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Albion Chambers EMPLOYMENT NEWSLETTER

Stays in Employment Proceedings

The Employment Tribunal Rules, rule 10(2)(h) provides the Tribunal with the power to order a stay of proceedings. This article considers under what circumstances a stay may be granted.

Stays when there are concurrent proceedings

In *Mindimaxnox LLP v Gover and Ho* (UKEAT/0225/10/DA 7 December 2010) Judge McMullen QC held that an Employment Judge had erred in refusing to stay the employment proceedings with the consequence that those proceedings would run concurrently with the High Court action. In reaching this decision, the Judge highlighted a number of factors relevant to whether a stay should be granted:

(a) The complexity of the factual matters. Whilst proceedings which concern complex factual matters should not necessarily be dealt with by the High Court simply by reason of their complexity, the question is whether it would be more appropriate for this to happen;

(b) The potential for embarrassment of a High Court Judge. Once findings have been made in the Employment Tribunal, a High Court Judge would find it difficult not to be bound by those findings;

(c) The complexity of the legal matters. Similarly to the complexity of the factual matters, the issue is whether the legal matters are such that they would be more appropriately dealt with by the High Court;

(d) The overlap in the matters to be dealt with in the different proceedings. Where there is considerable overlap in the matters to be dealt with *"it is appropriate to cede to the High Court"*;

(e) Whether the claim is of small financial value in the Employment Tribunal and whether there are more issues which can be determined in the High Court.

The Judge was of the view that "it is not in accordance with the overriding objective to have concurrent proceedings over exactly the same factual territory except for the unique tort of unfair dismissal in the Employment Tribunal".

Mindimaxnox therefore provides guidance on the relevant matters to consider when determining whether to grant a stay of employment proceedings where there is a concurrent action.

Stays when there are no concurrent proceedings

In *Andrew John Halstead v Paymentshield Group Holdings Ltd* [2012] EWCA Civ 524 the Court of Appeal was faced with a situation where there were no concurrent proceedings, but a *threatened* action.

The Appellant brought an action in the Employment Tribunal for unfair dismissal and subsequently sent the Respondent a letter before action and draft particulars of claim in relation to a prospective action in the High Court for breach of contract, rescission, debt and interest. The Respondent applied for a stay in the Employment Tribunal on the grounds that there were likely to be concurrent proceedings. The application was uncontested and a stay was granted pending the outcome of the High Court case.

The Appellant subsequently applied to lift the stay on the basis that he did not have the funds to pursue the High Court action. The stay was lifted.

The Respondent appealed to the Employment Appeal Tribunal, arguing that there was a considerable overlap between the claims and that the Appellant had indicated a clear intention to bring High Court proceedings. The Employment Appeal Tribunal considered the *Mindimaxnox* factors and overturned the Employment Judge's decision. The Appellant appealed to the Court of Appeal.

Pill LJ, whilst acknowledging the complexity of the claims and the overlap between the action in the Employment Tribunal and the proposed action in the High Court, opined that it would be *"wrong in principle to deprive the appellant of a remedy which statute has provided for him because he has chosen, without commencing proceedings in the High Court, to indicate lines of claim which may be available to him there"*. He noted that the Appellant was entitled to change his mind and that no case based on estoppel had been raised by the Respondent. The Judge stated *"in the absence of concurrent proceedings, that, in my judgment, is fundamental."* The Appellant could not be driven away from the Employment Tribunal by being required to first pursue an action in the High Court. Accordingly, the appeal was allowed.

Paymentshield stands for the proposition that, whilst the factors identified in *Mindimaxnox* are relevant when there are concurrent proceedings, they are not necessarily determinative in the absence of concurrent proceedings.

However, one must be careful not to assert that *Paymentshield* went further than this. The Court of Appeal did not say that there could never be a stay in the Employment Tribunal where proceedings in the High / County Court had yet to be issued. Nor did the Court of Appeal hold that the Employment Appeal Tribunal had been wrong to apply the *Mindimaxnox* factors to a case where the proceedings had not yet been issued.

It seems therefore, that whilst it will be more difficult to persuade a tribunal that a stay is justified where concurrent proceedings have yet to be issued, it is not impossible.

Consider, for example, a case where a claimant has a potential concurrent claim under the Protection from Harassment Act 1997 which has not yet been issued in the High / County Court. The claimant may have undertaken much of the pre-action work required by the Pre-Action Protocol for Personal Injury Claims, having sent a letter of claim and draft particulars of claim, received a response from the proposed

defendant, obtained a medical report and completed pre-action disclosure. Concurrent proceedings might appear to be a more certain prospect in such circumstances. One could arguably distinguish that example from the facts that Pill LJ was confronted with in *Paymentshield* and contend that the *Mindimaxnox* factors have more force in justifying a stay, despite the absence of concurrent proceedings.

Philip Baggley

Singing in the rain

Beware of the dancing umbrella

For employers seeking to evade the full rigours of the employment legislation there are a number of options.

■ The first option is to employ people for less than 12 months so as to remove the entitlement to an unfair dismissal action in most cases. Of course the 52 weeks continuous service requirement has now been superseded by the two year qualifying period inserted from 6 April 2012: see SI 2012/989. The change does not apply retrospectively, only to those contracts where the period of continuous employment begins on or after that date. So if the employee started before 6 April 2012, they need to gain 1 year's service, after that they need 2 years. Adopting a global policy of keeping people on short-term contracts of course provides employers with a high degree of control in terms of flexibility but from a business perspective employers stand to lose in the following ways:

(a) They may lose employees who have become fast and effective at performing their roles by virtue of purposefully practising their skills;

(b) They may miss out on the opportunity of creating a learning organisation where employees of long-standing teach more junior employees and possibly move up the corporate ladder;

(c) They risk a deficit in morale owing to the high turnover of staff and low expectations on the part of their staff.

■ The second option is one that has been utilised by many employers for decades; to employ people on an ad-hoc or locum basis such that, if it comes to the crunch, one can argue that they are not employees at all because of a lack of mutuality of obligation. However, the EAT and the Court of Appeal have shown an increased willingness to water down the meaning of *'mutuality of obligation'* and to permit short bursts of 'mutuality' to be sufficient to evidence a relationship of employment.

The foundation for any consideration of what makes an "employee" is the well-known judgment of MacKenna J in *Ready Mixed Concrete v Minister of Pensions* [1968] 2 Q.B. 497, at 515 where his Lordship stated that a contract of service exists if:

"(i) 'The servant agrees that, in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master.

(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

(iii) The other provisions of the contract are consistent with its being a contract of service"

In addition to these features, as was outlined in *Carmichael v National Power* [2000] IRLR 43 HL, there must during the contract, be mutual obligations between the employer and employee. Ordinarily this will involve an obligation to provide work and an obligation to do work, exemplified by an employee who is contracted for a certain number of hours each week. That was not the situation in *Carmichael*, a case involving power station guides:

"The documents contained no provisions governing when, how, or with what frequency guide work would be offered; there were not provisions for notice of termination on either side; the sickness, holiday and pension arrangements for regular staff did not apply; neither did the grievance and disciplinary procedures. The objective inference is that when work was available they were free to undertake it or not as they chose...The arrangements turned on mutual convenience and goodwill."

In addition to the judgment of the House of Lords in *Carmichael*, there are other authorities from the Court of Appeal which outline the imperative of mutuality of obligation to an employment contract:

"The inescapable requirement concerning the alleged employees however....is that they must be subject to an obligation to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer. If not, then no question of any "umbrella" contract can arise at all, let alone its possible classification as a contract of employment or of service..." (Nethermere (St Neots) Ltd v. Gardner [1984] IRLR 240 per Kerr L.J.)

And of more recent vintage:

"In my judgment, two decisions of this court are authority, binding on us, for the proposition that no "contract of employment" within the definition [contained in the Act] (whether it be given the name global or umbrella or any other name) can exist in the absence of mutual obligations subsisting over the entire duration of the relevant period." (Clark v Oxfordshire Health Authority [1998] IRLR 125 (CA) per Sir Christopher Slade.)

An employer considering these decisions could be forgiven for thinking; "if I employ people on the basis that I have no obligation to offer them work and they have no obligation to accept, then there will be no mutuality of obligation and no employment contract." However, this line of thought is risky, for 3 reasons:

1. First, the courts will be astute to ensure that employers do not utilise sham agreements or arrangements to outwit the protections afforded to employees by legislation. The tribunal will look at the substance rather than the form. For the most obvious example of this principle in action, see *Autoclenz v Belcher* [2011] UKSC 41 and, even more recently, *Pulse Healthcare Ltd. v Carewatch* UKEAT/0123/12/BA. In the latter case the EAT was considering whether people on 'zero-hours contracts', providing round the clock care for a vulnerable patient, had the mutuality of obligation necessary for a contract of employment. The EAT found that the tribunal judge had been entitled to find that there was in place a global contract of employment. The judge had based his findings upon the fact that the contract did not reflect the reality of the situation. The contract was replete with references to *'employment'*. There were provisions as to deductions from salary, uniforms, leave, sickness, notice and pensions. On the facts it was apparent that, despite what the contract said, the employees had worked for a fixed number of hours over a number of years. The judge considered the way the work had been allocated and held "once the rota was prepared they were required to work and the employer was required to provide that work."

2. Secondly, there is ample authority for the proposition that, in the majority of cases, the decision of whether there is employment status is a question of fact for the employment tribunal and the higher courts

will not readily interfere with such a finding:

"...if the existence or otherwise of the relationship is dependent solely upon the true construction of a written document or documents, the question is treated by the court as being one of law, so that an appellate tribunal is free to reach its own conclusion on the question without any restriction arising from the decision of the tribunal below...But in the more ordinary case, where the determination of the question depends not only on reference to written documents but also on the factual circumstances in which the work is performed, a quite different situation arises...In such a case...the responsibility of determining and evaluating all the... evidence...is that of the tribunal in the first instance..." (Clark v Oxfordshire Health Authority [1998] IRLR 125 CA.")

Such dicta are likely to embolden an employment tribunal. It is to be expected that in a high number of cases a tribunal will say either:

(a) That the agreement between the parties is not simply reflected in written documents but in other exchanges and is therefore a question of fact; or

(b) That the written documentation does not reflect the reality of the position (possibly a sham).

3. The third reason that employing people on an ad-hoc basis is not necessarily the answer is that there are now a number of authorities where such situations have been held to involve "employment". For example, *St Ives v Haggerty* [2008] All ER (D) 317 (May) EAT and *Cornwall County Council v Prater* (2006) EWCA Civ 102.

Very recently the EAT has had occasion to consider the matter in *Quashie v Stringfellows Restaurants* [2012] IRLR 536. The case involved a lap dancer suing Stringfellows, which is an establishment where such ladies work (apparently). In a moment of judicial levity Judge McMullen QC cited with approval the earlier words of Mann J:

"The appeal has the by-product of enabling the judiciary to fill in some of the gaps in its knowledge demonstrated, but teasingly left, by Sutton v Hutchison."

However, the importance of the EAT's decision is that it is a further example of a case in which intermittent work was found to give rise to a contract of employment. However, before drawing any general conclusions, it is worth paying close attention to the facts. On the one hand the Judge was shown a club agreement which labelled the dancers "self-employed". However on the other side, it was (unsurprisingly) accepted that Miss Quashie had an obligation to provide her services personally. If dancers were directed to a customer they could not refuse. There was a rota which specified when dancers were supposed to attend and there were fines if they did not. In addition there were a set minimum number of occasions per month when the dancers were supposed to work.

The EAT found that there was sufficient evidence to show mutuality of obligation on each night when the dancer worked. The learned Judge cited Stephenson LJ in *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612:

"I cannot see why well-founded expectations of continuing home work should not be hardened or refined into enforceable contracts by regular giving and taking of work over periods of a year or more, and why outworkers should not thereby become employees under contracts of service like those doing similar work at the same rate in the factory."

And from the same case Dillon L.J.:

"I see no reason in law why the existence of a contract of service may not be inferred from a course of dealing, continued between the parties over several years..."

The EAT then found on the facts found in the tribunal below, that there was an expectation of further work on both sides, hence an umbrella contract joining up the intermittent periods of work, giving Miss Quashie the requisite length of service for an unfair dismissal claim.

Conclusions

What practical conclusions can be drawn from this plethora of authority? Well, if you are advising an employer as to how to regulate their relationships with ad-hoc or locum employees the advice might be as follows:

(a) Put the nature of the relationship in writing. Note that there is no mutuality of obligation and that the employer is not obliged to offer work and the employee is not obliged to accept it. However, realise that if that does not reflect the reality of the situation you could be vulnerable to a finding of employment by a tribunal;

(b) Put in place as many indicators of self-employment as possible. E.g. the self-employed person should if possible use their own transport, provide you with invoices for their work, use their own equipment and deal with their own tax affairs;

(c) Most importantly be aware that the longer you "employ" a particular person and the more regular their pattern of work, the greater is the danger that a tribunal will find that their self-employment has crystallised into employment.

David Chidgey

Discrimination claims and contributions from separate respondents

The EAT has decided that employment tribunals do not have jurisdiction to determine claims for contributions. The recent case of *Brennan v Sunderland City Council* involved an appeal from a local authority defending a discrimination claim. They were a contribution from trade unions that had been involved in negotiating an allegedly discriminatory collective agreement. The EAT agreed with the tribunal; that it did not have jurisdiction to entertain claims for contributions in this way.

The case also dealt with an interesting side issue regarding a disclosure point; the EAT held that that it was lawful for the employment tribunal, when ascertaining the correct figure for compensation payable to the Claimants, to order disclosure of the terms of a settlement agreement between them and the trade union. That maybe for another article though.

Background

Claims for contributions are uncommon within discrimination cases, although claims against more than one respondent are not. The reasons for their rarity maybe two-fold; first, although many claimants seek to assert joint liability against employers and one or more employee, employers do not think generally think that it is worth asking for a contribution from the employee because their pockets are inevitably shallower than their own. Secondly, in recent years the tribunals have developed the practice of apportioning liability between respondents. In *Brennan v Sunderland City Council* [2009] ICR 479, the EAT confirmed that, although this practice was deemed to have derived from the Civil Liability (Contribution) Act 1978 ("1978 Act"), this was wrong because the Act does not have any application within such litigation. The Act confers a right upon a party liable for damage to make a claim for a contribution from another person that may also be responsible for the same damage, regardless of whether the claimant made a claim against that other person in the first instance.

In *London Borough of Hackney v Sivanandan* [2011] IRLR 740 and [2011] ICR 1374 the EAT disapproved the Tribunal's practice of apportioning liability and therefore the topic of contribution was thrown into sharper focus.

Brennan

In Brennan, the EAT had two questions to grapple with:

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Call 2009

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Call 2011

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Call 2011

Does the true construction of the 1978 Act confer a right to contribution in the case of claims for discrimination in the employment field?;

If so, does the employment tribunal have jurisdiction to determine such claims?

The EAT found that the Act only confers a right; it does not define jurisdiction. For this reason, it was important to examine the actual jurisdiction of the employment tribunals, which is statute based. Section 63 of the Sex Discrimination Act 1975 was very clear in its description of that jurisdiction; the tribunal only has jurisdiction to deal with claims made by a claimant for acts of discrimination/harassment against a respondent. An action under section 1 (1) of the 1978 Act would be a claim made by a respondent against another person. In *Brennan*, the Appellant submitted that, once the tribunal accepted jurisdiction for the primary discrimination claim, jurisdiction would flow from it to enable a determination on the issue of the contribution claim. The EAT found that that argument was wrong for three reasons (see para 19 of judgment):

1. It was contrary to the plain wording of the statute;

2. Within employment law, any contribution claim would be ancillary to the main discrimination claim; however, in the normal courts, contribution claims under the 1978 Act can stand alone;

3. If Parliament intended employment tribunals to have such jurisdiction, it would have been provided for it within the primary legislation. The Limitation Act 1980 provides a special limitation scheme for contribution claims. This cannot be applied to discrimination cases in employment tribunals.

The EAT concluded that neither the SDA 1975 nor the 1978 Act provided the tribunal with jurisdiction to hear claims for contributions. Given this finding, the EAT did not determine whether the 1978 Act applied to discrimination claims in the employment field in other jurisdictions. In their obiter comments (after hearing full submissions) the EAT felt that the Act was only meant to apply to claims falling to be determined by the County and High Courts. They expressed that view having considered the wording used by legislators (e.g. the use of the words "action" and "courts") and the legislative history of the Act, since it arose out of the common law of tort.

Conclusions

The position in respect of the 1978 Act is now clear. We are unlikely to see contribution claims at all in the tribunal, since the relevant provisions of the SDA considered in *Brennan* are now mirrored in the Equality Act.

Where an employer is vicariously liable for its employee's discriminatory acts, however, will he or she ever have to dip in to their own pockets? *Sivanadan* suggested that one of the reasons for not apportioning awards in such cases was the existence of the 1978 Act and the apparent ability of one to seek a contribution against the other. With that rug now pulled, at least within the same tribunal litigation, will the EAT return to the issue? There remain the circumstances where such awards are still possible under *Baker v Corus* [2006] 2 AC 572 and in the *Sivanadan* exception (where the same, indivisible damage is not being claimed against both), but whether the issue could be broadened back to the old *Way v Crouch* [2005] ICR 1362 position remains to be seen.

Emily Brazenall