references later to offers of alternative employment can only apply to the period prior to termination. If no offers of suitable alternative employment have been made prior to the date of termination - which would form the basis of any claim for the payment – the right to a contractual redundancy payment arises on or is outstanding at the termination of employment. Further, he says (2) on early release of redundant employees, sections 16.24 and 16.25 of the Agenda for Change envisage circumstances in which (i) a determination that there is no suitable alternative employment is made *prior* to termination; and (ii) that employee may obtain other employment outside the NHS prior to their planned date of redundancy (an earlier agreed date would subsequently become the date the redundancy). Therefore in these circumstances, he says, which inform the proper interpretation of section 16.26 more generally, it is clear that the right to a contractual redundancy payment arises/is outstanding as at the date of termination.

14. Although Mr Randle's primary point is that the wording of paragraph 16.26 in the Agenda for Change document is clear, he also submitted that if there is an ambiguity, the contractual principle known as the "*contra proferentum*" rule needs to be considered. This is a rule designed to resolve ambiguous language against the party who prepared the document containing the ambiguous language. In this context he referred to the case of *Nobahar-Cookson v Hut Group* [2016] EWCA Civ128. In that case Briggs LJ, giving the judgement of the court, stated that (at paragraph 18) in his judgement

"the underlying rational for the principle that, if necessary to resolve ambiguity, exclusion clauses should be narrowly construed has nothing to do with the identification of the *proferens*, either of the document as a whole, or of the clause in question. Nor is it a principal derived from an identification of the person seeking to rely upon it. Ambiguity in an exclusion clause may have to be resolved by narrow construction because an exclusion clause cut down or detracts from the ambit of some important obligation in a contract or a remedy conferred by the general such as (in the present case) an obligation to give effect to contract or warranty by paying compensation for breach of it. The parties are not likely to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect". At paragraph 19 Briggs LJ continues "this approach to exclusion clause is not now regarded as a presumption, still less as a special rule justifying the giving of a strained meaning to a provision mainly because it is an exclusion clause. Commercial parties are entitled to allocate between them the risk of something going wrong in their contractual relationship in any way they choose. Nor is it simply to be mechanisticslly applied wherever an ambiguity is identified in an exclusion clause. The court must still use all its tools of linguistic, contextual, purposive and common sense analysis to discern what clause really means". Mr Randle pointed out that this case is about commercial contracts, where there is normally equality of bargaining power, which is not of course the case for most employment contacts.

The law

15. The power of an employment tribunal to hear contractual claims is governed by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, which states: "*proceedings may be brought before an industrial tribunal in respect of a claim of an employee for the recovery of damages or any sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if – (a) the claim is one to which section 132 (1) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine; (b) The claim is not one to which article 5 applies; and (c)* ***the claim arises or is outstanding on the termination of the employee's employment****".* (emphasis added).

16. The phrase "arises or is outstanding" is not defined in the 1994 Order. Guidance was given in the *Sweeney* case, by Rimer J. This was a case about commission payments but the wording of the 1994 Order and in particular paragraph 3 (c) was considered. The ET in that case had adopted a purposive approach to the language used and had determined that Mr Sweeney did have a contractual entitlement to his commission which fell within paragraph 3 (c). That decision was overturned by the EAT, who found there was no jurisdiction to hear the claim, because no claim arose or was outstanding on termination. All Mr Sweeney had at that time was a prospective claim, which was not and could not have been enforceable at the date of termination. Any claim could only fall due after termination.

17. This case was raised and considered most recently in the *Brewsher* ET case, on 14 May 2018. At that hearing, the Respondent's counsel had referred to two other ET first instance decisions (*Pritchard* and *Lawlor*, the latter being a case I had myself heard and determined, albeit with a panel

and albeit on facts where the Claimant was neither an employee nor had two years continuous service) where the same issue had arisen about the interpretation of clause 16.23 of the Agenda for Change and the ET's jurisdiction to hear a claim. In both those cases, jurisdiction was declined. In *Brewsher,* the Employment Judge did not simply rely on the decisions in those cases, rather he went through a detailed analysis. None of these decisions are of course binding on me. Mr Murray says nonetheless, they set out the correct approach. Mr Randle says that in some instances these were obiter observations, in others Claimants were not legally represented, and further, none of those cases appeared (from the written judgments that were available) to have had full argument on the context in which clause 16.23 (16.26 in this case, but the wording is identical) appeared.

Conclusions and discussions

18. The 1994 Order places considerable restrictions on a tribunal's jurisdiction to hear contractual claims, including those set out in Article 3(c). The wording that arises in that article was considered in the *Peninsula* case, albeit in different factual circumstances. It has subsequently been considered by a number of other employment tribunal is who have reached the same conclusions about its impact. Article 3 focuses on a precise moment in time, namely the date of termination that is the key date and it is clear that any claim to come within the 1994 Order, must have arisen at that date.

19. Looking at the wording in 16.26, this is based around matters that can only in my judgment take place **after** dismissal. The preliminary wording in 16.26 says that claims for redundancy payments must be submitted **within** six months **of** the date of termination" (my emphasis added). This clearly imposes a time limit for the making of claims. In my judgment, clause 16.26 is predicted on certain factual matters having to be confirmed after employment has terminated. The time limit imposed on the subordinate matters (obtaining employment, being offered, an unreasonable refusal to apply) is four weeks after termination. Only after that period has expired and the certificate given, can any contractual right to make a claim be said to have crystallised. It is as at the date of termination, therefore only a prospective claim. There is a line in the clause that makes this very clear: "payment is made only on this condition". The Claimant's right to a redundancy payment was conditional upon him satisfying the conditions in clause 16.26, which he could not do until at least four weeks later. This contrasts, foe example, with the language in section 141 ERA 1996 which specifically refers to that section applying "where an offer (whether in writing or not) is made to an employee *before the end of his employment*". It seems to me to perfectly logical that a contractual right, which is better than the statutory right may well impose more onerous conditions as to when it can be relied upon. I also note, in passing, clause 16.16, which states if an offer of suitable alternative employment is made before termination, and that starts within 4 weeks of termination there will be no entitlement to a redundancy payment. There is what appears to me to be a consistent logic and approach to these terms, likewise in clause 16.20, four weeks from the date of termination appears to be key. I saw nothing in clauses 16.23,16.24 or 16.25 to persuade me otherwise. The fact that an offer of suitable alternative employment has to be made before the date of termination does not affect this – the actual employment must start not more than four weeks

after that date. That does not appear to me to detract from 16.26. This is an offer which the Claimant can reject up to 4 week after termination. It is only at that point that any liability may arise. Things may happen prior to termination but the effect is only to be determined four weeks afterwards.

20. Taking that approach, in my judgment the right to a redundancy payment in this case was a contingent right, not an absolute one. Applying the logic from the *Peninsula* case, there was nothing that the Claimant could have sued over at the effective date of his dismissal; any rights to sue only arose 4 weeks afterwards. I did not find there to be any ambiguity in this wording such as to require me to utilise or apply the *contra proferentum* rule in this case.

21. I accept therefore that as far as any claim for a contractual redundancy payment is concerned, that such a claim is based on a contingent contractual right, which requires certain conditions to have been fulfilled. This is therefore only a prospective claim and is not a claim which falls due on termination. As such the Tribunal has no jurisdiction to hear it under the Extension of Jurisdiction Order 1994. I therefore decided that I had no discretion in this matter. The employment tribunal is a creature of statute and as such it has no inherent common law jurisdiction and its powers are limited to those granted by Parliament, in this instance, as set out in the 1994 order. I find that this claim falls outside those powers. Nonetheless, this is not an interpretation that leaves a Claimant without remedy. It is a claim that can be pursued in the civil courts.

22. Therefore, for the reasons set out above, the Claimant's claim for an enhanced contractual redundancy payment is struck out.

Date: 17 December 2018