



EMPLOYMENT TRIBUNALS

Claimant: Mrs K Tangen

Respondent: The Committee of Pevensey & Westham Playgroup

RECORD OF A PRELIMINARY HEARING

Heard at: London South

On: 6 January 2020

Before: Employment Judge Truscott QC (sitting alone)

Appearances

For the claimant: A MacMillan of Counsel

For the respondent: Mr T Kirk of Counsel

JUDGMENT on PRELIMINARY HEARING

1. The hearing fixed for 6 and 7 January 2020 is discharged.
2. The Respondent is given permission to rely upon the Amended Grounds of Resistance as further amended by concessions made at the hearing on 6 January, such further amended document to be intimated to the Claimant by 31 January 2020.
3. The case is stayed pending the conclusion of the police investigation.

REASONS

Preliminary

1. The case was listed for a hearing on the merits for two days. It is unlikely that it would have been possible to conclude the hearing in that time even if the evidence had commenced at the start of the hearing. However, at the commencement of the hearing, the Respondent raised certain preliminary issues which had been identified by them some time before which required to be addressed. It became evident that these issues could not be disposed of in such a way as to permit the merits hearing to proceed in a satisfactory manner. The Tribunal decided to convert this hearing into a preliminary hearing.
2. It is the Respondent's case that the Claimant has overpaid herself wages, received pay and benefits without disclosing these to HMRC, stolen from her employer and used the Respondent's bank cards/online accounts to purchase items that were solely for her own benefit. The total amount is estimated to be in the tens of thousands of pounds

constituted by small transactions and payments to herself. The Claimant denies the allegations in these proceedings.

3. There is a current police investigation with the Claimant having been interviewed at least twice. Parties position in the Tribunal brought into sharp relief the difference between criminal proceedings and Tribunal proceedings. The Claimant is permitted in the former to wait to see what, if any, charges are made against her before responding. She can draw on the advice of her solicitors. In the latter, she has information which but for the criminal proceedings, the Respondent would be entitled to seek from her as relevant to the proceedings, such as her Amazon account. Both parties are hampered by the fact the police have certain of the relevant documentary material, for example, the Respondent has handed over copies of petty cash logs.

Amended Response

4. The Respondent sought to have the case proceed on the basis of its amended response. Its original application to the Tribunal was made on 5 August 2019 and the grounds of the application are set out there [64-66]. At the hearing, the Respondent amplified by oral argument the written submissions. The Respondent made three concessions, firstly that the Respondent was correctly identified, secondly that because of the dissolution, there was a dismissal and thirdly that EJ Siddall had addressed the relevant issues of time bar.

5. The Amended Response contains much more detail about what the Respondent considers the Claimant has done with its funds. It also introduces the contention that the contract is tainted by illegality.

Amending the claim

24. Employment tribunals have a general discretion to grant leave to amend the claim. It is a judicial discretion to be exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions'. General guidance on making amendments to a claim is contained in **Selkent Bus Co Ltd v. Moore** [1996] ICR 836 EAT and **Cocking v. Sandhurst (Stationers) Ltd** [1974] ICR 650 NIRC. There is a distinction which requires to be drawn between:

(i) Amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint. Amendments falling within this category are not affected by the time limits, as the nature of the original claim remains intact, and all that is sought to be done is change the grounds on which that claim is based, i.e. re-labelling.

(ii) Amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim. As Harvey notes at paragraph 312.01 in relation to this type of amendment: "So far as category (ii) is concerned, the tribunals and courts have always shown a willingness to permit a claimant to amend to allege a different type of claim from the one pleaded if this can be justified by the facts set out in the original claim. It is usually described as putting a new 'label' on facts already pleaded.

(iii) Amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

25. In essence, **Selkent** said that whenever the discretion to grant an amendment was invoked, “a tribunal should take into account all the circumstances, including but not limited to the nature of the amendment, the applicability of time limits and the timing and manner of the application]” before balancing “the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.” This approach was approved by the Court of Appeal in **Ali v. Office of National Statistics** [2005] IRLR 201.

26. There is also Presidential Guidance.

Decision

6. The Tribunal considered the decisions made by EJ Siddall in relation to extensions of time did not prevent the application being considered at this stage.

7. The Tribunal could not find any support for the suggestion that EJ Siddall had already decided the issue of stay against the Respondent. The reference to such a stay in the solicitors’ letter dated 5 August 2019 [page 64] is erroneous.

8. The Amended Grounds set out in a more detailed manner the reasons the Respondent says its funds have been inappropriately dealt with by the Claimant. The Tribunal considered this material to fall within category 1 of **Selkent**. Allegations of illegality go to the Tribunal’s jurisdiction and are frequently taken by Tribunals on their own initiative. Although this part of the amendment might fall into category 2 of the **Selkent** guidance, the Tribunal decided to exercise its discretion to grant the application in its entirety. The balance of prejudice favours the Respondent. Granting the application also furthers the overriding objective in that, having regard to the factors under rule 2(a)-(e) of the Employment Tribunals Rules of Procedure 2013:

- (a) Permitting this amendment does not place the parties on an uneven footing and the Claimant is able to answer the points raised in the Amended Response;
- (b) Allowing important jurisdictional issue illegality to be fully argued is plainly proportionate to the complexity of this case and its value of over £70,000 (see Schedule of Loss [298-302]);

9. The Respondent also sought certain Orders for Disclosure as follows.

Disclosure of the contents of Police Interviews

10. The Respondent’s application for this order for third party disclosure is set out in the Respondent’s solicitors’ letter dated 2 October 2019 [71-73] as augmented by written and oral submissions to the Tribunal.

11. The Respondent suspects that the issues will have been covered by two comment interviews given by the Claimant to Sussex Police in January 2019 and then again in September 2019.

12. Without the benefit of considering these interviews and any transcripts, the Respondent considers that it is potentially at a disadvantage in this litigation. This may well be correct.

13. The Tribunal noted that a copy of the Respondent's application has been served on the investigating police officer who has indicated that copies of the interview transcript for September 2019 would be shared with the Respondent provided a Tribunal order was made. The Tribunal did not consider that the officer had sufficient authority to bind the investigating and prosecuting authorities.

14. The Tribunal declined to make the Order requested. It will not make any Order which might interfere with the ongoing police investigation in this case.

Disclosure of the contents of Lawson Lewis Blakers Solicitors' File

15. The Respondent's application dated 8 November 2019 [77-78] is for discovery of the file held by Lawson Lewis Blakers Solicitors on the Claimant's police investigation. The Respondent submitted that, for the reasons set out in its application, the Claimant has waived privilege over such advice by openly disclosing parts of that file (a letter dated 9 January 2019 [287] and email [288]) and actively referring to its contents in another document prepared for the Tribunal proceedings (a case summary [79]). The submission is again set out in more detail in the written skeleton.

16. The Tribunal declined to make such an Order. It will not interfere in how the Claimant might defend herself with the assistance of her solicitors in any criminal proceedings which might arise from the ongoing investigation.

Further procedure in the case

17. The Tribunal made no orders as to case management for any hearing which might be listed after the conclusion of the police inquiries however, it may be appropriate that an early listing of the merits hearing before a judge sitting alone should be sought. It also seemed likely that fresh case management directions would require to be made. This could be at a telephone case management hearing. Parties would not be restricted to the contents of the witness statements produced for the current hearing at any future merits hearing.

Employment Judge Truscott QC
13 January 2020