



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Anna Deksne

v

(1) Ambitions Limited; and
(2) Gerrard Grundy

Heard at: Norwich

On: 10 July 2023

Before: Employment Judge M Warren

Appearances

For the Claimant: In person, assisted by her Son

For the Respondent: Mr Ashley, Counsel

Interpreter: Mrs Nalivaiko, Latvian Speaking

RESERVED JUDGMENT AT A PUBLIC PRELIMINARY HEARING

The Claimant's complaints in respect of holiday pay and failure to provide itemised pay statements for her employment up until 18 August 2021, are struck out on the grounds that such complaints are subject to cause of action estoppel.

REASONS

Background

1. Ms Deksne had been employed by the Respondent as a Food Packer since 15 February 2017. She resigned her employment by giving notice on 26 May 2022, her notice expiring and her employment terminating on 23 June 2022. After Early Conciliation between 20 and 22 June 2022, she issued these proceedings on 1 July 2022, claiming unfair dismissal, race discrimination, sex discrimination, discrimination on the grounds of religion and belief, unpaid wages and "other payments". A list of what Ms Deksne claims by way of, "other" appears in the appropriate box at 8.1 of her ET1.
2. Ms Deksne had previously issued Employment Tribunal proceedings against the Respondent, under Case Number: 3315210/2021. Those proceedings were issued on 18 August 2021 and determined after a Final

Hearing before Employment Judge King, on 24 May 2022. The complaint of unfair dismissal was struck out for want of jurisdiction, (she had acknowledged she was still employed at that time). Her complaints of holiday pay failed in some respects being dismissed as not well founded and in other respects, struck out as being out of time. EJ King identified a claim in relation to itemised pay statements, which she found to be not well founded and which she therefore dismissed. The conclusion of EJ King's Judgment states at paragraph 5,

"There are no other complaints the Claimant brings which the Tribunal has jurisdiction to hear".

3. These proceedings are resisted. The Grounds of Resistance submit that elements of the claim should be struck out as amounting to an abuse of process, having already been brought before the Tribunal in the earlier proceedings. In other respects, it is argued that they should be struck out on the grounds that the Tribunal has no jurisdiction. In respect of the discrimination, unfair dismissal, arrears of pay and "other payments" aspects to the claim, the Respondent seeks further and better particulars.
4. Today's Preliminary Hearing was listed to determine whether any of Ms Deksne's claims should be struck out and thereafter, for further Case Management. Ms Deksne was ordered to provide further and better particulars of her complaints of discrimination relating to the protected characteristics of sex, race, religion or belief, whether that be by way of harassment, direct discrimination, victimisation or indirect discrimination. Because she had ticked the box at 10.1 of the ET1, (information to regulators in protected disclosure cases) she was further ordered to provide further and better particulars of her whistle blowing claim.
5. The further information was to be supplied by 28 May 2023. By email dated 27 April 2023, Ms Deksne attached 10 documents and wrote,

"Please investigate the discriminatory letter sent by the Respondent Mr Grundy against the Claimant."
6. A letter was written on my instructions on 13 June 2023, requiring Ms Deksne to provide the information ordered, using her own words and not by copying documents. She was to do that by 27 June 2023. On 26 June 2023, Ms Deksne sent to the Tribunal a document purporting to set out in writing her answer to the order for further and better particulars. Unfortunately, this was not printed out by the Tribunal staff and placed on the file. I note that the Case Number given on the document handed up to me is wrong (33091/2022 instead of 3309011/ 2022). I accept Ms Deksne submitted the document.
7. On 13 June 2022, Ms Deksne wrote to the Tribunal to request that the Latvian interpreter appointed for her should not be Mrs Nalivaiko, the interpreter who had been appointed in the hearing of her case before EJ King.

8. Finally by way of background, I should note that Ms Deksne has appealed against the Judgment of EJ King. The Respondent's Solicitors were able to provide me with information in that regard by way of a copy of the Notice of Appeal and the correspondence received from the Employment Appeal Tribunal, from which I can see that a Preliminary Hearing has been listed for 15 November 2023, limited to the issue of whether or not EJ King had erred in applying the three month time limit for breaks in holiday payments pursuant to Bear Scotland Limited. In all other respects, it appears Ms Deksne's Appeal has been dismissed.

Issues with the Interpreter

9. As I have noted, Ms Deksne had written to the Tribunal to specifically request that the Latvian Interpreter appointed for today should not be Mrs Nalivaiko. It is very unfortunate that Mrs Nalivaiko was indeed the Interpreter appointed for today. Ms Deksne made her objections very clear to the Tribunal Clerk outside the Tribunal room, when she saw Mrs Nalivaiko was to be our Interpreter.
10. At the start of the Hearing, I explained to Ms Deksne that Mrs Nalivaiko was the only Interpreter available to me today and I suggested that I should ask her to interpret for me and that we see how we get on. Ms Deksne agreed.
11. Through Mrs Nalivaiko, Ms Deksne explained that her objections to Mrs Nalivaiko were that at the previous hearing before EJ King:
 - 11.1 Ms Deksne had made reference to a document about holidays, Mrs Nalivaiko had told the Judge that Ms Deksne had the document, but she did not.
 - 11.2 Mrs Nalivaiko had told the Judge that Ms Deksne had an Employment Contract, but she did not.
 - 11.3 EJ King had said in her decision that even with the Interpreter's help, Ms Deksne had not been able to explain herself.
 - 11.4 Mrs Nalivaiko had concurred with the Judge's adverse opinion.
12. I noted that in Ms Deksne's Notice of Appeal to the Employment Appeal Tribunal, she did not raised any issue with regard to the Interpreter. Ms Deksne agreed.
13. In identifying the above points with Ms Deksne, I ought to record that she had a great deal to say about why she felt that the outcome of her case before EJ King was wrong and unfair.

14. Ms Deksne agreed with my suggestion that the main purpose of today's hearing was to try and identify and understand what her case is about and that we should use Mrs Nalivaiko as an Interpreter for today.
15. I do, however, record that it would not be appropriate, it would not be in accordance with the overriding objective, for Mrs Nalivaiko to be appointed again as an Interpreter in this case. Indeed, Mrs Nalivaiko has herself specifically requested she not be allocated to this case again. I have done my best to make it clear to the Administration that Mrs Nalivaiko should not again be appointed as a Latvian Interpreter for Ms Deksne on this case.

Ms Deksne cannot raise in this case the same issues that were raised in her last case

16. I explained to Ms Deksne that she cannot raise in this case, issues that were raised in the previous case before EJ King. If she is unhappy with the outcome of her case before EJ King, the way for her to deal with that is by way of an Appeal, which is what she has done. That is dealt with by the Employment Appeal Tribunal.
17. I explained that what she cannot do is have another go at making the same points all over again in this new case.
18. It means also potentially, she may not be able to raise in this case issues which she ought to have raised in the previous case.
19. Separating out and identifying what was raised last time, what ought to have been raised last time and what is raised this time, would be a lengthy exercise and we ran out of time in this three hour hearing. I indicated to the parties that I would give a reserved decision as to whether any of the claims brought in these proceedings should be excluded because they were, or ought reasonably to have been, raised in the previous proceedings. I indicated that I would also go through the documents supplied by Ms Deksne today and do my best to identify the issues in this case. I explained that she, (and indeed the Respondent) will have the opportunity of correcting any omissions, errors or misunderstandings at a further Public Preliminary Hearing, (which need not necessarily be before me).

Law relating to Estoppel

Cause of Action Estoppel

20. Cause of action estoppel prevents a party from pursuing a cause of action that has been dealt with in earlier proceedings. The principle is, that it is in the public interest that there be finality in litigation. For this to apply, there has to have been a judicial determination, a decision, on the matter. Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence

of a cause of action. See Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd 2014 AC 160 SC.

Issue Estoppel

21. This prevents a party from reopening an issue that has already been decided in earlier proceedings involving the same parties.
22. Where a tribunal has made a finding of fact which is necessary to establish a cause of action before the tribunal, a party cannot call that fact into question in later proceedings. If the finding of fact is not necessary, but is only relevant to, the cause of action, there is no issue estoppel. Lord Keith said in Arnold v National Westminster Bank Plc (No 1) 1991 2 AC 93, SC:

“Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving different cause of action to which the same is relevant, one of the parties seeks to reopen that issue “

23. Lord Keith said in Arnold that unlike with cause of action estoppel, with issue estoppel there may be exceptions in special circumstances where further material has become available relevant to the correct determination of the point in the earlier proceedings, whether or not that point was specifically raised and decided, if it was material which could not by reasonable diligence have been adduced in those proceedings. Lord Sumption in Virgin Atlantic described that exception as, “...special circumstances where this would cause injustice”.

Abuse of Process - The Rule in Henderson v Henderson

24. The rule in Henderson v Henderson [1843] 3 Hare 100, reformulated by the House of Lords, (as was) in Johnson v Gore Wood and Co [2002] 2 AC 1 HL in essence provides that if a party fails to raise an issue in one set of proceedings that could have been raised, he or she may be estopped from raising that issue in the future, if to do so would amount to an abuse of process. The rule is discretionary, there has to be analysis of whether what is proposed as a claim or an issue, amounts to an abuse of process.
25. To deny a claimant the opportunity to argue a case or a point that has not been previously adjudicated is on the face of it a breach of Article 6 of the European Convention on Human Rights and so these principles should only be invoked where it is, (per Lord Millett in Johnson) necessary, “to protect the process of the court from abuse and the defendant from oppression”. There is no presumption that successive actions should not be brought.
26. Lord Bingham said in Johnson that there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust

harassment of a party. He said it would be too dogmatic to hold that because a matter could have been raised in earlier proceedings, it should have been, so as to render it abusive to raise it in later proceedings, “...*the crucial question is whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before*”.

27. The question is, not just, “could” but also, “should” the claim have been raised in the earlier proceedings. A broad, merits-based, approach is required in determining whether what is proposed is an abuse of process, (see Parker v Northumbrian Water Limited 2011 ICR 1172, EAT).
28. This is not a matter of discretion; there is a right and a wrong answer, (see Foster v Bon Groundwork Limited 2012 ICR 1027, CA).
29. It may be an abuse of process to fail to raise a matter that one could have raised by way of amendment in respect of something that happened after the issue of the original proceedings, see London Borough of Haringey v O'Brien EAT 0004/16.

Papers before me today

30. It is important that I record the papers which I had before me today.
31. I had a paginated Bundle of documents running to page number 91, containing the relevant papers on this case. The Respondent’s Solicitors had helpfully added copies of the Judgment of EJ King from 24 May 2022 and her Written Reasons, sent to the parties on 29 November 2022.
32. During the course of the hearing, I was provided with the following documents by Ms Deksne which were not included in the Respondent’s Bundle, copies of which were provided to the Respondent during the course of the Hearing:
 - 32.1 A document running to four pages headed with the incorrect Case Number, “33091/2022” which I identified as the further and better particulars provided by Ms Deksne in her email to the Tribunal of 26 June 2023;
 - 32.2 A document dated 26 May 2022 with a heading, “Application” which Ms Deksne told me was her letter of resignation;
 - 32.3 A document dated 29 May 2022 with a heading, “An Hand Over False Documents” which Ms Deksne told me she provided to the Respondent as a further explanation of what she was complaining about when they wrote to her treating her letter of resignation as a grievance;
 - 32.4 A further undated document with a heading, “Explanation of Complaint” which ends,

“5.1 Account Manager G. Grundy”

When I queried this with Ms Deksne she told me that there were no pages missing, this is how the document ended and it is a further explanation to the Respondent of what she was complaining about when she resigned. The date of the document is uncertain.

33. Ms Deksne referred to these latter three documents in response to my inquiring of her as to the reason for her resignation.

The Claims and Issues before Employment Judge King on Case Number: 3314210/2021 and whether Ms Deksne should not be permitted to pursue any such claims in these proceedings

34. Turning first of all to the Judgment of EJ King:
- 34.1 Although the claim for unfair dismissal in those proceedings was struck out, that was because at that time Ms Deksne was still employed by the Respondent. There is no bar to Ms Deksne pursuing a claim of unfair dismissal in these proceedings following her subsequent resignation.
- 34.2 Ms Deksne’s claim for holiday pay in July and August 2021 was dismissed. Any claim for holiday pay during that period in these proceedings may not be considered. Such a claim is excluded by reason of cause of action estoppel.
- 34.3 Ms Deksne’s claim for holiday pay in December 2020 and before that, were struck out as being out of time. Any such claim may not be pursued in these proceedings, again by reason of cause of action estoppel. It is this claim which is due to be considered by the Employment Appeal Tribunal in November. If Ms Deksne’s Appeal is successful, the claim in this respect under Case Number: 3314210/2021 will be remitted to EJ King or, depending on the direction of the Employment Appeal Tribunal, to another Employment Judge selected by the Regional Employment Judge.
- 34.4 Ms Deksne’s claims of breach of the requirement to provide an itemised pay statement were dismissed. No such claim may be pursued in these proceedings, they are excluded by reason of cause of action estoppel.
- 34.5 The final paragraph in Employment Judge King’s Judgment states that there are no other complaints Ms Deksne brings which the Tribunal has jurisdiction to hear. I take this as a reference to claims Ms Deksne may have sought to advance that are not as a matter of law, within the jurisdiction of the Employment Tribunal. The Tribunal did not have jurisdiction to consider such claims in Case Number: 3314210/2021 and would not have jurisdiction to consider such claims in these proceedings.

35. It is necessary to consider in further detail, the reasons handed down by EJ King in November 2022:
- 35.1 At paragraph 8, she made it clear that the Tribunal could not consider any claim for accrued but untaken holiday pay as Ms Deksne's employment had not at that time been terminated. Any claim in these proceedings for payment in respect of accrued but untaken holiday at the date of termination of employment, may be pursued. It is not clear whether Ms Deksne intends to make any such claim.
- 35.2 At paragraph 9 of her Reasons, EJ King refers to exploring, "*the claim for discrimination*". It is clear then, that Ms Deksne sought to advance a claim for discrimination in Case Number: 3314210/2021. EJ King clearly explored this with Ms Deksne and recorded that Ms Deksne was unable to identify a protected characteristic upon which she relied, stating that, "*she had been treated like a dog*". From this I established that Ms Deksne had an opportunity to advance claims of discrimination dating back to the issue of those original proceedings on 18 August 2021 and further, by way of amendment from that date through to the Final Hearing on 24 May 2022.
- 35.3 It is clear from EJ King's Reasons, paragraphs 24 through to 30, that she explored with Ms Deksne what her complaints about holiday pay were in detail and the outcome of those discussions is reflected in the Judgment referred to above. From this I established that Ms Deksne had every opportunity before EJ King to articulate what complaints about lack of holiday pay she wished to make in respect of the period of her employment up to the issue of those earlier proceedings on 18 August 2021 and thereafter, by way of amendment up until the Final Hearing on 24 May 2022. In this respect, she had referred to ten letters she had sent the Respondent over two years attempting to resolve her holiday pay concerns.
- 35.4 I see at paragraph 32 of EJ King's Reasons, that she explored with Ms Deksne her concerns about fraudulent payslips, ID and employee numbers. No justiciable claims were identified.
36. When asked to provide further and better particulars of her discrimination claim, (and whistle blowing) Ms Deksne attached to her email of 27 April 2023:
- 36.1 Letter from Mr Grundy dated 10 March 2020;
- 36.2 Hand written letter by Ms Deksne dated February 2021;
- 36.3 Typed note referring to ID, Payroll and time clock card register, undated;
- 36.4 Letter from Mr Grundy dated 5 March 2020;

- 36.5 Minutes of a Grievance Meeting held on 25 March 2021;
 - 36.6 Minutes of a meeting held following the Grievance Meeting on 25 March 2021;
 - 36.7 Letter, Mr Grundy to Ms Deksne dated 1 April 2021;
 - 36.8 Letter, Mr Grundy to Ms Deksne dated 15 April 2021;
 - 36.9 Schedule of holiday pay, 6 September 2019 to 28 August 2020;
 - 36.10 Letter, Ms Mason (HR Manager) dated 21 April 2021;
 - 36.11 Letter, Mr Grundy dated 11 May 2021;
 - 36.12 Letter, Mr Grundy dated 16 August 2021;
 - 36.13 Letter, Mr Grundy dated 18 August 2021; and
 - 36.14 Letter, Mr Grundy dated 20 August 2021.
37. I take into account that English is not Ms Deksne's first language. I also note that she completed claim forms online without assistance from anybody else, that she had corresponded with the Tribunal without assistance from anybody else and that amongst the above mentioned documents, is a hand written letter in English by her. She is able to understand what is asked of her in writing and is able to formulate a written response in English.
38. I note that the above mentioned letters from Mr Grundy dated 5 March and 10 March are incorrectly dated 2020, clearly from their content they should be dated 2021.
39. Much, (although not all) of the correspondence and the Grievance appear to relate to holiday pay, payslips and clock cards. These are all matters that were dealt with by EJ King and include reference to a Disciplinary Hearing on 20 August 2021 arising out of Ms Deksne allegedly taking unauthorised leave when her request for leave had been refused.
40. I find that these relate to matters that were before EJ King and insofar as they relate to holiday pay and non-itemised pay statements, they are excluded from the present proceedings by reason of cause of action estoppel.
41. Insofar as the content of these documents may purport to form the basis of a complaint of discrimination arising either before the issue of the first set of proceedings on 18 August 2021, or during the course of those proceedings up to their final determination on 24 May 2022, the question may arise as to whether attempting to bring such claims amount to an abuse of process because such claims should have been brought in the

original proceedings, either upon issue or subsequently by way of amendment.

42. The same may be said of the matters raised in the further and better particulars document sent to Tribunal by Ms Deksne on 26 June 2023.
43. Mr Ashley's sensible submissions in this regard were that, as at the point when we were running out of time in this Hearing, we had still not got to the point where we could understand what Ms Deksne's claims were and until one understood that, one could not properly consider the issue of estoppel or abuse of process. The Respondent was anxious to avoid further satellite litigation.
44. Mr Ashley is right to say that we did not reach the point where we could understand what Ms Deksne's discrimination complaints were. I had hoped that after the Hearing and given time to prepare this Hearing Summary, when I could consider the correspondence provided by Ms Deksne and her further and better particulars document of 26 June 2023, I might "at my leisure" be able to identify the allegations of discrimination. Alas, not so. I am afraid that they largely remain incomprehensible to me and will require further exploration and clarification by the Employment Judge that hears this case at the next Public Preliminary Hearing.

Claimant's complaint of constructive unfair dismissal

45. As I have explained above, Ms Deksne referred me to three documents which she said set out her reasons for resignation and which I therefore take as setting out allegations by her of conduct which might be said to amount to a breach of the implied term requiring an employer to behave in such a way so as to maintain mutual trust and confidence. Doing the best that I can, (for these documents are similarly difficult to comprehend) they appear to rely upon the following:
 - 45.1 Not being provided with a written contract of employment;
 - 45.2 Being issued with a fake ID for payroll;
 - 45.3 Being issued with a fake employee number;
 - 45.4 Not being provided with confirmation in writing of changes to employment terms and conditions;
 - 45.5 Delayed and inaccurate P60 including a false employee number;
 - 45.6 Provision of false, incorrect, incomprehensible payslips with fake employee number;
 - 45.7 Issuing a Food Safety Certificate on 15 February 2017;
 - 45.8 Not being provided with full holidays for five years [Ms Deksne will have to explain this further, is she complaining about not being paid correctly for holiday pay? In that respect, the Tribunal has already

made a determination, or does she mean that she was not permitted to take sufficient holidays?];

45.9 Not increasing her hourly rate for five years;

45.10 Making alterations to her time sheets; and

45.11 I am not sure what is meant by Ms Deksne's reference to not being allowed to tell her co-workers, "*about the shock that was caused by Ambitions*". She will have to explain at the next Hearing.

46. Reading the second two documents provided, "*Explanation of Complaint*" and, "*An Hand Over False Documents*", I found these hard to understand but they appeared to amount to the provision of further information in relation to the key allegations which I have just listed.

47. If there are further allegations about the behaviour of the Respondent that are set out in the documents provided and which I have overlooked, Ms Deksne will be able to explain that to the Employment Judge at the next Preliminary Hearing.

Whistle blowing

48. From the documents provided by Ms Deksne, she does not appear to be seeking to advance a claim that she was either constructively dismissed or otherwise subject to bad treatment because she had blown the whistle. If I am wrong about that, she will need to explain to the Employment Judge at the next Preliminary Hearing what the whistleblowing by her was and what specifically the bad treatment of her was, she says, because she had blown the whistle.

Listing further Hearings

49. I have listed this case for a further Public Preliminary Hearing, in person, at the Norwich Employment Tribunal, with a time estimate of three hours on **16 October 2023**. The purpose of that Hearing shall firstly, be to identify the issues in this case and then secondly, consider whether any of the Claimant's claims should be struck out either by reason of issue estoppel, abuse of process or on the grounds that they have no reasonable prospects of success. The Tribunal may further consider whether a Deposit Order should be made in respect of any of the claims.

50. It would be helpful if the Respondent would please prepare a further bundle for that Hearing which includes the additional documents referred to above produced by the Claimant during the course of this Hearing, copies of which were provided to Mr Ashley as we proceeded.

51. In order to ensure there is no further delay in the Final Hearing, I arranged with the Listing Team for the case to be listed for its Final Hearing over the course of five days, in person at the Norwich Employment Tribunal on **8 -**

12 January 2024. Case Management Orders in respect of the same will have to be made at the next Preliminary Hearing.

52. For both Hearings, a Latvian Interpreter will be required. That Interpreter must not be Mrs Nalivaiko.

Employment Judge M Warren

Date: 30 August 2023

Sent to the parties on:5 September 2023

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For the Tribunal Office