EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4101953/2015

5 **Held in Glasgow on 18 October 2019**

Employment Judge: R Gall

10 **Mr J McMahon** — **Claimant Represented by Mr M Cain – Solicitor**

15 **Contraflow Ltd** — **Respondent Represented by Mr R Taylor - Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

(1) The Preliminary Hearing set down for 18 October 2019 will proceed, the application by the respondents to sist this claim being refused.

25 (2) The claims made by the claimant in respect of the period prior to December 2014 are dismissed, the Tribunal having no jurisdiction to consider them as they have been brought out of time. It was not argued that it was not reasonably practicable to bring the claims in time.

REASONS

30 1. This case was scheduled to proceed to a Preliminary Hearing ("PH") at Glasgow on 18 October. Mr Cain appeared for the claimant. Mr Taylor appeared for the respondents.

2. In correspondence prior to the PH the respondents had highlighted that they wished to have this claim sisted to enable a decision to be made in the claim

of *Chief Constable of the Police Service of Northern Ireland v Agnew and others 2019 IRLR 782 "(Agnew")***.** They set out the reasons why, in their view, sisting of this case was appropriate. Mr Cain for the claimant had set out his view as to why the case should not be sisted, notwithstanding *Agnew*.

5 3. I heard submissions as to whether the case should be sisted or not. I adjourned to consider those submissions.

4. Prior to adjourning I also heard submissions upon the time-bar point. It seemed efficient to do that. This area was rendered relatively straightforward in that Mr Cain and Mr Taylor were agreed on the relevant facts and law.

10 5. The key element involved in determination of the time-bar point was that there was a period between January 2014 and October 2014 when the claimant was absent from work on sick leave. It was accepted on his behalf that there was no underpayment of holiday pay during that time. The claim had been presented to the Employment Tribunal in January 2015. Both parties agreed
15 that the claim "caught" alleged underpayment of holiday pay which was said to have occurred in December 2014.

6. The claimant accepted that given the law as detailed in the Employment Appeal Tribunal ("EAT") case of *Bear Scotland Limited v Fulton and another 2015 ICR 221 ("Bear")***,** the fact that there was a gap of more than 3 months
20 in the alleged underpayments meant that this Tribunal was bound to regard any claim for the period prior to December 2014 as being time-barred. That was accepted as being the inevitable outcome if the question of time-bar was to be determined by this Tribunal at this PH.

Sisting of the claim

25 7. *Agnew* was a case determined by the Court of Appeal in Northern Ireland. It is not entirely clear, however it appears to be the case that there is an intention to proceed with appeal from that court to the Supreme Court. It is believed that procedural steps with a view to such an appeal being advanced are currently being taken.

8. *Agnew* took a different approach to that taken in *Bear*. It took the view that there was a series of payments notwithstanding there being what *Bear* had regarded as a fatal gap of 3 months between alleged underpayments. The provisions of the legislation interpreted in *Agnew* reflect those in Section 23 of the Employment Rights Act 1996 which had been subject of interpretation in *Bear.*

Submissions for the respondent.

9. The respondents' position was that this claim should be sisted without determination of the time-bar point. They said that, when decided, *Agnew* would "set the scene" and would make the way forward much clearer.

10. *Agnew* was said to go to the heart of *Bear*. If the decision in *Agnew* by the Supreme Court favoured the claimant, then there would be a stronger basis for appeal by the claimant. Indeed, determination of *Agnew* might mean that there was no requirement for appeal in this case in that *Agnew* might be highly persuasive in leading to a view being taken by parties as to disposal in this case. Alternatively the Tribunal/Court would have the benefit of the decision in *Agnew* when considering this case.

11. Although it might be possible that the appeal in *Agnew* did not proceed due to brokering of some deal between the parties, Mr Taylor referred to common sense as being the touchstone in reaching a view as to sisting this case. Knowing the lie of the land and what the law was, as determined in *Agnew*, would make it easier to plot the course of action in this case.

12. If on the other hand the Tribunal was to hear this PH and to make a determination upon the time-bar point, the claimant was intent upon appealing that to the EAT. That would involve cost to the claimant, to the respondents and also to the public purse through judicial and administrative time.

13. Sisting of the case did not mean that an appeal would not be possible. It simply meant that there could be a clearer view taken by parties upon determination of *Agnew.*

14. I queried with Mr Taylor whether the respondents were saying that they would follow and accept the view taken in *Agnew* if it did take a different view to that set out in *Bear*. Understandably, he said that he could not give any definitive commitment on that point as he did not have instructions. He accepted however that *Agnew* would give a strong indication of the way matters were perceived and of potential application of the law.

15. In reply to the submission of the respondents, Mr Taylor said that it appeared if the PH was held and an appeal taken against the decision it there would in effect be two appeals racing one against the other in *Agnew* and in this case.

Submissions for the claimant.

16. Mr Cain refer to the overriding objective. He said that in relation to the sist, the case of *Agnew* was of importance. The current circumstances were not such however that this case should be sisted pending the outcome in *Agnew*.

17. The case of *King v Sash Windows C-214/16 ("King")* was instructive in this regard. Cases had been sisted pending the outcome of that case. Ultimately however *King* had settled and it had therefore not been particularly beneficial to sist the claims pending the outcome of that case.

18. Similarly therefore, *Agnew* might not proceed to final decision. It might also be the case that *Agnew* did not in fact proceed to the Supreme Court. There was therefore a very real element of contingency in the *Agnew* situation.

19. There could also be an argument as to the applicability of *Agnew*. This was as, if the Supreme Court decided that case, it might still be argued that the decision was peculiar to Northern Ireland. Certainly if *Agnew* did not proceed to the Supreme Court then the decision left standing in that case was that of the Northern Ireland courts. It might be anticipated that a respondent would argue that the case applied solely in Northern Ireland The decision being issued in *Agnew* did not therefore determine the matter.

20. As mentioned above, Mr Cain accepted that this Tribunal must apply ***Bear.*** He accepted that this Tribunal would find, if it did proceed with the PH, that claims prior to December 2014 were time-barred. Taking matters to that

extent would enable an appeal in this case to be lodged with the EAT. This would avoid delay in that progress would be made in the case. If at some future point the decision in *Agnew* was known and was influential one way or the other in relation to the current case, that could no doubt be a matter for discussion and possible impact. The delay which would be involved however in sisting this claim to await the outcome in *Agnew* was not consistent with application of the overriding objective, said Mr Cain. It also required to be borne in mind that the claimant was proceeding with a claim which was already approaching 5 years in its running time before the Tribunal. If there was an appeal in this case, there would be the stage of involving the EAT and determination of that appeal and then potentially the Court of Session would see an appeal taken there.

21. Cost was an element, however the delay and the need for progress outweighed that, Mr Cain said. This was especially so when it was considered that *Agnew* might not proceed and that even if it did proceed and went to decision, it might be argued by the respondents that it was not determinative of this case.

Discussion and Decision.

22. I considered carefully the question of whether this claim should be sisted or whether the PH should proceed.

23. It seemed to me that it was appropriate that the PH proceed.

24. I could see the argument that sisting this case until the outcome of *Agnew* would be of benefit. The benefit would be that *Agnew* would provide a strong indication as to the likely view of higher courts in relation to adhering to the principle in *Bear* or enabling a claimant to argue that the series of deductions continued notwithstanding a gap in time of more than 3 months.

25. As I see it, the fact that, if decided, the phrase I have used is that *Agnew* would give a “strong indication” of whether *Bear* continued to be good law is of significance. This is not a situation where the appeal to a higher court will be determinative in this case. As canvassed during the arguments upon a

possible sist, it may be maintained by the respondents that the decision of the Supreme Court is of interest and is persuasive but is not determinative and can potentially be distinguished from this case, either on the basis that it applies solely to the Northern Irish provisions or that there is some distinction between the circumstances in that case and those in this case. Applicability therefore of the Supreme Court judgment in *Agnew* may be a point taken by the respondents in seeking to resist a claim relating to time prior to December 2014 in this case. This of course assumes that the current decision in *Agnew* is not overturned by the Supreme Court.

26. It may also be the case that *Agnew* does not proceed either because authority to proceed with the appeal is denied or because of some settlement during the pre-hearing or hearing phase. This claim might therefore be sisted without *Agnew* ever emerging as a decision of the Supreme Court in this area.

27. It will also take some time for the decision in *Agnew* to emerge if indeed a decision is taken.

28. It seemed to me that it was appropriate to proceed with the PH rather than to sist the claim. I regarded that as consistent with the overriding objective. Delay is avoided. That is one of the elements mentioned. It is true that there will be an element of cost with the PH proceeding and more particularly with the anticipated appeal being taken. The argument for appeal however is well focused.

29. It may also be that, depending upon timeframes, the appeal to the EAT in this case does not proceed given the outcome of *Agnew* and its possible influence upon parties considering the merits and commercial risks in this case.

30. Having determined therefore that this claim would not be sisted, I proceeded to consider the matters canvassed upon the point for determination at this PH.

Time bar

31. This effectively was a matter of concession by the claimant. There was no argument advanced by Mr Cain that *Bear* was not binding upon me. He did not seek to distinguish this case from the circumstances determined in *Bear*.

He accepted that in terms of *Bear* a gap of more than 3 months saw claims prior to that 3 month period "dropping off ", as being time-barred.

32. It was a matter of agreement therefore that the decision in *Bear* meant that claims prior to December 2014 were time-barred. There was no evidence or argument to support the proposition that it was not reasonably practicable to present the claim within 3 months of any deduction prior to December 2014.

33. Where the parties differed was that Mr Cain maintains that, although binding upon me, *Bear* is wrong in law. That is a matter, he recognises, he will require to take to the EAT and potentially to a higher court. The case of *Agnew* may or may not assist with determination of this case, and indeed with the argument before any such higher court, if this case proceeds there.

34. I was extremely grateful to parties for clarification of their respective positions in the lead up to the PH. I was also very grateful to them for the succinct and lucid arguments which they provided during the course of the PH both in relation to the question of possible sisting of this claim and also in relation to the issue of time-bar. There has been very helpful cooperation between the respective solicitors. I was presented with a very clear and well thought out argument by each solicitor.

35. It appears to me that, absent any appeal, a hearing can now be arranged in this case in respect of the elements of claim relating to the period in and after December of 2014.

Employment Judge Robert Gall
Date of Judgment 18 October 2019
Date sent to parties 24 October 2019