EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100411/2020; 4100412/2020; 4100413/2020; 4100414/2020 and 4100415/2020 (P)

Held via written submissions on 2 June 2020

Employment Judge L Wiseman

Mr J Robertson	**Claimants Represented by: Mr R Lawson - Solicitor**
Mr B Adamson	
Mr J Gouck	
Mr F McLeod	
Mr D Murray	
Alexander Dennis Ltd	**Respondent Represented by: Mr S Chowdhury - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to refuse the respondent's application for the claim to be struck out. The case will now proceed to a one hour telephone conference call to discuss whether the hearing of this case could proceed remotely.

REASONS

1. The claimants presented a claim to the Employment Tribunal asserting there had been a breach of contract in circumstances where an offer of employment had been withdrawn. The claim form explained that the claimants had been applied for and been offered employment with the respondent, with a start date of the 5 August 2019. The respondent had issued the claimants with a Principal Statement of Main Terms and Conditions of Employment for Hourly Paid Employees.

2. The claimants were subsequently informed that the start date had been delayed until the 16 September 2019, and a revised version of the Principal Statement of Main Terms and Conditions of Employment for Hourly Paid Employees was issued to each claimant amending the start date of employment. The claimants accepted this amendment.

3. On or about the 9 August 2019 the respondent wrote to each claimant to inform him that owing to unforeseen changes to the production plan, a decision had been made to withdraw the offer of employment. Accordingly, there was no requirement for the claimants to commence employment with the respondent on the 16 September 2019 or at any point thereafter.

4. The claimants asserted the withdrawal of the offer of employment was a breach of contract, and they sought payment of one weeks' notice. The contract provided for the first three months of employment to be a probationary period and that the contract could be terminated with one week's notice from either side during this time.

5. The respondent entered a Response to the claim. The respondent agreed the claimants had been offered employment due to start on or about 5 August 2019, and that the claimants had been subsequently been advised that the

start date had been varied to the 16 September 2019. The respondent also admitted it wrote to the claimants on the 9 August 2019 to advise the offer of employment had been withdrawn. The respondent asserted this amounted to notice to terminate employment as permitted under the contract.

6. The respondent denied there had been a breach of contract, but argued that if there had been a breach of contract the claimants suffered no loss because the respondent issued notice on the 9 August 2019, far in excess of the one week's notice required under the contract. The period notice expired prior to the proposed start date.

7. The respondent's representative made an application for strike out of the claims.

8. A preliminary hearing took place on the 1 May 2020 where it was agreed the respondent's representative would provide his submissions to the claimant's representative, who was given a period of 7 days to consider before providing his submissions to the respondent's representative. Mr Chowdhury was given a further period of 7 days to comment on the claimant's submissions.

9. The written submissions and further comments from the respondent's representative have been received by the tribunal.

Respondent's submissions

10. Mr Chowdhury's submissions were made under the following headings: (a) no breach of contract occurred; (b) waiver of alleged breach; (c) no nominal damages; (d) mitigation and (e) if a breach occurred.

No breach of contract occurred

11. The respondent accepted it had written to the claimants on the 9 August 2019 to advise that their offers of employment were withdrawn. The contract was for a fixed term of three months commencing on the 16 September 2019, with a notice provision on both sides of one week. Accordingly, this correspondence amounted to notice to terminate employment as permitted under the contract.

12. The claimants' representative noted there was no provision in the contract permitting the offer of employment from being terminated before it commenced, and asserted that written notice to terminate employment under the contract could only be issued when employment had commenced. Mr Chowdhury submitted it would be unusual for a contract to contain a provision allowing for termination prior to commencement of employment, since the purpose of the contact is to govern the relationship from the commencement date. Nevertheless, if it were not possible to terminate prior to commencement of employment, implying an obligation on an employer to await the first day of employment would be akin to specific performance of the employment contract. This would run contrary to the equitable principle that contracts for personal service – including employment contracts – are not specifically enforceable. Mr Chowdhury invited the tribunal to reject that submission.

13. The respondent, in any event, submitted that notice of termination was given on the 9 August 2019 when the claimants were advised that their services would not be required. It is a basic principle of contract that termination excuses all parties from further performance of their primary obligations after the termination date. On that basis, and since the respondent issued notice on the 9 August, some five weeks before the putative start date of 16 September, notice was validly given and since no payment would have been due to the claimants prior to their start date, they were not entitled to any payment as alleged or at all.

If a breach of contract occurred

14. Mr Chowdhury submitted, that if the tribunal found there was a breach of contract, the claimants would not be entitled to any compensation. This was on the basis the claimants ought to be put into the position they would have been in but for the breach. The claimants would not be entitled to any benefits before the employment relationship began, the claimants' loss in respect of any such breach would only begin to accrue after the date on which their employment was due to start.

15. The respondent accepted that if it had (for example) terminated in breach of contract on the 15 September 2019 (that is, the day before employment was due to start), then it would have been obliged, under the contract, to pay the claimants the balance of one week's pay as the claimants would have expected to receive pay from the 16 September onwards. But this was not the case. Accordingly, even if the tribunal finds that there had been a breach of contract (which was denied) the claimants would only be able to recover the balance of any notice period that ran beyond the putative start date of 16 September. Since the five weeks' notice given far exceeds the one week required under the contract, the respondent submitted no compensation would be due.

Waiver of alleged breach

16. Mr Chowdhury submitted, in the alternative, that if there had been a breach, it was waived by the claimants. The respondent sent a letter to each claimant by recorded delivery on the 9 August notifying them they were no longer required. The claimants each signed for receipt of the letter. The respondent received no correspondence or contact from the claimants to suggest they were dissatisfied with the decision to withdraw employment.

17. The claimants did not attend for work on the 16 September 2019, nor did they advise the respondent they were seeking specific performance of the contract. The claimants, through their conduct, are estopped from pursuing a breach of contract claim.

No nominal damages

18. Mr Chowdhury noted the claimants' representative had referred to the case of **Webster & Co v Cramond Iron Co 175 2 R 752** in support of an alternative argument that nominal damages would be due to the claimants for inconvenience. Mr Chowdhury observed that in that case the Lord President of the Court of Session had stated there had been a breach of contract and that the mill owners had sustained loss, injury and damage, but were only entitled to damages for breach of contract to the extent to which they had sustained damages, but to no greater extent. It was submitted the case was

authority for allowing nominal compensation for a breach, but not where no loss had occurred whatsoever. Accordingly, even if the tribunal accepted there had been a breach of contract the present facts could clearly be distinguished from the authority referred to.

Mitigation

19. Mr Chowdhury lastly submitted that if there had been a breach of contract, the claimants would be under a duty to mitigate their loss. The claimants had a significant opportunity to not only find, but to commence, alternative employment in the period 9 August to 16 September. No evidence of mitigation had been provided.

20. Mr Chowdhury invited the tribunal to strike out the claims because they had no reasonable prospect of success. In the alternative, should the tribunal decide not to strike out the claims, a deposit order in the sum of £1000 per claimant should be made.

Claimants submissions

21. Mr Lawson noted the respondent's application for strike out of the claims appeared to be based on three grounds, namely (I) the respondent did not breach the contracts it entered into with the claimants; (ii) the claimants are estopped from pursuing these claims and (iii) the claims are of no value in the event that they succeed. Mr Lawson addressed each of these arguments, but prior to doing so he referred the tribunal to the case of **ODOS Consulting Ltd & Others v Mr S Swanson 2012 WL 1933434** where the EAT, at paragraph 49, stated that applications to strike out on the basis that there is no reasonable prospect of success should only be made in the most obvious and plain cases in which there is no factual dispute and which the applicant can clearly cross the high threshold of showing that there are no reasonable prospects of success.

No Breach of contract

22. Mr Lawson agreed with the respondent's assertion that the contract was for a fixed period of three months with a notice provision on both sides of one week,

but disputed that the correspondence on the 9 August 2019 amounted to one weeks' notice to terminate the contract. Mr Lawson referred to contract, where it provided that: "the first three months of your employment with the Company will be a probationary period. During this time, your employment may be terminated with one week's written notice from either side". Mr Lawson submitted there was no entitlement on the part of the respondent to terminate the contracts prior to the commencement of employment.

23. Mr Lawson submitted the respondent's contractual entitlement to issue notice only arose at the point in time that employment commenced. That is expressly stated as commencing on the 16 September 2019. There was no contractual provision for termination prior to this and the termination of the contracts was, therefore, in breach of those contracts.

24. Mr Lawson noted the respondent's position that it would be unusual to have a term in a contract of employment allowing for termination prior to commencement, but submitted this was not a relevant consideration. It was, in any event, open to the respondent, as the party who prepared the contract, to have made provision for such a clause. It did not do so, and any ambiguity in the contractual wording should be construed in the claimants' favour.

25. The respondent also referred to an equitable principle, which did not form part of Scots law. The express obligation on the respondent was to provide work for the claimants as of a certain date. They did not do so and therefore acted in breach of contract.

Estoppel

26. Mr Lawson, in relation to the issue of estoppel, submitted the tribunal had to have regard to the respective pleadings of the parties when determining the application for strike out of the claims. The respondent did not, in its response, plead that the claimants were estopped from pursuing these claims. In those circumstances, it was submitted it was not open to the tribunal to have regard to this submission when considering the respondent's application.

27. In any event, the submission that the claimants waived the breach by not attempting to attend the workplace on their putative first day is not well founded. Estoppel is not a principle of Scots law. Moreover the respondent offered no authority to support the submission that the claimants would be precluded from advancing a claim in respect of breach of contract by choosing not to attend the workplace when they had been unambiguously informed that they would not be offered work by the respondent.

Value of claims if upheld

28. Mr Lawson submitted that the earliest date the respondent could terminate the contract in accordance with the terms of the contract was on the date of commencement of employment. At a minimum, therefore the quantum of damages will be equivalent to wages that would have been paid during the one week of notice that the respondent was required, under the contract, to provide after employment had commenced (no less than £529.84 per claimant).

29. Mr Lawson further submitted that an employee who secures a full time offer of employment with a particular date of commencement of employment can ordinarily be expected to cease attempts to secure alternative employment in respect of the period after the commencement of that employment. In the period commencing no later than 28 June 2019 until 9 August 2019, the claimants had no incentive to seek alternative employment that would extend beyond 16 September 2019. It was reasonably foreseeable that a result of the respondent's breach of contract was the loss by the claimants of this period of time during which they could have endeavoured to obtain alternative employment. The claimants are entitled to compensation in respect of this loss.

30. The respondent disputes the above assertion: accordingly, it is a core disputed fact making strike out of the claims not appropriate.

31. Mr Lawson submitted that even if there was no proof of actual loss caused by a breach (which is denied) an award of nominal damages can be made (**Webster & CO v Cramond Iron Co 1875 2 R 752**). It was stated: *"The*

contract and the breach of it are established. That leads of necessity to an award of damages. It is impossible to say that a contract can be broken even in respect of time without the party being entitled to claim damages – at the lowest, nominal damages".

32. The respondent submission that this case is not authority for allowing compensation where no loss has occurred, does not follow from the extract quoted above. It follows from a subsequent paragraph,

33. The principle espoused in the judgment is as applicable to the present circumstances as to the factual matrix of that case. The respondent's submission that the claimants were given sufficient notice to allow them to obtain another job prior to their putative start date, ignores the fact that had they not secured the offer of employment from the respondent, they could have secured employment at an earlier point in time.

34. Mr Lawson submitted that the respondent's assertion that the claimants failed to mitigate their losses does not form part of the grounds of resistance. It cannot therefore be considered by the tribunal in the context of the application for strike out. In any event, the determination of this issue would be a matter for the tribunal having heard evidence from the claimants.

Conclusion

35. Mr Lawson submitted the respondent had failed to cross the high threshold of showing that there are no reasonable prospects of success. Accordingly the application for strike out should be refused and a Hearing assigned to determine the claims.

36. Mr Lawson noted a preliminary hearing was assigned in this case to determine the application for strike out only, following the respondent's email of the 19 February 2020. At no point prior to the written submissions had the respondent intimated an application for a deposit order. Mr LAwson referred to rules 53 and 53 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and submitted that in the circumstances, it

would not be competent for the respondent's application for deposit order to be considered.

Respondent's comments on the claimants' submissions

37. Mr Chowdhury rejected the claimants' position that contractual entitlement to issue notice only arose at the point in time that the employment commenced, because it precluded the possibility of termination prior to employment, which was tantamount to obliging specific performance of the employment contract.

38. Mr Chowdhury referred to his original submission where he had dealt with the issue of mutuality of obligations. He referred to the case **of Inveresk plc v Tullis Russell Papermakers Ltd 2010 UKSC 19** where it was stated that all the obligations that a contract embraces are to be regarded as counterparts of each other unless there is a clear indication to the contrary. It was submitted that if there was an implied obligation on an employer to specifically perform the contract (which was denied) then that same obligation should apply to employees. Mr Chowdhury submitted it could not be correct to suggest an employee cannot change his/her mind about starting a new job, and would have to start the job and then give notice.

39. Mr Chowdhury submitted that it must follow that a party is permitted, in the absence of any provision on this point, to terminate prior to commencement of employment without this giving rise to a breach of contract.

40. Mr Chowdhury clarified that personal bar was the Scots equivalent to the principle of estoppel as referenced in his submissions. He insisted the claimants had delayed in relying upon any alleged breach, failed to speak out at the time of the alleged breach and thereby impliedly accepted the breach. It would simply not be in accordance with the over-riding objective for the tribunal to – as suggested by the claimants' representative – ignore this point. The claimants did not object or protest and this supported the respondent's argument regarding acquiescence. Mr Chowdhury referred to the case of **Davies v City of Glasgow Friendly Society 1935 SC 224.**

41. Mr Chowdhury rejected the claimants' submission that damages equivalent to wages that would have been paid during the one week of notice that the respondent was required to give under the contract, because it ignored principles of contract law which applied when determining damages. The claimants were under a duty to mitigate their loss and the fact this was not referred to in the response ought not to bar the tribunal from taking this into account because it is a well established principle of contractual damages.

42. The claimants referred to there being no incentive to seek alternative employment in the period 28 June to 9 August, but they were still employed by their previous employer until shortly prior to 1st and 5th August and so their ability to seek alternative employment would have been limited. The fact however remained that the claimants had an opportunity to not just find but commence alternative employment before the putative start date of 16 September.

43. Mr Chowdhury submitted there was no dispute regarding the essential facts of this case and the respondent's position, in a nutshell, was that regardless of whether there was a breach of contract, the claimants enjoyed no reasonable prospects of success on the basis they suffered no loss and therefore no compensation was due to them. He nvited the tribunal to find the claimants' claims had no reasonable prospect of success and to strike them out.

44. Mr Chowdhury invited the tribunal to make a deposit order and he rejected the claimants' submissions on this. Mr Chowdhury referred to rule 30 of the tribunal rules and submitted he had complied with the terms of this rule. Further, based on both rules 30 and 39, he submitted no prior notice of the intention to make an application for a deposit order was required. The claimants were advised at the preliminary hearing on the 1 May of the intention to seek a deposit order should the claims not be struck out. They accordingly had had notice of the application and time in which to address the matter.

Decision

45. I firstly considered it necessary to determine the scope of this hearing in circumstances where the respondent wished me to determine an application for strike out failing which an application for a deposit order, and the claimant objected to the application for a deposit order being included in this hearing.

46. I noted the claims had originally been listed for a one day hearing to take place on the 1 May 2020. The respondent had, in its response to the claim, made an application for the claims to be struck out. An Employment Judge, having obtained comments from both parties, decided to convert the final hearing on the 1 May, to a preliminary hearing to determine the respondent's application for strike out.

47. I noted that correspondence from the tribunal had been sent to both parties on the 13 March 2020 confirming that an Employment Judge had directed that the hearing listed for 1 May 2020 be converted to a preliminary hearing to consider the respondent's application to strike out the claim on the basis it has no reasonable prospect of success.

48. The preliminary hearing on the 1 May was converted to a telephone conference call, the purpose of which was to discuss how to move the case forward in light of the current crisis. Mr Chowdhury attended the conference call prepared to address the tribunal regarding the application made to strike out the claims. Mr Lawson did not attend on that basis. The outcome of the discussion on the 1 May was that Mr Chowdhury would send his written submissions to Mr Lawson, who had a period of time in which to prepare his written submissions for comment by Mr Chowdhury before all of this being submitted to the tribunal.

49. I accepted the claimants' position that prior to receiving Mr Chowdhury's written submissions, he understood the application being made was for strike out of the claim. I also accepted the submission that in terms of rule 54 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) the claimants had not been given at least 14 days' notice specifying the issues to be determined at a preliminary hearing.

50. I, in addition to the above, and having had regard to the terms of rule 39 of the Rules, noted that I did not have any information regarding the ability of the claimants to pay a deposit. I acknowledge this does not prevent me from making such an order, but given the points in the preceding paragraph, I considered it a further reason for limiting the scope of this hearing.

51. I decided, for the above reasons, that the issue to be determined at this hearing related solely to the respondent's application for strike out of the claim.

52. I had regard to the terms of rule 37 of the Rules, which provides that at any stage of the proceedings, a tribunal may strike out all or part of a claim on the basis it has no reasonable prospect of success.

53. I also had regard to the case of **Balls v Downham Market High School and College 2011 IRLR 271** where it was stated that the test to be met for strike out is "a high test". This chimes with the oft-quoted statement that strike out is a draconian step.

54. I next had regard to the fact that many of the essential facts in this case are not in dispute. The respondent agreed it made an offer to employ the claimants commencing on the 5 August 2019; the start date was delayed/varied to the 16 September 2019 due to changes to the respondent's production plan and updated Statements of Main Terms and Conditions of Employment were issued to each claimant, which they signed and returned. The claimants were then advised on the 9 August that the offer of employment had been withdrawn.

55. The Principal Statement of Main Terms and Conditions of Employment for Hourly Paid Employees was produced by the claimants' representative. This document confirmed the following:

    a. your employment with ADL will commence on 16th September 2019 for a fixed term of 3 months and

b. the first three months of your employment with the Company will be a probationary period. During this time, your employment may be terminated with one week's written notice from either side.

56. I reminded myself that the issue for determination in this case is the respondent's application to have the claim struck out because it has no reasonable prospect of success. It is not within my remit at this hearing to make a final determination of the claim, and for that reason I deal summarily with the detailed submissions advanced by the parties.

57. I considered there were two points for consideration at this hearing: firstly, could it be said the claimants had no reasonable prospect of success of demonstrating there was a breach of contract and secondly, could it be said there was no reasonable prospect of success of the claimants demonstrating they would be entitled to an award of damages for such a breach.

58. I, in relation to the first issue, decided it could not be said there was no reasonable prospect of success of the claimants demonstrating there was a breach of contract. I say that because once the claimants had accepted the offer of employment unconditionally, and were due to commence employment on the 16 September 2019, the contract was binding and the employer could not unilaterally withdraw the offer.

59. I acknowledge the arguments advanced by Mr Chowdhury regarding the giving of one weeks' notice, but considered those arguments appeared to be premised on the Statement of Main Terms and Conditions of Employment allowing for one weeks' notice to be given. The Statement, however, provides that during the probationary period (my emphasis) notice may be given by either party, and the probationary period had not started.

60. I next considered whether there was no reasonable prospect of success of the claimants showing they are entitled to an award of damages for the breach of contract. This is the crux of this case: the respondent's position is that even if there was a breach of contract, then damages of one weeks' notice would not be payable because more than a weeks' notice was given to the claimants. The claimants' position is that damages are payable

notwithstanding the fact notice was given on the 9 August that the claimants would not be required to commence employment on the 16 September.

61. I, in considering this matter, had regard to the fact Mr Lawson, in his submissions, referred to damages for the breach of contract being equivalent to one weeks' wages. He also referred to the claimants being entitled to compensation in respect of any loss sustained by them in the period 28 June to 9 August, when they could have looked for alternative employment but did not do so because they had secured employment with the respondent.

62. Mr Chowdhury, in his submissions, made reference to the ability of the claimants to seek alternative employment being limited by the fact they remained employed with their previous employer.

63. I considered this was a core issue about which a tribunal will require to hear evidence to ascertain whether there was, in fact, any loss during this period which flowed from the breach and which may form part of a payment of damages.

64. I concluded, in relation to this second issue, that in circumstances where there is a disputed core issue about which a tribunal will require to hear evidence, that it would not be appropriate to strike out a claim and deny the claimants the opportunity to have their case heard.

65. I decided not to grant the respondent's application for strike out of the claim. I made this decision for two reasons: (a) because I considered it could not be said there was no reasonable prospect of success of the claimants showing there was a breach of contract and (b) because there is a dispute regarding a core factual issue. I considered that a hearing would also allow an opportunity for the issues of waiver of the alleged breach and mitigation to be explored factually and legally.

66. I direct that a telephone conference call be arranged to discuss with the parties the listing of this case for a one day hearing and whether that hearing could take place remotely.

Employment Judge: L Wiseman
Date of Judgment: 02 June 2020
Entered in register: 08 June 2020
and copied to parties