



EMPLOYMENT TRIBUNALS

Claimant: Ms Rachael Anne Brennan

Respondent: Ravenstall Ltd

OPEN PRELIMINARY HEARING

Heard at: Birmingham (by CVP and telephone)

On: 6 August 2024

Before: Employment Judge Gilroy KC

Appearances

For the Claimant: In Person

For the Respondent: Mr S Smith, Director

ORDER

The Respondent shall be permitted to pursue its counterclaim.

REASONS

1. This was a public preliminary hearing held for the purposes of the Tribunal determining a preliminary issue under Rule 53 (b) of the Tribunal rules, as set out in the Order made at the preliminary hearing in this matter on 28 June 2024 by Employment Judge Childe, namely whether the Tribunal had jurisdiction to hear the Respondent's breach of contract counterclaim.
2. On 25 August 2023, before these proceedings were issued, the Respondent issued proceedings in the civil court for recovery of substantially the same monies that are claimed by the Respondent in these proceedings by way of counterclaim. The claim was issued in the Warwick County Court under Claim Number K3QZ2F0Z. Those proceedings were subsequently struck out.
3. At the open public preliminary hearing on 6 August 2024, the Tribunal was directed to determine whether the doctrine of res judicata applied to the Respondent's counterclaim in these proceedings in view of the striking out of the County Court claim, the rationale of that doctrine being that there must be finality of litigation and the avoidance of a multiplicity of proceedings on the same issue.

4. The Tribunal considered (a) if it was an abuse of process for the Respondent to now litigate its counterclaim in the Employment Tribunal; (b) if cause of action or issue estoppel applies to prevent the Employment Tribunal from hearing the Respondent's counterclaim, and (c) if there was any other reason why the Employment Tribunal could not hear the claim.
5. The Claimant was employed by the Respondent, a bar and eatery, as a venue manager, from 21 November 2022 until 22 June 2023. She issued Tribunal proceedings claiming unpaid wages, holiday pay and notice pay, the latter claim being a claim of wrongful dismissal, ie breach of contract. It was the Claimant's case that she resigned with notice on 22 June 2023 and was then subsequently summarily dismissed on 30 June 2023 and was owed the monies claimed. It is the Respondent's position that the Claimant misappropriated around £12,000 of its funds, and that the Claimant had resigned with immediate effect when this had been brought to her attention. It was said by the Respondent within these proceedings that the Claimant was therefore not owed the monies claimed or, if they were due to her, they should be offset against the money that the Claimant stole from the Respondent and, in particular, the Respondent relied in this regard upon clause 4.7 of her contract of employment.
6. By a claim form issued on 25 August 2023, the Respondent issued a claim against the Claimant in the County Court, and in the box on the claim form headed "Particulars of Claim C", the following appeared: *"Rachael Brennan worked for Ravenstall Ltd from November 2022 until she resigned in June 2023. Following her resignation, it has transpired that Mrs Brennan had fraudulently issued refunds for cash sales across the bar who at the time was manager of the venue. She then pocketed the cash and deprived the company of the income. She also owes the company for holidays she was not entitled to, missing till floats, unpaid bar tabs, drinks not paid for, meals not paid for, hours paid for but she did not work, management time resolving IT issues she caused following her resignation. We have not charged for the significant costs incurred by management and bookkeeper investigating the losses to the company"*.
7. The matter proceeded in the Warwick County Court. The Claimant in the Employment Tribunal proceedings served a generic and brief Defence to the claim, containing a general denial. Directions were subsequently given for the conduct of the County Court proceedings and, in due course, the matter came before District Judge Bull on 21 February 2024, on which occasion the Court held that as the Claimant (ie the Respondent in the Tribunal proceedings) had made serious allegations of fraud but that the Particulars of Claim were not specific about the alleged fraudulent conduct and did not provide a breakdown of the various allegations or the heads of loss. It was ordered as follows: (1) The Particulars of Claim were struck out as not disclosing reasonable grounds for bringing a claim and as an abuse of process in that they do not adequately specify the allegations made. (2) The Claimant (ie the Respondent in the Tribunal proceedings) was granted permission to rely on fresh Particulars of Claim which must be filed at court and served by 4.00 pm on 20 March 2024. The Court's Order went onto specify the details that would have to be contained within the fresh Particulars of Claim.

8. It would appear to be the case (although the Tribunal has not seen an Order to this effect) that the County Court claim was automatically struck out on 9 May 2024 due to non-compliance with District Judge Bull's Order in respect of the provision of fresh Particulars of Claim. In that sense, it could be described as a default judgment in the sense that there was no formal court hearing where evidence was led and considered before a reasoned judgment was delivered on the matters forming the basis of the dispute. At the Tribunal hearing on 6 August 2024, Mr Smith indicated that a deliberate decision had been taken not to issue fresh Particulars of Claim in the County Court proceedings because by the time the Particulars of Claim in their new format were to be required, the Employment Tribunal proceedings were on foot and, as far as he was concerned, the matter, or as far as the Respondent was concerned, the matter could be dealt with in the Employment Tribunal by means of a counterclaim.
9. The doctrine of res judicata arises where a decision given by a judge or a tribunal with jurisdiction over that cause of action results in the matter being disposed of with finality to the extent that it cannot be relitigated by those who are bound by the judgment unless the matter is subject to appeal. The reason for the doctrine is to provide finality to litigation and to protect parties from being subject to multiple vexatious proceedings. It is accepted that final judgments by default or consent can be covered by the doctrine but not decisions on procedural grounds and decisions which are not final in any sense. Res judicata is generally regarded as an umbrella description for cause of action estoppel and issue estoppel. Cause of action estoppel operates to prevent a cause of action being raised or challenged by either party in subsequent proceedings where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Issue estoppel describes a defence which may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided but in subsequent proceedings between the same parties, involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue.
10. Res judicata therefore covers a range of legal principles with different legal or juridical origins upon which courts and tribunals have endeavoured to impose a coherent scheme only in recent times.
11. As indicated, a judgment by default should, unless and until set aside, conclude matters expressly decided by its operative and declaratory parts. However, in ***Regina (Gray) v Police Appeals Tribunal [2018] 1WLR 1609***, Etherton MR stated that propositions to that effect in recent cases, that default judgments may give rise to res judicata estoppels, should be treated with caution, referring there to at least six reasons why. I do not recite those reasons here. The one in particular strikes me as relevant in this case is the fourth factor, which is described in these terms: It was emphasised in ***Kok Whoong v Liong Cheong Kwang Minds Limited [1964] AC 993*** that any estoppel arising from a default judgment must be given a restricted operation and was limited to what must necessarily and with complete precision have been determined. There is other authority for the proposition that a default judgment gives rise to an issue estoppel if an issue was determined in favour of the claimant which can be formulated with complete precision (***Ozer Properties Limited v Ghaydi [1988] 1 EGLR 91***).

12. Prior to the hearing of this matter I arranged for the parties to be provided with a copy of the Weekly Law Reports version of the case of **Gray** and in discussions during the course of the hearing, I particularly drew the parties' attention to paragraph 52 of the judgment in that case.

Analysis and conclusions

13. Applying the relevant principles to the facts of this case, my conclusions are as follows. In my judgment, a cause of action estoppel does not arise because the cause of action pursued by the Respondent in the County Court was the cause of action of fraud. Fraud is a distinct cause of action from breach of contract. I therefore find that there is no bar in terms of cause of action estoppel to prevent the Respondent from pursuing its counterclaim in the Tribunal. Secondly, as far as issue estoppel is concerned, in my judgment, issue estoppel does not arise because as indicated in the legal discussion set out above, issue estoppel will only be created by a default judgment if an issue was determined in favour of the Claimant which can be formulated with complete precision. In my judgment, the default judgment that was entered in the County Court does not constitute an issue being determined in favour of one party or another which can be or could be formulated with complete precision.
14. Taking all of the circumstances into account, therefore, in my judgment, there is no cause of action estoppel, and there is no issue estoppel, and in the circumstances, it is my judgment that the doctrine of res judicata does not prevent the Respondent from pursuing its counterclaim for breach of contract in these Tribunal proceedings.

Employment Judge Gilroy KC

20th August 2024