EMPLOYMENT TRIBUNALS

Claimant: **Mr Alan Dickinson**

Respondent: **Boxt Ltd**

HELD: **Via CVP** **ON:** **18th August 2020**

BEFORE: **Employment Judge Eeley**

REPRESENTATION:

Claimant: **Mr T Coughlin QC**
Respondent: **Mr S Brochwicz-Lewinski, counsel**

RESERVED JUDGMENT

1. The Tribunal has jurisdiction to hear and determine the Claimant's wrongful dismissal claim in these proceedings.

REASONS

Background

1. The case came before the Tribunal for a preliminary hearing following consideration of the case file by an Employment Judge. The Tribunal's letter of 3rd July 2020 stated:

"The Tribunal notes that in the Claimant's complaint of "wrongful dismissal" he is seeking a declaration. There appears to be no sustainable or intended claim for damages in circumstances where a payment in lieu of notice was subsequently made. The Tribunal's contractual jurisdiction derives from statute- the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623. That Order gives to the Tribunal jurisdiction to hear claims for the recovery of damages. The parties are asked for their views as to whether the Tribunal in fact has jurisdiction to determine the

type of contractual complaint the Claimant is bringing i.e. one seeking a declaration." Following receipt of the parties' views it was listed for a preliminary hearing to consider the jurisdiction point.

2. This is a claim of unfair dismissal and wrongful dismissal and in respect of the Respondent's alleged failure to provide an adequate or truthful statement of reasons for dismissal. The preliminary hearing was called to consider a narrow jurisdictional question about the wrongful dismissal claim. The focus of the wrongful dismissal claim is upon a declaration. If the Claimant is found to have been wrongfully dismissed he acquires "Good Leaver" status pursuant to the Respondent's articles of association and this potentially unlocks the full market value of his shareholding. The difficulty for the Claimant is that he has already received payment from the Respondent of a sum equivalent to pay in lieu of notice. This payment has eliminated the substantive claim for pecuniary loss in the wrongful dismissal complaint. The claim therefore remains only for a declaration and nominal damages. The Claimant asserts that the claim as currently constituted remains a claim within the ambit of the 1994 Order. The Tribunal has queried this and the Respondent lends its voice to the argument that the Claimant's claim is effectively for declaratory relief and thus, it is said, outside the ambit of the statutory jurisdiction.

3. In order to determine this issue I had the benefit of helpful skeleton arguments from both counsel which were supplemented by oral argument. I have also been referred to a number of relevant authorities. I extend my thanks to both counsel for their assistance.

What is the true nature of the Claimant's extant claim before the Tribunal?

4. Article 3 of the 1994 Order gives jurisdiction to the Tribunal in respect of a claim "for the recovery of damages or any other sum" subject to various other qualifications listed at article 3(a) to (c). On the face of it the 1994 Order does not give jurisdiction to the Tribunal to provide purely declaratory relief. Rather, the claim is for 'damages or any other sum'.

5. The Claimant's Particulars of Claim in this case set out the remedy sought in respect of the claim of wrongful dismissal at paragraph 44. It is said in terms that the Claimant seeks: a) a declaration that he was wrongfully dismissed; and b) nominal damages. The Claimant's claim is evidently for damages as well as for declaratory relief. It may well be that the claim for damages is a tactical step utilised by the Claimant to 'unlock' the value of the shares without having to resort to the additional cost and inconvenience of pursuing proceedings in the High Court. However, that does not make it impermissible or an illegitimate use of the legislation. I also note in passing that the Particulars of Claim quote the relevant part of the articles of association thus, when defining "Good Leaver" status: *"48.1.2…(a) the cessation occurs as a result of his:-… (iv) the termination of that person's employment by his employing company in circumstances that are* ***determined*** *by an employment tribunal or court to be or amount to: (1) wrongful dismissal (and for the avoidance of doubt this shall exclude any*

finding of unfair dismissal…" (emphasis added). It is notable that the articles of association themselves steer clear of the terminology of "declaration" and instead focus on the need for a "determination" by the Tribunal. It may therefore be that, whilst the Particulars of Claim ask for a declaration, this is not actually required under the articles of association for the purposes of unlocking the shareholder value. A simple determination may suffice. That said, as the issue has been argued on the basis of a claim for a declaration and nominal damages that is what I shall address in these reasons.

Do nominal damages fall within the ambit of article 3 of the 1994 Order?

6. The Order itself does not specify which type of damages it covers. The term "damages" is left unqualified. the qualifications, such as they are, are set out in subsections (a)-(c) of article 3:

"(a) the claim is one to which section 131 (2) of the 1978 Act applies and which a court in England and Wales would on 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."

The 1978 Act referred to is the Employment Protection (Consolidation) Act 1978. This was replaced by section 3 of the Employment Tribunals Act 1996. The relevant provisions are subsections (2) – (4) which provide for:

"(a) a claim for damages for breach of a contract of employment or other contract connected with employment,

(b) a claim for a sum due under such a contract, and

(c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

if the claim is such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim."

A claim for damages in respect of personal injury is specifically excluded. Subsection (4) explicitly provides for concurrent jurisdiction with the civil courts.

7. The legislation itself provides no further definition of what is meant by "damages" in the context of the 1994 Order. In the absence of such a specific statutory definition of the term "damages" I am thrown back on common law concepts and authorities. Whilst the Employment Tribunal exercises a statutory jurisdiction, that jurisdiction is parasitic upon (and operates through) the common law framework, particularly that of the law contract and of damages. It is therefore relevant to look at common law guidance as to the nature of a claim for 'damages' in such a case where explicit statutory definitions are lacking.

What are damages at common law?

8. The 33rd edition of Chitty on Contracts states (at paragraph 26-010, emphasis added):

"Wherever the defendant is liable for a breach of contract, the claimant is in general entitled to nominal damages although no actual damage is proved; the violation of a right at common law will usually entitle the claimant to nominal damages without proof of special damage. Normally, this situation arises when the defendant's breach of contract has in fact caused no loss to the claimant, but it may also arise when the claimant, although he has suffered loss, fails to show an adequate causal link between the loss and the breach of contract, or fails to prove the actual amount of his loss. A regular use of nominal damages, however, is to establish the infringement of the claimant's legal right, and sometimes the award of nominal damages is "a mere peg on which to hang costs."

In a similar vein the 20th edition of McGregor on Damages states (at paragraph 12-002):

"…an award will be more than nominal where a claimant is entitled to an award based on a real loss (compensatory damages), a real benefit to the defendant (restitutionary damages), a real profit made by the defendant (disgorgement damages) or a substantial award to deter the claimant and others like him or her (exemplary damages). If none of these circumstances is present, nominal damages may be awarded in all cases of breach of contract…"

Professor Andrew Burrows QC (now Lord Burrows JSC) further clarified in his book "Remedies for Torts and Breach of Contract" (3rd Ed):

"nominal damages are therefore in no sense compensatory and must be distinguished from a small sum of compensatory damages. Their function is merely to declare that the defendant has committed a wrong against the claimant and hence that the claimant's rights have been infringed."

In simple terms McGregor on Damages states at paragraph 1-001: *"Damages are an award in money for a civil wrong…. This definition of damages has evolved to a recognition now that there are only three requirements for a damages award: (1) an award in money; (2) for a wrong; (3) which is a civil wrong. The aim of damages, as a money award for a civil wrong, is to eradicate the consequences that fall within the scope of the duty breached."*

McGregor also identifies two broad categories of damages: (1) compensatory damages: and (2) non-compensatory damages. Nominal damages are identified as one of the six subcategories of non-compensatory damages.

9. All the above sources clearly indicate that nominal damages are a type of damages at common law, albeit they are not, strictly speaking, compensatory. The legislation in question in this case does not refer to "compensation" it refers to "damages". This rather implies that it is not limited to compensatory damages.

10. It is important to note that there is no explicit exclusion of nominal damages from the ambit of the Order even though other exceptions are specified (e.g. personal injury damages). If Parliament has gone to the trouble of setting out some exceptions to the Order one would anticipate that it is an exhaustive list of exceptions unless it is specifically 'non-exhaustive.' There is nothing present within the Order to facilitate me adding to the list of exceptions. The starting point has to be "damages means damages" unless there is a clear exception. As a matter of principle, it would seem that a claim for nominal damages can bring a claim within the ambit of the 1994 Order and therefore within the Employment Tribunal's jurisdiction.

11. I am urged by the Respondent to consider that the proper interpretation of the legislation must be to construe "damages" as referring to substantive damages as opposed to nominal damages. The difficulty with that is that there is no authority or further guidance from the legislation to indicate that that is indeed the correct construction. Instead the Order operates to permit claims for breach of contract within the law of contract of England and Wales. Damages for breach of contract can include both nominal damages and substantive (special) damages. There is nothing available to me to indicate that only the subcategory of special/substantive damages is covered by this legislation.

12. In addition to the words of the legislation and the principles of common law, I have been referred to various caselaw authorities. The first is Capek v Lincolnshire County Council [2000] ICR 878. The central issue to be determined in that case was whether the Tribunal could entertain a claim for breach of contract within the 1994 Order where it had been presented to the Tribunal before the effective date of termination giving rise to the claim. The ratio of the case dealt with whether the breach of contract claim was premature and therefore not justiciable. In setting out the background to the 1994 Order Mummery LJ quoted the judgment of Lord Browne-Wilkinson in Delaney v Staples where he said …. *"To be forced to bring two sets of proceedings for small sums of money in relation to one dismissal is wasteful of time and money. It brings the law into disrepute and is not calculated to ensure that employees recover their full legal entitlement when wrongfully dismissed. The position is capable of remedy by an order under section 131 of the Employment Protection (Consolidation) Act 1978 which enables the minister to confer jurisdiction on industrial tribunals to deal with claims for breach of contract….."* Mummery LJ notes that the 1994 Order was made to remedy this state of affairs and cites the judgment of Keene J in Sarker v South Tees Acute Hospitals NHS Trust [1997] ICR where he said: *"[the Order of 1994] extending the jurisdiction of industrial tribunals is intended to avoid the situation where an employee (or for that matter an employer) is*

forced to use both a tribunal and a court of law to have all his or her claims determined. In simple terms, the purpose of the extension of jurisdiction was to enable an industrial tribunal to deal with both a claim for unfair dismissal ….and a claim for damages for breach of the same contract of employment. Two sets of proceedings are thus avoided."

13. It is submitted on behalf of the Claimant that because the point of the legislation is to end the necessity for duality of litigation the Tribunal will have the power to award the same damages as would the civil court (subject to the explicit exceptions in the Order). As the statutory scheme does not exclude nominal damages then it should include them. To interpret it otherwise would be to run contrary to the statutory purpose of the Order as identified in Sarker and Capek. There is some force to this argument in my view as being the only way in which an employee avoids being forced to bring two sets of proceedings in relation to the same dismissal. The fact that a finding in the Employment Tribunal in relation to a breach of contract claim may subsequently be used in County Court/High Court proceedings does not necessarily undermine this rationale. In this case, if there is found to be a breach of contract in the Employment Tribunal there *may* be subsequent proceedings to claim under the "Good Leaver" shareholder provisions. This will not necessitate the redetermination of the same issue or claim in a second set of proceedings. Rather, the Tribunal's finding will be the springboard for the subsequent arguments in the civil courts following the usual principles of res judicata, issue estoppel etc. If the Tribunal would have jurisdiction to order nominal damages for breach of contract in a case where no subsequent proceedings were envisaged then it should not, as a matter of principle, be otherwise purely because this particular Claimant's case does envisage further proceedings. The avoidance of duplication envisaged by the Order is not mandatory. One can have two sets of proceedings relating to the same employment contract but one avoids two sets of proceedings where possible by giving jurisdiction to the Employment Tribunal. In many or most cases the Employment Tribunal proceedings will be an end to it without recourse to the civil courts. In others a second set of proceedings will be used, not to determine the same issue or legal claim, but to build upon the findings and determinations of the first piece of litigation. The two sets of proceedings will not duplicate each other although they will be linked. The fact that the Claimant could choose to argue the wrongful dismissal claim as part the civil court proceedings does not *require* him to do so. There may be a benefit to both parties to the litigation of a greater degree of certainty in entering the second set of proceedings having had some of the preliminary issues narrowed in the other Tribunal.

14. I also note that it has not been suggested that a claim for wrongful dismissal in the County Court or High Court could not include a claim for nominal damages. If there is concurrent jurisdiction for wrongful dismissal claims in the civil courts and the Tribunal then why should there be no power to award nominal damages in the Tribunal too?

15. I have also been referred to Uttley v St John Ambulance and another UKEAT/635/98. The EAT is noted as observing in that case that: *"It is trite law that for the breach of any contract, even if no financial loss is suffered, the plaintiff is entitled to at least nominal damages."* I note that this judgment arose as a result of a preliminary hearing in a claim under the Sex Discrimination Act 1975.The point in issue in that case was the nature of the relationship between the parties and whether it was, amongst other things, a contractual relationship for the execution of personal work and labour. That said, the comments quoted still provide useful guidance and indicate, perhaps, that the point made by the Claimant in this case is one which had hitherto been viewed as self-evident.

16. I am further referred to Young v Reading Borough Council UKEAT/0293/01. The quoted passage is from Mr Recorder Underhill QC (as he then was) where he says: *"If there was a breach of contract the Applicant is entitled in principle to nominal damages."* This, again, was the judgment from a preliminary hearing at the EAT. The relevant paragraph of the judgment goes on to note that nominal damages would be an empty victory. The judgment goes on, at paragraph 7, to suggest that the Appellant consider whether he wants to pursue the appeal on breach of contract further and to consider whether, if he succeeds on the point, he will ever recover any substantial award.

17. I note what is said on behalf of the Respondent regarding the absence of any case law where there is a claim solely for nominal damages or a declaration in a claim under the 1994 Order. I have some sympathy for this observation but it suffers from the perennial difficulty of the question "how do you prove a negative'? The absence of authority may just mean that the issue has never occurred to parties as being important before or just has not gone forward on appeal. It does not necessarily mean that the Claimant's argument is ill-founded.

18. The Respondent also argues that there is in effect no difference between an award of nominal damages and a declaration such that by seeking nominal damages the Claimant is in effect just seeking a declaration and that this would be impermissible. The function of both remedies is in essence to mark a finding or declaration, it is argued. This does not follow, in my view. All the available guidance indicates that nominal damages are qualitatively different from a declaration. Just because neither option provides substantive compensation for pecuniary loss does not mean that they are remedies of the same type or species. I would describe them as two different types of remedy that happen to have similar (but not identical) financial consequences. Nominal damages would nonetheless require payment of a sum of money, however small.

19. Taking the arguments of first principle, the words of the legislation and the guidance of case law in the round I conclude that "nominal damages" are both damages at common law and within the meaning of the 1994 Order. A claim for nominal damages can be made pursuant to the 1994 Order.

Does the 1994 Order permit declaratory relief in addition to or instead of a claim for damages?

20. The Claimant argues that an award of nominal damages in the Tribunal will provide him with the determination that he seeks, namely that he was wrongfully dismissed. The Claimant argues that such a determination could also properly be regarded as a declaration. On that basis it is said that the question of whether a separate remedy of a declaration is available is therefore academic and the two remedies in reality overlap and merge. Given my decision that the Tribunal does have jurisdiction to hear the wrongful dismissal claim because it is empowered to make an award of nominal damages (if appropriate), it may not be strictly necessary for me to determine the issue of the availability of declaratory relief. However, for the avoidance of confusion at the next Tribunal hearing I will do so.

21. I am referred by the Claimant, by analogy, to look at the position in relation to claims of unfair dismissal. There, it is said, there is also no express power to make declarations within the unfair dismissal provisions of the Employment Rights Act 1996. In the case of Evans v London Borough of Brent UKEAT/0290/19 Eady J considered a comparison between the remedies available in unfair dismissal and in discrimination claims pursuant to the Equality Act 2010. I am directed in particular to paragraphs 47 and 48 of the judgment where Eady J queries whether this is a helpful distinction given that a declaration in either context *"will simply amount to a judicial statement that the employer has violated the employee's right."* She further notes that HHJ Mullen QC did not draw a distinction between a finding of unfair dismissal and a declaration. The overall ratio of the Evans case is that there was value in a Tribunal finding of unfair dismissal even if there was no possibility of any monetary award as a result. The whole claim of unfair dismissal should not, therefore, have been struck out. The Claimant in that case was not directly seeking a declaration. The comments about the distinction between a finding and a declaration could therefore be seen as obiter observations. This does not, however, mean that they are without persuasive value even if the ratio of the case was not that "declarations are an available remedy in unfair dismissal claims."

22. Eady J's comments in paragraphs 47-48 were made in the context of paragraph 46 of the judgment which specifically refers to the Tribunal's conclusion that it was relevant that the ERA made no separate provision for a declaration as a remedy. The observations at 47 and 48 effectively observe that there is little meaningful difference between a 'finding' and a 'declaration' such that giving the former is effectively giving the latter. I appreciate that the wording of the Order is to permit a claim for damages and no reference is made to the right to a "finding" or a determination. However, section 112 ERA also does not refer to a 'finding' as a remedy. The claim is for a remedy of re-engagement, reinstatement or compensation which flows when a claim is well founded. I do consider that Eady J's observations tend to show that in substance a declaration is available in

unfair dismissal claims and that this would tend to support an argument that declarations are also available pursuant to the 1994 Order.

23. I am also referred to Ceesay v Securicor Services Ltd UKEAT/0105/04. The Claimant argues that at paragraph 17 of the judgment the EAT clearly stated that the tribunal does have jurisdiction to make a declaration of wrongful dismissal and quotes the following passage: *"the Tribunal was wrong to say that the wrongful dismissal award was subsumed in the unfair dismissal award….This does not have any financial consequences because that amount was to be offset against the compensatory award for the unfair dismissal, but the claimant is entitled to have a declaration as to wrongful dismissal, and we propose to make such declaration."*

24. Respondent's counsel sets out an argument (at paragraphs 7-12 of his skeleton argument) essentially pointing out the differences between Ceesay and the instant case. In Ceesay, there was no further award for damages for wrongful dismissal because double recovery was to be avoided and the sums claimed had already been recovered under the guise of damages for unfair dismissal. The fact that this offsetting process was undertaken so that no further monetary award was made for the wrongful dismissal does not mean that, as pursued, there was no properly constituted claim for wrongful dismissal. In the instant case, it is argued, there is a difference. In this case we are not looking at the elimination of wrongful dismissal damages due to double recovery concerns. Rather, no claim for damages is pursued, even at the outset.

25. I respect the Respondent's argument but I disagree with it. The reality is that in Ceesay, even after the decision not to make a further award of damages, the EAT goes on, in terms, to give a declaration. That presupposes that the Tribunal has jurisdiction to make a declaration which is not tied to a monetary award. That jurisdiction is either there from the outset or it is not. It does not come into being or crystallise only once the claim for special damages falls away. Had there been no such jurisdiction the Tribunal could have said so in terms and could have said that, in the absence of a monetary award it was unable to make a declaration. It could have refrained from making the declaration and explained its reasons for so doing by reference to a lack of jurisdiction in the absence of an award of damages. It does not do so. I do not think that Ceesay assists the Respondent.

26. The Respondent also argues that in this case the Claimant is seeking to extend the jurisdiction of the Tribunal and that, were I to conclude that the Tribunal does have jurisdiction I would effectively be acting to extend my jurisdiction in an impermissible way. However, the contrary argument also applies. The Respondent may be asking me to artificially narrow a statutory jurisdiction in a way that I am not permitted to do. I am not extending jurisdiction to artificially assist the Claimant or meddle in a potential second set of proceedings. I am setting out the extant jurisdiction as I understand it to be.

27. Taking all the available information into account I ask myself the question what does a "declaration" amount to in substance? I conclude that a declaration is really a formal statement that a litigant's legal rights have been infringed, whether at common law or contrary to statute. To that extent there is a distinction without a difference as between "declarations" and "findings" and "determinations". On that basis, if the Tribunal at the next stage "determines" that the Respondent acted in breach of contract and wrongfully dismissed the Claimant, then it will, at the same time, be making a "declaration" or a "finding" to that effect. To put it another way, it will declare that it upholds the claim or that the Claimant's claim is "made out".

28. On balance (and given the available caselaw guidance) I conclude that as well as having jurisdiction to award nominal damages in the event of a successful claim under the 1994 Order, the Tribunal will also be able to provide the relevant "declaration". Such will form part and parcel of its decision as to whether the claim is made out. I reiterate that, given the wording of the articles of association a formal "declaration" may not actually be required in this case. A determination may well suffice in any event.

Employment Judge Eeley

Date: 12th September 2020

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