

STO/RM



EMPLOYMENT TRIBUNALS

Claimant: Mr A Ciappei

Respondents: Barclays Services Limited

Heard at: East London Hearing Centre

On: 19 March 2019 and (in chambers) 15 April 2019

Before: Employment Judge O'Brien

Representation:

Claimant: In person

Respondent: Mr. Dyal of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claim for damages for breach of contract fails and is dismissed.

REASONS

1 On 9 August 2019, the claimant presented a claim for damages for breach of contract arising from the Respondent's withdrawal of an offer of employment. In essence, the claimant alleges that the offer was withdrawn without proper basis and without reasons having been given. He relies on the offer letter dated 12 July 2018 and the attached terms and conditions of employment as the contract he alleges was breached by the respondent. The claimant sought damages for loss of earnings, loss of opportunity and damage to reputation.

2 I heard live evidence from the claimant himself, given on the basis of his ET1 claim form and response to the respondent's request for further information, and from Jenine Lee (Screening Governance Manager) on behalf of the respondent. It was agreed that I could take as read a witness statement from Rodrigo Calvo Garcia on behalf of the claimant, and I decided that I would admit the unsigned statement of Jason Bear (Head of Applications and Infrastructure Support for Credit and Macro Markets), having been

shown evidence that he had agreed its contents. However, he had been unable to attend today for cross-examination, and so I gave only such weight to the statement as was appropriate in all the circumstances.

3 I was provided with a bundle of documents prepared by the respondent. The claimant had hitherto been reluctant to agree the bundle, being suspicious of the respondent and its representatives and had brought his own bundle of documents. However, I gave the claimant an opportunity to confirm what, if any, documents were in his bundle but not the respondent's and which I needed to take into account. There were none and so I used the respondent's bundle, which was indexed and paginated.

4 The parties each made oral submissions, which I took into account in their entirety.

FINDINGS OF FACT

5 I make the following findings of fact, determining facts in issue on the balance of probabilities.

6 The claimant is a highly skilled and experienced IT specialist, who applied in or around June 2018 for the role of 'RTB Infrastructure Manager'. He performed well at a first interview with the respondent on 14 June 2019 and was invited back for a second interview on 20 June 2018. Again, the claimant performed well and was the respondent's preferred candidate. The claimant was notified of his success on 21 June 2019 by the Sam Stone, an external recruitment consultant with the Nicholl Curtin Group, with whom the claimant had been liaising regarding the vacancy.

7 Some email correspondence then followed between the claimant and Mr Smith in which such matters were discussed as the claimant's reasons for leaving his previous role and when the respondent would be making a formal offer. On 9 July 2018, the claimant was notified by Mr Smith of the proposed remuneration package and replied immediately that he was satisfied with it. He was, however, keen to start working as soon as possible because of the period of time he had already spent without a salary. The claimant was aware from his experience in the work sector that any employment would be subject to his successfully completing screening.

8 The claimant was notified by the respondent on 12 July 2019 that it was offering him a role but that certain steps had to be finalised before his offer and start date could be finalised. He had to log onto the 'Welcome Portal' to access and accept the proposed contract of employment and had to complete successfully the respondent's screening checks.

9 The claimant accepted the offer that day and filled out the screening questionnaire. The offer letter contained the following material statement:

'This offer is conditional upon you satisfying Barclays recruitment and screening conditions and procedures and where applicable, the appropriate regulatory approvals.'

10 The attached summary of key terms provided amongst other things as follows:

'Start Date- 20 August 2018, subject to the pre-employment conditions being met to the Company's satisfaction. Your start date for the purposes of continuous employment is the day you commence your new role.'

'Notice Period- Your employment may be terminated by the Company or you may terminate your employment by giving 4 weeks' written notice. After completion of 4 years' service notice from the Company will increase by one week for each completed year of employment, subject to a maximum of 12 weeks' notice for, if greater, for entitlement to statutory notice. Notice to the Company will remain the same.'

11 The attached detailed terms and conditions of employment contained these further material provisions:

'2.1 You understand that the Company's offer of employment is made to you subject to conditional on the completion of certain pre-employment procedures and processes. You certify that the information that you have provided in connection with completion of the procedures and otherwise in connection with this offer of employment (including at interview stage) is true and accurate both at the time it is given and on the start date. The Company reserves the right to carry out screening checks on all employees, and such procedures may include, but are not limited to:

(a) receipt of references and documentary proof that you are satisfactory to the Company that you are legally entitled to reside and work in your country (immigration documents) and you agree as a condition of your employment to provide copies or original immigration documents promptly on request, and to provide the Company with original immigration documents on or before your Start Date. The company may delay your Start Date or withdraw your offer of employment if you have not provided suitable immigration documents in the format (i.e. copies or originals) and by the deadline (including but not limited to the start date) requested by the Company.'

'2.3 Whilst every effort will be made to complete the pre-employment procedures before your Start Date, this may not always be possible and the Company may terminate your employment at any time on minimum statutory notice if the procedures are not completed to our satisfaction all within a reasonable period of time. If your role is a certified role, you will not be permitted to commence employment until all required screening procedures have been completed and you have been issued with a certificate to perform your role. The Company may delay your Start Date or withdraw your offer of employment if you have not provided necessary informational documents required to assess you as fit and proper to carry out your role in the format and the deadline(s) requested by the Company. The Company may delay your Start Date and/or withdraw your offer of employment if a decision is taken not to issue a certificate because the Company has been unable to assess you as fit and properly carry out your role.'

'19.1 Subject to paragraph 2 of the detailed terms and conditions, the Company and you may each terminate your agreement in accordance with the "notice" paragraph set out in your summary of key terms. In addition:

(a) if you are unable to start your employment by your agreed Start Date (including by reason of the Company having delayed your Start Date due to your failure to provide any information or documents requested by the Company prior to your Start Date, or any other screening failure, the Company may withdraw your offer of employment immediately without notice and you will have no entitlement to receive any payment or other benefit whatsoever from the Company or the Barclays group;

...

(d) the Company may (without notice, pay in lieu of notice or incurring any obligation to pay compensation) immediately terminate your employment if you:

...

(iv) have breached or otherwise failed the Barclays group sanctions screening policy or process'

'20.1 The Company reserves the right in its sole and absolute discretion to terminate your employment and this agreement with immediate effect (whether or not notice has been given by either party) by giving notice in writing to you of its intention to make payment in lieu of notice. If it does so, the Company shall make you a payment in lieu of notice equal to the basic salary which you would have been entitled to receive if you had worked during your notice period or, if your notice period has started, the unexpired portion (the "payment in lieu"). Where the Company elects to make a payment in lieu of some or all of your notice period, your employment shall terminate on the date specified by the Company, regardless of when the payment in lieu is made to you.

20.2 Any payment in lieu will be paid less tax and any applicable withholdings. You will not be entitled to receive any payment in respect of annual leave entitlement that would have accrued during the period for which the payment in lieu is made.'

'24.3 You acknowledge that in entering into your agreement you have not relied on any representation or undertaken by the company whether oral or in writing, except as expressly incorporated into your agreement'

12 The claimant accepted the terms that day; however, he did enquire immediately with Mr Stone whether it would be possible to bring the start date forward for financial reasons. Mr Stone indicated that a sooner start date could be requested once 'onboarding' had been completed.

13 On 12 July 2018, the claimant provided the information necessary for his screening checks by completing an online form (a "candidate invite report"). This information was passed by the respondent to its screening organisation, HireRight LLC ('HireRight'). In it, the claimant stated that:

- 13.1 He did not have any convictions, cautions, reprimands or final warnings (including traffic offences) that were not "protected" as defined by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975.
- 13.2 He had obtained degree level qualifications in telecommunication engineering and mechanical engineering from Universita Degli Studi Di Pisa ('Pisa University').
- 13.3 He had been employed by Telrock from October to December 2017 on a fixed term contract and then by Forcepoint between January and June 2018
- 13.4 in respect of the latter, the claimant indicated that he had been dismissed during his probationary period because he had escalated management problems to the company and had brought an employment tribunal claim as a result.

14 Certain information was automatically populated into the form from the claimant's CV, including that he had been self-employed from March 2004 to the present with IT Sistemi Solutions Ltd. However, the claimant emailed HireRight on 23 July 2018 to clarify that this period of self-employment had finished at the end of 2017.

15 The claimant was interviewed by telephone on 20 July 2018 about his failed probation with Forcepoint, and described the circumstances leading to his failed probation being 'Planned for wedding and needed holiday, conflicts with managers' and said that no action had been taken against him and he had not appealed the decision. When asked if he could provide his termination documents, the claimant said, 'I cannot contact the company for any documents. Can send the tribunal form.' Indeed, the claimant did send the ET3 and ACAS early conciliation certificate to HireRight by email after the interview and gave further details about the circumstances in which he left Forcepoint.

16 On 24 July 2018, HireRight asked the claimant to provide documentation including amongst other things: proof of his qualifications from Pisa University; documents providing the start and end date of his employment with Telrock and Forcepoint; and documents confirming the start and end date of his self-employment. The claimant informed HireRight the same day that he would not be able to obtain his university documents immediately because they were at his mother's house in Italy, and said that if producing the documents was mandatory, he would 'refuse the contract' because the process had already taken so long. HireRight told him not to worry, and that they would simply update their report to the respondent. The claimant repeated in an email dated 30 July 2018 that he would be unable to provide his academic certificates until he next visited Italy, which would be in September/October 2018.

17 On or around 26 July 2018, HireRight received the results of a criminal records check conducted in Italy on the claimant. It showed that he had been convicted by the

Firenze Court of Appeal on 12 November 2007 of a matter for which he paid a fine in lieu of a sentence of imprisonment. The exact details are irrelevant, it being uncontentious that the claimant did not disclose the conviction during screening but that he was under no obligation so to do because it was a spent conviction pursuant to the Rehabilitation of Offenders Act 1974.

18 HireRight did not appreciate at the time that the conviction was spent and conducted a telephone interview about it with the claimant on 3 August 2018. The claimant said that he did not know anything about the conviction or the fine, although he recalled an issue in 2001. These answers did not satisfy HireRight and they informed the respondent that day that the claimant had failed his screening because of an undeclared criminal conviction. The respondent consequently decided on 6 August 2018 that they would not proceed with recruiting the claimant.

19 The respondent's 'People Screening Disqualification and Exceptions Guide', published in November 2017, specifies the evidence to be sought during screening checks and the actions to be taken for adverse screening results and where screening is not satisfactorily concluded within the required timeframes. It contains the following material provisions:

- 19.1 In respect of previous employers, an automatic disqualification will result if it is not possible to independently verify 2 or more previous employers where the roles did not exceed 6 months in duration, the prospective employee was dismissed other than for redundancy by a previous employer, or if the prospective employee failed probation in a role that was different to the position offered by the respondent.
- 19.2 In respect of claimed academic awards, the prospective employee was required to provide either original certificates or a reference from the awarding body of the highest academic award declared, and a failure to provide such evidence would result in an automatic disqualification.
- 19.3 The discovery of a criminal conviction not declared by the candidate during the screening process would result in an automatic disqualification.

20 The respondent's People Screening Policy, attached to the Guide as Annex A, provided that the minimum screening checks must include company verification and career history for the three years prior to the application, and the prospective employee's highest academic award. The policy also provided that all checks must have been completed before the prospective employee took up his or her role, unless that was not possible for local legal/regulatory or unavoidable operational reasons, in which case certain checks (including those concerning company verification and career history for the three years prior to the application, and the prospective employee's highest academic award) had to be completed within 6 weeks of his or her start date.

21 At no point did HireRight receive a reference for the claimant from Forcepoint or Telrock or even confirmation that he had been an employee of either. A number of attempts by HireRight to contact the claimant's accountant to verify his self-employment were unsuccessful. The Student Records Department at Pisa University had advised

HireRight that they held no records in the claimant's name. Consequently, a screening report subsequently prepared for the respondent by HireRight on 6 September 2018 identified these matters as discrepant as well as the Italian criminal conviction.

22 The claimant has now been able to provide his university certificates but only after he returned to Italy to collect them sometime in September/October 2018.

23 It is not at all clear when the claimant was informed that he failed screening, although it would appear from an email he sent to HireRight on 6 August 2018 that he was aware that his conviction might well lead to that result. Certainly, he must have been told (or realised for himself) that the respondent's offer of employment had been withdrawn soon afterwards because he secured alternative employment in September 2018, at a level of remuneration greater than that offered by the respondent.

THE LAW

24 The Employment Tribunal has jurisdiction to hear claims for damages for breach of contract, provided that the damages arise out of or outstanding on termination of employment (article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994). An individual who has entered into a contract of employment by accepting a sufficiently certain job offer is an employee, even if he or she has not started working for the employer at the date of the breach.

25 Such a contract can be unconditional, in which case the employer cannot withdraw the offer without committing a breach of contract. However, not unusually job offers are made subject to conditions such as in the present case. Where an agreement is subject to a contingent condition precedent, there is, before the occurrence of the condition, no duty on either party to render the principal performance promised by him (Chitty on Contracts, 33rd Ed, Vol 1, Pt 2, Ch 2, section 8, para 2-160, approved in **Schweppe v Harper [2008] EWCA Civ 442**).

26 However, an agreement subject to such a condition may impose some degree of obligation on the parties or on one of them. Whether it has this effect, and if so what degree of obligation is imposed, depends on the true construction of the term specifying condition. At one extreme, either party might be able to withdraw from the agreement at any time prior to satisfaction of the condition. At the other, neither party can withdraw whilst the condition is capable of being satisfied. However, if it becomes clear in such a case that the condition has not occurred, or that it can no longer occur, within the time specified in the contract, the parties will be under no further obligations under the contract (ibid).

27 Whether satisfaction of the condition is to be judged subjectively or objectively is a matter of contractual interpretation.

28 Damages for withdrawal of a contractually binding offer of employment comprise the sums otherwise due under the contract. Those sums calculated on the basis that the employer would have performed the contract on the basis most advantageous to it. Therefore, damages are those net sums which would have been paid during the

contractual (or, if longer, the statutory) notice period or, if less and the employer has such a contractual right, pay in lieu of notice (**Lavarack v Woods [1967] 1 QB 287**).

29 That said, the employee is not entitled to any damages if the employer is entitled to rescind the contract on the basis of a repudiatory breach by the employee, or is otherwise entitled to dismiss the employee without notice. That is the case whether or not the employer had in mind or even knew of the repudiatory breach or the entitlement (as the case may be) at the time of dismissal/withdrawal of the offer (**Williams v Leeds United Football Club [2015] IRLR 383**).

30 The fact of a spent conviction is not a proper ground for dismissing or excluding a person from any office, profession, occupation or employment (s4(3) of the Rehabilitation of Offenders Act 1974).

CONCLUSIONS

31 The first respondent offered and the claimant accepted for the former to employ the latter, subject to the requirement that he pass the respondent's screening process. The requirement was both a condition of the offer itself, and so a condition precedent of the contract, as well as having been incorporated into the contract as a valid reason for dismissal without notice (and so a condition subsequent).

32 The latter term appeared to be necessary in case an employee was permitted to commence work before the full screening process was complete. However, the respondent's People Screening Policy only permits such an event where completion of the full checks are not possible for local legal/regulatory or unavoidable operational reasons. There were no such reasons applicable to the claimant's case and so I find that the respondent was entitled to require that the claimant satisfied the full screening checks in order to commence work.

33 I also find in all of the circumstances that the respondent was entitled under the contract to treat a prospective employee as not satisfying the screening checks if, amongst other things, if he or she fell for automatic disqualification under its 'People Screening Disqualification and Exceptions Guide'.

34 I satisfied that it was an implied term of the contract that neither party could withdraw from the contract until such time that the screening process was complete or it became apparent that the claimant would not be able to pass the screening checks by the appropriate deadline. In the claimant's case, this was the proposed start date.

35 The respondent withdrew the claimant's employment offer after being notified by HireRight that they had discovered an undeclared conviction in Italy. Mr Dyas accepts that the conviction was in fact spent and that this was not, therefore, a lawful reason to withdraw the offer. Had this been the only basis on which the claimant had failed his screening checks, undoubtedly the withdrawal would have been a breach of contract. However, the claimant's screening checks had uncovered two other bases for automatic disqualification: it not been possible to verify independently his employment and self-employment history, and it had not been possible to evidence his highest academic qualification. Moreover, there were no reasonable grounds to believe that any such

verification would be forthcoming from the claimant's accountant and former employers, and certainly not before 30 August 2018. In any event, the claimant had made clear by then that he would not be able to provide his academic certificate until September/October 2018.

36 Consequently, the respondent would have been entitled to withdraw the offer on the basis that the claimant had not passed screening and was not likely to be able to pass screening before his proposed start date. It follows that the respondent was not in breach of contract in withdrawing the claimant's offer of employment.

37 Even if I were wrong, and the respondent was obliged to give the claimant a further opportunity to satisfy his screening checks, that would necessarily have resulted in the respondent asking the claimant to provide his original academic certificates. As he made clear at the time, the claimant would then have withdrawn himself from the recruitment process and so suffered no loss as the result of any breach.

38 Given my findings above, it is not necessary to quantify the claimant's damages. However, had the respondent withdrawn the offer in breach of contract, the claimant's damages would have been limited to net pay in lieu of the contractual 4-week notice period.

39 The claimant argued that he should be compensated for the period of time he spent unemployed between first being notified of his success at interview on 21 June 2018 and obtaining replacement employment in September. However, to do so would put him in a more favourable position than if the contract had been performed; the respondent was not obliged to start paying the claimant until he started work on 30 August 2018, and could then have given him immediate notice. Incidentally, at no point did the parties agree that the claimant could start work before 30 August 2018.

40 The claimant also argued that he should be awarded compensation for reputational damage. Putting aside for one moment whether such damages are available under employment contracts, it is clear that the claimant suffered no reputational damage. He accepted that it would have been difficult in any event to obtain alternative employment to start in August but was able to obtain employment in September. Moreover, that employment was better remunerated than the position with the respondent.

Employment Judge O'Brien

16 April 2019