EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100316/18

Held on 16 December 2019

Employment Judge N M Hosie

Mr K Hunter	**Claimant** **Represented by** **Ms L Beedie** **Solicitor**
JBS Fabrication Limited	**Respondent** **Represented by** **Mr T Gillie** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

1. Mr Michael McCafferty c/o JBS Fabrication Limited, South View, Dales Industrial Estate, Peterhead, Aberdeenshire, AB42 3GZ is sisted as 2nd respondent;

2. the claim will proceed against JBS Fabrication Limited, as 1st respondent, and Mr Michael McCafferty, as 2nd respondent; and

3. the claimant's application to amend the ET1 claim form is allowed.

REASONS

Introduction

1. This case has something of a history. The claim against various "JBS" Companies was submitted as long ago as 15 January 2018; there were a number of case management procedures thereafter, the implications of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") and the identity of the correct respondent being recurring issues.

2. In any event, a Preliminary Hearing, for case management purposes, was held on 10 July 2019. I refer to the Note I issued following that Hearing.

3. Two outstanding issues were identified at that Hearing:-

    (1) An application by the claimant's solicitor to sist Michael McCafferty, the Managing Director of the JBS Companies, as a respondent (which was opposed).

    (2) The assertion by the respondent's Counsel that the claim against JBS Fabrication Limited ("Fabrication"), the only remaining respondent, has "no reasonable prospect of success" and should be struck out.

4. The parties agreed that I should proceed to determine these issues on the basis of written submissions without the need for a Hearing. These are now to hand.

Parties' Submissions

5. The claimant's solicitor had made written "Outline Submissions" for the Preliminary Hearing on 10 July. She made further submissions by email on 14 August. On

16 August she submitted an amended ET1 claim form with, Fabrication and Michael McCafferty identified as respondents.

6. Counsel, instructed by the respondent's solicitor, made written submissions by email on 4 September 2019.

7. After further email exchanges, the parties' solicitors were directed to make any final submissions by 22 November. The claimant's solicitor made further submissions by email on 22 November. The respondent's solicitor was content to rely on her Counsel's previous submissions.

Fabrication

Claimant's Submissions

8. Fabrication was identified by the claimant's solicitor as the 4th respondent in the claim form. In her "Outline Submission" the claimant's solicitor maintained that: "*The employing entity of the employees who initially transferred to JBS Subsea Ltd is JBS Fabrication Limited, a position which has been acknowledged by the respondent's solicitors*".

9. This was expanded upon by the following averments in her written submissions of 14 August :-

> *"E The timeline vis-a-v the transfer is a matter of record. The claimant has stated it cannot be the intention of either the European or Domestic Legislature that an errant Respondent can simply evade responsibility by simply voluntarily winding up an entity and 'bumping' obligations/liabilities along to a separate entity. Instructing solicitors (as suggested by the Employment Judge) sought discovery of documents pertaining to the TUPE transfer from the Subsea entity to the Fabrication entity by email of 1st August 2019. That email has not as yet been responded to or acknowledged. The Tribunal is invited to accept that in those circumstances the inference that all obligations/liabilities transferred to the Fabrication entity.*

*F If the Tribunal do not accept the foregoing the claimant's **esto** position is as follows: -*

The employees transferred to Subsea were never paid via that entity. The entity barely traded if at all and did not pay the employees. They were paid by the Fabrication entity (and it may be in some cases by another of the JBS Group companies). There were no contracts of employment between employees and the Subsea entity. Further information is awaited from the Liquidator. As the Tribunal is aware the Subsea entity applied for voluntary winding up and that took effect on 19 February 2018. Prior to that winding up the last accounts filed at Companies House was in January 2017 made up to 30 April 2016 for a 'Dormant Company'. Evidence to that effect is publicly available and will be produced. The accounts previously filed for the Subsea entity was January 2016 for accounts made up to 30 April 2015 also for a 'Dormant Company'.

It is a matter of record that the transferring employees in Subsea were ultimately confirmed as having transferred to the Fabrication entity on 26 February 2018 some 7 days after the winding up of the Subsea entity.

*Against the above background the Tribunal is invited to accept that the TUPE transfers were linked to the extent that they were inseparable. The relevant legislation is contained within the Transfer of Undertakings (Protection of Employment) Regulations 2006. Regulation 3 describes a relevant transfer. Regulation 3(6)(a) sets out that a relevant transfer **'may be effected by a series of 2 or more transactions'.** The Tribunal will require to hear evidence in relation to these matters and is and will be invited to accept that the transfer, in effect from Screw Conveyor Ltd to the Fabrication entity, was made in stages, stage one being the transfer to the Subsea (dormant) entity and stage two being the subsequent transfer to Fabrication. In those circumstances any penalties under TUPE ought to be imposed upon the Fabrication entity. The Tribunal is referred to **Dines and ors v Initial Healthcare Services Ltd [1995] ICR 11.** It is also submitted that in these circumstances the obligations relating to breach of contract also fall to be imposed upon the Fabrication entity."*

Respondent's Submissions

10. The respondent's Counsel made submissions in relation to the prospects of the claim against Fabrication succeeding under the heading, *"The application to sist JBS Fabrication Limited".* However, as I recorded above, Fabrication was already a party to the proceedings, having been identified as the 4th respondent in the claim form.

11. Counsel set out, first of all, a "short chronology". He referred, in particular, to TUPE Regulation 8(7) which he submitted: *"dis-applies the transfer of rights and liabilities from a transferor under Regulation 4 where that transferor is the subject of voluntary liquidation that has been commenced and is under the supervision of an insolvency practitioner."*

12. He then went on to make the following submissions:-

> *"19. The voluntary liquidation of JBS Subsea Limited was instituted by a resolution of its members dated 19 February 2018 [Resolution as filed with Companies House, Appendix 1 below]. Two Liquidators, being insolvency practitioners, were appointed the same day [Official record of AIB Register of Insolvencies, Appendix 2 below]*
>
> *20. Therefore, Regulation 8(7) TUPE applies to any transfer after 19 February 2018 to JBS Fabrication Limited. R submits that any liabilities connected with the Claimant's contract cannot have transferred to JBS Fabrication Limited by virtue of Regulation 4 TUPE.*
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> *21. For that reason, any claim brought by the Claimant against JBS Fabrication Limited in pursuit of his rights under a contract of employment with Screw Conveyor Ltd or JBS Subsea Limited is doomed to fail. For that reason, the Respondent submits:*
>
> a. *The application to add (sic) Fabrication should be refused because the claim against it is a nullity: see Herry v Dudley MBC and anor EAT0170/17*
>
> b. *In any event, the balance of hardship and injustice falls firmly in favour of the Respondent because the Claimant seeks to add a merit list complaint against a new Party, out of time, to his claim.*

c. Those factors should drive the Tribunal to dismiss the Claimant's application to sist JBS Fabrication Limited as a Party"

Claimant's Response

13. The claimant's solicitor responded by email on 22 November as follows:-

"In relation to JBS Fabrication Limited (always a party to the action), I refer to points E & F of my application dated 14 August 2019 which deal with the transfer from JBS Subsea to JBS Fabrication.

A resolution was passed on 19 February for creditor's voluntary winding up of JBS Subsea Limited.

The Respondent's averments at point 13 of its submissions dated 27 August 2019 are misguided and accordingly misleading. The Respondent states that some assets and employees were bought by/transferred to JBS Fabrication on 26 February 2018. That is not the case. The Tribunal will note at point (F) of my application dated 14 August 2019 that the employees received confirmation of having transferred on 26 February 2018 not that they transferred on that date. Indeed I have had a conversation with the Liquidator (Messrs Begbies Traynor) this afternoon who confirmed that as at 19 February when the resolution to wind up was made, and hence the relevant date of winding up, there were no existing fixed assets or employees of JBS Subsea Limited. Therefore the transfer had, of necessity, against that background taken place prior to the winding up of JBS Subsea Limited which, again of necessity means that JBS Subsea was not at the material time, the subject of 'bankruptcy proceedings or any analogous insolvency proceedings …'. A copy email from the Liquidator to that effect is attached (you will require to scroll down as the email was re-sent following a short delay in receipt).

In the circumstances I invite the Employment Judge to find for the Claimant in view of the above and my previous submissions/applications having particular regard to TUPE Reg 3(6)(a) referred to at point (F) of my application dated 14 August 2019 and await hearing from the Tribunal in due course."

Discussion and Decision

14. As Fabrication was already a respondent, the issues for me were:

- **Whether the claim should be struck out as having "no reasonable prospect of success" in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure)**

- **Whether the claim has "little reasonable prospect of success" and, if so, whether the claimant should be required to pay a deposit as a condition of continuing to advance the claim against Fabrication**

15. When considering these issues, I was mindful that the test for striking out claims is a very high one. I was also mindful of the cautious approach to striking out discrimination claims taken in such cases as ***Ezsias v North Glamorgan NHS Trust [2007] ICR 1126.*** This approach stems from the view that it is unfair to strike out a claim where there are crucial facts in dispute.

16. For the purpose of this exercise, I took the claimant's averments at their highest. In other words, I proceeded on the basis that the claimant would be able to prove all that is averred.

17. The picture was confused in the present case by the myriad of JBS Companies which had been incorporated, their relationship with each other and with Screw Conveyor Ltd, the timings and implications of any TUPE transfers and whether liability now rests with Fabrication. There was also an assertion by the claimant's solicitor that the respondent had failed to respond to a request for disclosure.

18. It was also clear from the claimant's submissions, in particular, that there are crucial facts in dispute which can only be properly and justly determined by hearing evidence. For example, the status of Subsea when the alleged transfer to Fabrication took place and the date of any such transfer.

19. I was unable to conclude, in all these circumstances, that the claim against Fabrication has either *"no reasonable prospect of success"* or *"little reasonable prospect of success".*

20. Accordingly, the respondent's application is refused. The claim will proceed against Fabrication.

Claimant's application to sist Michael McCafferty as a respondent

Claimant's Submissions

21. In her "Outline Submissions" the claimant's solicitor said this:-

> "**Background**
>
> 1. *This claim was originally brought against JBS Subsea Limited and other companies within the JBS Group of companies all as set out in the ET1/ET3.*
>
> 2. *On 5th October 2017 the claimant's contract of employment transferred to JBS Subsea Limited under the provisions of the TUPE Regulations. The respondent's email of 10 October 2017 to the claimant confirms this as does the respondent's representative's email to the Tribunal dated 30 July 2018. On receipt of the respondent's email of 10th October the claimant contacted the respondent as requested to be told that he would not be required and that as he had insufficient service he was not entitled to a redundancy payment. This course of action it is submitted is predicated upon a soured relationship between the claimant and the Managing Director of the respondent Mr Michael McCafferty who previously worked for the Transferor. The claimant's position is that Mr McCafferty was simply not prepared to engage the claimant and/or honour the responsibilities incumbent upon the respondent under the TUPE Regulations. It is submitted that Mr McCafferty procured a breach of contract as Director of the respondent(s). The claimant ultimately obtained further employment on 1 November 2017.*
>
> 3. *The 1st respondent applied for voluntary winding up a matter of days after the claimant lodged the Early Conciliation Notification in this action. It was ultimately wound up on 19 February 2018. It transferred its employees to JBS Fabrication Limited on 26 February 2018.*

4. *The above gives the claimant no comfort that Mr McCafferty will simply transfer the employees yet again to another employing entity. Indeed in the last few weeks yet another JBS company has been incorporated. Documentary evidence will be lodged and oral evidence led in relation to the foregoing matters. As it stands it is understood that the employing entity of the employees who initially transferred to JBS Subsea Limited is JBS Fabrication Limited, a position which has been acknowledged by the respondent's advisors.*

The Law

Rule 34 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 governs the addition, substitution and removal of parties to proceedings where the interests of justice will be met. The fact that the relevant statutory time limit for bringing a claim has expired does not in itself prevent a Tribunal from adding or substituting a respondent: ***Argyll & Clyde Health Board v Foulds (UKEATS/0009/06/RN).*** *The only primary time limit applicable to any claim is that which elapses between the act complained of at the date on which the claim is first presented to the Tribunal. Provided, as in this case, the ET1 is lodged within that time limit, the Tribunal has a discretion at any time to add a new respondent. Furthermore once the Tribunal has ordered that a new respondent should be added, it is not open to that party to argue that the claim against it is time barred, since the only thing that matters is that the original ET1 was lodged in time even although that ET1 did not include the new respondent(s) and that they only received notice of a claim against them after the time limit had expired.*

In relation to the TUPE Regulations, where one relevant transfer (Employer A to Employer B) is followed by a second relevant transfer (from Employer B to Employer C) in an action that has not yet been decided, as in the current case, it is submitted that on the second transfer Employer C will acquire all Employer B's rights, powers, duties and liabilities under or in connection with the contracts of employment of transferring employees, subject to TUPE, subject to Regulation 15(9). On this analysis it is submitted that the correct interpretation is as herein stated.

On 8 April 2019 the decision in ***Antuzis & ors v DJ Houghton & ors [2019] EWHC 843 (QB)*** *"Houghton" was issued. That case put forward an argument that [a Director] could not be personally liable on the basis of the rule established in* ***Said v Butt [1920] 3 KB 497*** *that a servant does not become personally liable … at the suit of a person whose contract has been broken. However Mr Justice Lane accepted that principle but found that the [Directors] had not acted bona fide and so did not escape personal liability under the* ***Said v Butt*** *rule given that they had acted in clear breach of their duties under the Companies Act.*

It is submitted that Mr McCafferty has not acted bona fide in relation to his fiduciary and general duties as a Director under the Companies Act 2006 in relation to his

actions vis-a-v the claimant where a clear disregard for the applicable law attracts potential claims against the Company(ies).
The Claimant has taken prompt action after the decision in Houghton was issued. At the commencement of proceedings that Judgment had not been issued. There would be substantial prejudice to the Claimant if the application was refused particularly where he believes that the respondent company dealings are unconventional at the very best – mostly at the instance of Mr McCafferty. The claimant believes that these are arrangements designed to evade its legal obligations, a mere cloak and simply acts as an agent for those controlling it, all as set out herein.

22. In her application to sist Mr McCafferty as a respondent, which was submitted on 14 August 2019, the claimant's solicitor expanded upon her "Outline Submissions". In addition to the decision in ***Antuzis*** she referred to ***OBG Ltd v Allan [2007] UKHL 21*** which she submitted supported her contention that there is, *"joint civil liability between an apparent perpetrator of a breach and those said to have induced that perpetrator to act as it did".*

23. She submitted, *"these cases found precedent for the joining of, in this case, a Director to civil proceedings. The Tribunal is not being asked to adjudicate upon a delictual matter. The Tribunal is invited to support the claimant's contention that given there is precedent for joining a Director to civil proceedings the rationale of the case law must apply in a contractual setting".*

24. The claimant's solicitor then went on to set out, "*a history of the claimant's relationship with Mr McCafferty and how that relationship had soured".* She submitted that, *"the claimant will show that MM is the individual who in essence procured the breach of the claimant's contract of employment".*

Respondent's Submissions

25. On 27 August 2019, the respondent's Counsel made written submissions in response to the application to sist Mr McCafferty.

26. So far as the Tribunal's jurisdiction was concerned, Counsel referred to the relevant statutory provisions and submitted that, *"outside its jurisdiction to hear*

specific statutory causes of action, the Employment Tribunal only has jurisdiction to hear a claim for breach of contract. It does not have jurisdiction to hear delictual claims".

"**Antuzis and the procurement of breaches of contract"**

27. Counsel submitted that: *"**Antuzis** is authority for the proposition that a Director of a company may be liable personally **in tort** for the tort of procuring a breach of contract".* He explained that as this is an English High Court Judgment, the Court was concerned with a specific tort, rather than a claim in delict.

28. Counsel referred to the following comments of Mr Justice Lane:-

> *"114 The conclusion of Waller J in The Leon, cited in paragraph 57 of the Judgment, points towards the conclusion I draw: namely, that it is the officer's conduct and intention in relation to his duties towards the company – not towards the third party – to provide the focus of the "bona fide" inquiry to be undertaken pursuant to the rule in **Said v Butt**".*

29. Counsel also submitted that: *"The procurement of the breach of contract is an action that requires intentional conduct to be established: see for example **OBG**".*

30. Counsel then went on to address the claimant's submissions. He said this:-

> *"7. The claimant's application is unclear about whether he seeks to sist a contractual or delictual complaint to his claim. The claimant's representative states at paragraph B of her submissions that – "The claimant's position is that these cases [Antuzis etc] found precedent for the joining of in this case a Director to civil proceedings. The Tribunal is not being asked to adjudicate upon a delictual matter. The Tribunal is invited to support the claimant's contention that given there is precedent for joining a Director to civil proceedings the rationale of the case law must apply in a contractual setting.*
>
> *8. That assertion is contradicted by paragraph D of the same application it states: "For the foregoing further explanatory reasons the claimant seeks to join Mr McCaffery (sic) as a party to the proceedings. The claimant will show that MM is the individual who in essence procured the breach of the claimant's contract of employment. The Tribunal is asked to take this into account …"*

9. The respondent nevertheless makes the following submissions, in response to the claimant's points at B and D of his application. In summary, the respondent contends that the Tribunal should not sist Mr McCafferty to the present proceedings"

31. Finally, the respondent's Counsel made the following submissions, *"against sisting Mr McCafferty": -*

"*10. Any claim for damages arising from an alleged procurement of a breach of the claimant's contract by Mr McCafferty is a delictual claim for economic loss. The Tribunal has no jurisdiction to hear it.*

11. The claimant's contention that, because "there is precedent for joining a Director to civil proceedings, the rationale of the case law must apply in a contractual setting", is redundant and wrong. The case law does not apply in a contractual setting because:

a. *The legal principle in **Antuzis** and **Said v Butt** is that the corporate veil may be pierced in some circumstances to establish a delictual relationship between two Parties*

b. *There was no contract between Mr McCafferty and the claimant. The contractual relationship was between the claimant and his employing entity. **Antuzis** and **Said** are not authority that a company Director can be imputed or implied as a Party to a contract into which he did not explicitly enter. The cases do not change the fundamental legal principle that a party to a contract can only hold liable another party to that contract for a breach of the contract.*

12. The respondent submits that the Employment Tribunal should therefore dismiss the claimant's application to sist Mr McCafferty as a Party to this action because:

a. *There is no claim against him in delict that the Tribunal can hear; and/or*

b. *Any claim for dismissal for breach of employment contract against him is legally misconceived and is doomed to failure. For that reason, the balance of hardship and injustice falls firmly in favour of the respondent; and or*

c. *Even if there were a delictual claim that the claimant could bring, he has not set out in his amended pleadings 2 fundamental ingredients of a claim for procurement for breach of contract: intentionality and a breach of Mr McCafferty's duties to the*

company of which he was a Director. For that reason, even if there were a delictual claim to be heard, such a claim is legally misconceived as pleaded and has no reasonable prospect of success. In those circumstances the Employment Tribunal should refuse to amend the claim to include it.

d. We are instructed that in any event, Mr McCafferty was not the relevant decision maker in the TUPE transfer from Screw Conveyor Ltd to JBS Subsea Limited, which forms the basis of the claimant's claim. We are instructed that Scott Buchan, who was joint Managing Director of JBS Subsea Limited at the time, was responsible for the management of this TUPE transfer from the transferee's perspective. As such, Mr McCafferty is the incorrect respondent in any event".

Discussion and Decision

32. It has already been decided by the Courts that Directors of a Company can be held responsible for the wrongdoing or "torts" of their Company if they actively directed them. This means they have to answer for an act or omission carried out in the name of the Company but under the control of the Director(s) which cause injury or harm to another and which can be actioned through the Courts.

33. Until recently, the law has been unclear on the personal liability of Directors when the unlawful act undertaken in the name of the Company is a breach of contract.

34. However, the High Court held in ***Antuzis*** that, in certain circumstances, Directors will be personally liable for a breach of contract as well as for negligent acts.

35. The case was brought by three employees who alleged they were ill treated in their employment by an employer. They were employed to travel around farms and catch chickens for slaughter. They claimed their employer failed to pay them correctly for all hours worked, pay the national minimum wage or pay holiday pay. They worked unreasonably long hours and frequently had their pay withheld for a variety of unlawful reasons or for no reason at all.

36. The Court accepted the evidence of the employees. The question to be considered was whether the Directors were personally liable for the numerous breaches of the employment contracts of employment by the employing Company.

37. The Court found that the Company was being operated by the defendant Directors, *"at all material times in a deliberate and systematic manner and catchers were working massively more than the hours recorded on the pay slips" and concluded that the Director and Company Secretary were jointly and severally liable for inducing a breach of contract. The Court found that they knew exactly what they were doing when they operated their business on a model which relied upon exploiting its workers to obtain an economic advantage for themselves".* Mr Justice Lane was unimpressed with the Director's version of events and concluded there was: *"no iota of credible evidence that either Director possessed an honest belief that what they were doing would not involve a breach of contractual obligations towards the employees".* In his view, they clearly realised that the way they operated the business would cause the Company to breach contractual obligations towards its employees and that was enough to make them liable for losses stemming from the breaches such as wages and holiday pay owed.

38. S.172 of the Companies Act imposes duties on Directors to act in good faith so as to promote the success of the Company and, in so doing, to have regard to matters such as, *"the likely consequences of any decision in the long term; the interests of the Company's employees; the impact of the Company's operations on the community; and the desirability of the Company maintaining a reputation for high standards of business conduct".* S.174 imposes a duty on the Director to exercise reasonable cares, skill and diligence.

39. Mr Justice Lane acknowledged that merely procuring a breach of contract which involves a breach of statutory duty would be insufficient to decide if a Director is liable, because that would mean Directors would regularly face personal liability in that many aspects of employment contracts have a statutory element. However, *"as a general matter, the fact that the breach of contract has such a statutory*

element may point to there being a failure on the part of the Director to comply with his or her duties to the Company and, by extension, to the Director's liability to a third party for inducing the breach of contract. Whether such a breach has these effects will, however, depend on the circumstances of the particular case".

40. In ***Antuzis***, the Directors were clearly acting within the scope of their authority in terms of the Companies Articles of Association. However, it was beyond doubt that they acted in breach of ss.172 and 174. *"What they did was not in the best interests of the company or its employees".* So far as personal liability was concerned, Mr Justice Lane held they were not acting in good faith vis-a-v the Company: *"I am in no doubt whatsoever, having heard the evidence that both of them actually realised that what they were doing involved causing the Company to breach its contractual obligations towards the claimants. What they did was the means to an end. There is no iota of credible evidence that either [Director] possessed an honest belief that what they were doing would not involve such a breach. On the contrary, the evidence is overwhelmingly to the contrary. At all material times, each new exactly what he or she was doing. The breaches they occasioned were central to the Company's modus operandi".* Accordingly, the Directors were found to be jointly and severally liable for inducing breaches of contract by the Company.

41. However, not all Directors will be liable for a breach of contract perpetrated by the employing Company. As a general principle, a Director will not be personally liable for inducing a breach of contract by their Company if they act in good faith and within the scope of their authority. To determine whether a Director's actions are in good faith, the focus is on the Director's conduct and intention in relation to their duties towards the Company.

42. While the decision was a narrow one and I was mindful that Mr Justice Lane confirmed in ***Antuzis*** that the focus of the *"bona fide"* inquiry is on a Director's conduct and intention in relation to his duties towards the Company, not towards the third party, I was driven to the view that the submissions by the claimant's

solicitor were well founded. I was not persuaded that this was a "delictual claim" as submitted by the respondent's Counsel.

43. I decided, therefore, that Michael McCafferty should be sisted as 2nd respondent.

Application to Amend

44. For the sake of completeness, I also record that the claimant's application to amend is allowed and that the claim form is amended in terms of the amended ET1 claim form which was submitted to the Tribunal by the claimant's solicitor on 16 August.

45. I shall allow the 1st respondent's solicitor to reply to the amended claim form, if so advised, in writing to the Tribunal, with a copy to the claimant's solicitor, by no later than 17 January 2020.

46. The claim form, as amended, will now require to be intimated to the 2nd respondent, in the usual manner, and he will have the opportunity of submitting an ET3 response form. Once that is to hand, I shall consider further procedure.

Employment Judge:	Nick Hosie
Date of Judgment:	24 December 2019
Date sent to parties:	30 December 2019