EMPLOYMENT TRIBUNAL OF GIBRALTAR

Case No. 9 of 2017

Fiona Yates (Claimant)

v

Administrator of GDC (Insolvency Fund) (Respondent)

JUDGMENT

FACTUAL BASIS

1. The Claimant stated that she worked for Bentley Property Services Limited ("BPS") from 1st May 2001 as an Administration Officer. This was set out in the Notice of Terms of Engagement, which though undated was clearly received by the Employment Service on 31st May 2001.

2. The Claimant stated that BPS provided services to other companies owned by the same beneficial owner (who was referred to as being Evgeny Cherepakhov) ("the Beneficial Owner").

3. During early 2014, discussions were held regarding the outsourcing of the accounting/book-keeping/administrative functions undertaken by BPS (for which the Claimant worked) to another company, which would also be owned by the Beneficial Owner.

4. The Claimant informed the Beneficial Owner that she and another employee (Priya Vaswani) could handle this work. However, as neither she nor Priya Vaswani were qualified accountants, the Claimant said that she informed the Beneficial Owner that a qualified accountant would be required to "assist, supervise and obviously to sign the accounts ...". It was agreed by the Beneficial Owner that he would employ someone and also pay for any further courses to increase the Claimant's expertise.

4.1 On the basis of these assurances the Claimant states that she agreed to the transfer.

5. In or around March 2014 the Claimant was told that Daniel Wahnon, a qualified Accountant, would join the new company as its Managing Director. The new company was called Axiom Limited ("Axiom").

6. A Termination of Employment Form was signed by the Claimant and BPS on 31st March 2014 (received and stamped by the Employment Service on 10th April 2014) which, rather than highlighting the transfer of her employment, stated that the reason for the termination was "Career Progress".

7. A Notice of Terms of Engagement Form was then signed with Axiom on 1st April 2014 (received and stamped by the Employment Service on 1st April 2014) which also made no mention of the transfer of employment.

8. An open letter (referred to within its body as being a Letter of Undertaking) dated 1st April 2014 ("the Letter of Undertaking") was signed by both Paul Collado (a Director of BPS) and by Daniel Wahnon (a Director of Axiom) which said that if Axiom did not succeed "they will both be offered continued employment with the same conditions presently enjoyed with their former employer BPS [sic]".

   and

   "Should either of them for any reason whatsoever be due any redundancy payment, this will be apportioned and paid based on the time spent on each company".

8.1 It is noted that the Letter of Undertaking does not seem to be addressed to anyone in particular and is drafted in third party terms.

9. The transfer took place and there was a physical move to another office, on the same floor, of the same building they had been working from previously.

10. According to the Claimant rows broke out between the Beneficial Owner and Paul Collado (BPS's Director) which resulted in Paul Collado leaving BPS.

11. From the moment Paul Collado left, according to the Claimant, the Beneficial Owner took control of the operation and for reasons not explained, Daniel Wahnon left Axiom as an employee, but seems to have continued being its Director.

12. The Complainant said that she sought the advice of the Employment Service and was advised around December 2014/January 2015 to resign from Axiom and then try to enforce the Letter of Undertaking. The intention of this advice being presumably, to test the value of the Letter of Undertaking in enabling her to be re-employed by BPS. The Complainant explained that she felt that her position was becoming extremely tenuous and untenable within Axiom.

13. The Complainant said that the Beneficial Owner had in the meantime, started employing new people into another company called Bentley Estates, which included a new bookkeeper, which seemed to directly replicate and threaten her job.

14. In early 2015 the Beneficial Owner indicated to the Claimant that he was winding-down Axiom and also advised (per the Claimant) that "whether or not he offered me a job with Bentley Estates was his prerogative and that he wanted new people with fresh ideas".

15. The Claimant said that she was asked by the Beneficial Owner to induct the new bookkeeper into Bentley Estates, which she refused to do as this was presumably tantamount to a hand-over of her work. The Beneficial Owner then allegedly advised the Claimant that "Axiom didn't have any money to pay for it [redundancy]" "he said that I could get the payment from the Employer's Insolvency Fund or sue Daniel of BPS". The Beneficial Owner allegedly told the Claimant that if "I sued BPS, he would dry up that company up so that I wouldn't get a penny from him".

16. On 27th February 2015 Daniel Wahnon gave the Complainant one month's notice, as the company (Axiom) "was going insolvent". A Termination Form was prepared dated 31st March 2015 which whilst signed by Daniel Wahnon as Director of Axiom was not signed by the Claimant because she said she did not receive her redundancy payment.

17. On the same day as the Termination Form was prepared (31st March 2015), the Complainant made her application for payment out of the Employer's Insolvency Fund.

18. There was no response from the Employer's Insolvency Fund until 3rd March 2017 when the Administrator communicated her refusal.

19. The delay by the Employer's Insolvency Fund in dealing with the matter, it seems, was due to the fact that no Administrator had been appointed by the Government of Gibraltar and there was no one else within the Employer's Insolvency Fund organisation willing, or able, to deal with the matter. Deborah Garcia was appointed the Administrator of the Employer's Insolvency Fund on 26th November 2016.

THE APPLICATION

20. The application (or Complaint) to the Employment Tribunal is made pursuant to Regulation 14 of the Gibraltar Development Corporation (Employer's Insolvency) Regulations which states:

"14(1) A worker who has made an application under regulation 10 and who is aggrieved by the decision of the Administrator thereon, or by the failure of the Administrator to communicate a decision to him, may present a complaint to the Employment Tribunal –

(a) that the Administrator has failed to make any payment to the worker or into an occupational pension scheme, as the case may be; or

(b) that the amount paid by the Administrator is less than the amount that should have been paid; or

(c) that no decision has been communicated to him although more than 3 months have elapsed since the application was made.

(1A) A worker may also present a complaint to the Employment Tribunal where –

(a) the Administrator has refused an application pursuant to Regulation 13A; or

(b) the Administrator has erred in determining that the worker falls outside the scope of these Regulations by virtue of regulation 18(b);

(2) A complaint under regulation (1) shall be presented –

(a) where the decision of the Administrator has been communicated to the worker, within three months of such communication or such further time as the Employment Tribunal may allow;

(b) where no decision has been communicated to the worker, at any time not being less than three months, no more than six months after the date when the application was made.

(3) Where the Employment Tribunal finds that the worker is entitled to receive a payment from the Fund or to the benefit of a payment into an occupational pension scheme, or to a larger payment than the Administrator has determined, it shall make a declaration to that effect, specifying the amount to be paid and the period to which it relates.

(3)(A) Where the Employment Tribunal finds that the Administrator erred in holding that regulation 18(b) applied to that worker, the Employment Tribunal shall direct the Administrator to consider the application under the Regulation 18(a).

(4) The decision of the Employment Tribunal shall be communicated to the worker as soon as practicable".

ISSUES

There are a number of issues affecting both this application and its determination.

The first issue is whether there a valid Transfer of Employment from BPS to Axiom?

21. The documents provided in evidence to show a valid Transfer were:-

(A) **Termination of Employment Form (from BPS) signed on 31st March.**

21.1 This document makes no mention of the transfer or of any accrued rights. There is a fixed date of termination on the Form being 31st March 2014. The Tribunal notes that this is disputed by the Claimant.

21.2 In addition, the reason given for the termination is not by virtue of a transfer of undertaking but rather for "career progress".

(B) **Notice of Terms of Engagement (to Axiom) dated 1st April 2014.**

21.3 This document states that the Claimant's employment began on 1st April 2014 and not from the date of the original employment.

(C) **Letter of Undertaking dated 1st April 2014.**

21.4 This document clearly indicates that what was supposed to be happening, was a transfer of employment/undertaking from BPS to Axiom. The letter clearly says:-

"Here are the following requirements to be moved from Bentley Services Limited to Axiom".

Fiona Yates

- 13 years of service with BPS
- 2 years of service with Craig Wines Limited (same owner as Bentley)
- Insurance on critical illness cover"

21.5 The Claimant has argued, that it is the "act" of transfer rather than the completed forms that was important. It was submitted that notwithstanding the content of the Notices of Termination and Engagement, what was "actually happening on the ground made it a transfer".

21.6 The Claimant referred to a number of cases, Claude Rotsart de Hertaingj v Benoidt SA in Liquidation and IGC Housing Services SA [1997] 1CMLR329 as authority for the submission that, a transfer from one undertaking to another will constitute a transfer notwithstanding a refusal to accept the obligation by the Transferee. "1. Article 3 of Directive 77/187 is to be interpreted as meaning that all employment contracts existing on the date of the transfer and concerning staff employed in the undertaking transferred are, by virtue of the transfer, transferred from the transferor to the transferee without any option on the part of the transferor or the transferee. 2. The staff are automatically transferred regardless of the refusal of the Transferee to comply with his obligations. They are transferred on the date of the transfer of the undertaking ..."

Allen and others v Amalgamated Construction Company Limited [2001] ICR 436 which lay down the principle that the Directive applies to a transfer between two subsidiary companies in the same group, even if the companies had the same ownership, management and premises and were engaged in the same work.

"...if the other conditions it lays down are also met and it can therefore apply, wherever there was any change in the transfer between two subsidiary companies in the same group which are distinct legal persons each with specific employment relationships with their employees. The fact that the companies in question not only have the same ownership but also the same management and the same premises and that they are engaged in the same works makes no difference in this regard ..."

21.7 These Regulations only apply to a relevant transfer under Section 78 of the Employment Act which is a transfer from one person to another of an undertaking or part of an undertaking situated immediately before the transfer in Gibraltar or a part of one:-

"78B (1) This Part applies to a transfer of an undertaking or business situated immediately before the transfer in Gibraltar to another person where there is a transfer of an economic entity which retains its identity.

(2) In this section "economic activity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

21.8 Waite J in Cook v Kingston-Upon-Hull City Council EAT 6601 83 said:

"a Tribunal should consider two questions, namely:

(1) was there a transfer of anything and, if so, of what?
(2) If there was any such transfer, then having regard to its subject matter, was it a relevant transfer for the purpose of the Regulations?"

21.9 What is a transfer of a business as a going concern, is a question of fact. A whole bookkeeping section being moved from one entity to another constitutes a transfer of something. The substance of this transfer is that this activity can no longer be undertaken by the Transferor, as it has been transferred whole from the Transferor to the Transferee. The transfer of bookkeeping staff and services from BPS to Axiom is clear. These were the same people undertaking the same activity in Axiom, as they did for BPS.

21.10 One accepts that the intention of the transfer was also to attract "new business", however, the fact is that Axiom (and the employees being moved) was still doing the same activity, for the same client, within the same organisation and within the same building.

21.11 The Tribunal accepts that the transfer of a group of people within one business (BPS) to another (Axiom) which undertakes the same activity, within the same building, together with their resources, equipment, files etc. satisfies this factor.

21.12 I am, therefore, satisfied that (fortified also by the Letter of Undertaking and other evidence adduced) the intention was to transfer the employment and all of the book-keeping/administration activities and relevant resources from BPS to Axiom. Therefore, the transfer constitutes a "transfer of undertaking", ... to another person where there is a transfer of an economic activity which retains its identity pursuant to Section 78B of the Employment Act.

21.13 The failure to properly and "officially" document the transfer is the liability of the Employer. The Tribunal believes the Claimant's assertions and also accepts that she would only have signed both the Termination and the Engagement Forms on the basis of the assurances she received. I am also comforted by the Letter of Undertaking signed by both Directors of Axiom and BPS which shows evidentially what was actually happening, even if it was not being properly reflected in other documents.

21.14 The object of this legislation "is to ensure that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor" (see Landsorginisationen i Danmark v N y Molle Kro (Case 287/86)[1989] ICR 330, 338. para 12) [also see Allen and Others].

21.15 In addition, one cannot contract out of Part VIB (viz Section 78):-

> "Any provision of any agreement (<u>whether a contract of employment or not</u>) shall be void insofar as it purports to exclude or limit the operation of Section 78C, 78F or 78K or to preclude any person from presenting an Originating Application to the secretary of the Employment Tribunal".

21.16 However, whilst the Tribunal is satisfied on this point, the matter does not end here given further complications that exist and which I will deal with later.

21.17 The Letter of Undertaking also clearly shows what <u>should</u> have happened in 2014 and it is this intention that the European Legislation incorporated into our domestic law, and which it is meant to protect.

<u>DIRECTIVE 2008/94EC</u>

22. Preamble (4) states:-

"In order to ensure equitable protection for the employees concerned, the state of insolvency should be defined in the light of the legislative trends in the Member States and that concept should also include insolvency proceedings other than liquidation".

22.1 Gibraltar's Insolvency Fund was established under the Gibraltar Development Corporation (Employers Insolvency Fund) Rules 1991. Rule 2(1) states:-

"There is hereby established as a separate fund the Employer's Insolvency Fund ... "

INSOLVENCY AND EMPLOYER'S INSOLVENCY FUND

23. Regulation 3 of the Gibraltar Development Corporation (Employer's Insolvency) Regulations 1991 ("the Regulations") sets out the meaning of Insolvency as being:-

"For the purposes of these Regulations, an employer shall be deemed to have become insolvent –

(c) In the case of a company registered in Gibraltar –
  (i) when a winding-up order has been made in respect of the company; or
  (ii) when the Company resolves by extraordinary resolution that it cannot by reason of its liabilities continue its business; or
  (iii) when a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge ... "

23.1 Regulation 3 (c) obviously applies in this case, given that Axiom is a company. (i), (ii) and (iii) are alternative conditions which Axiom needs to meet in order for insolvency to be held.

23.2 At the time the Claimant made her application to the Employer's Insolvency Fund, Axiom had actually been struck-off rather than wound-up. No extraordinary resolution (that it could not by reason of its liabilities continue its business) had been passed or no receiver appointed.

23.3 Pursuant to section 413 of the Companies Act:-

(1) On an application by a company, the Registrar may strike the company's name off the Register.

(2) The application:-

"(a) must be made on the company's behalf in writing by its directors or by a majority of them; and
(b) must state that the company has no assets or liabilities".

23.4 The making of this striking-off application was clearly wrong in law and in fact and would prima facie prevent an application being made under the Regulations. Axiom did have assets (equipment etc) and liabilities, (redundancy payments etc) making this an incorrect dissolution method. Axiom simply did not yet qualify for under the Regulations, nor did it meet the conditions required for the Fund to consider the Application.

23.5 However, this technical point does not end the difficulties and further problems that this Tribunal faces:-

(i) There was no Administrator in post at the time that the application was made. A new Administrator was only appointed, according to representations made, on 26th November 2016. This appointment was therefore made some 21 months after the application was made to the Insolvency Fund. Therefore, the argument seems to be that the delay in the Administrator responding to the application was due to there not being an Administrator. This is quite an unacceptable state of affairs, as well as being an unfair period of time to wait for such an office to be filled, let alone for a response to a formal application.

(ii) When asked, Counsel indicated that no investigation was made as to whether Axiom qualified (or indeed was capable of qualifying) under the Regulations. This was further made obvious by the simple fact that the Administrator and her representatives had not even realised, until an earlier Case Management Conference, that Axiom had not been wound-up.

(iii) Regulation 4 clearly gives powers to the Administrator to appoint inspectors and to seek information from Receivers and Liquidators. None of this was done, as obviously (a) there was no Administrator and (b) no enquiry had been made.

(iv) There was simply no enquiry made of any liquidator or similar, or review of accounts, or at all. Simply a perfunctory refusal. Again, under Regulation 11 of the Regulations. On receipt of an application under regulation 10 the Administrator shall make such enquiry as he may consider necessary to satisfy himself –

(a) that the Employer is to be deemed to have become insolvent within the meaning of regulation 3;

(b) that the sums claimed were payable; and

(c) that such sums have not been paid by the employer".

(v) It is simply not enough for the Administrator to say, which she did not to her credit do, that she had exercised her discretion not to make any enquiry.

(vi) The Application under Rule 10 clearly had to be made "as soon as practicable and in any case not more than 30 days after the employee became aware of the insolvency of the employer". Clearly, the Claimant had no reason to suspect that the Director would misrepresent the Company's state of affairs, to the Registrar of Companies and have Axiom struck-off instead of wound-up. I use the word "misrepresent" because the Director must have known that Axiom did have liabilities and that Axiom did not qualify to be struck-off. The consequences of his actions are that the Claimant has had her case for payment out of the fund severely curtailed, if not prevented;

(vii) The Administrator's rejection came in March 2017. Therefore, the rejection was made some 4 months after the appointment of the Administrator. But this was actually an incredible 2 years or more after the application was first made.

23.6 The Administrator has argued that, as she now realises that Axiom was not insolvent at the time of the application nothing else matters, given that Axiom did not actually qualify. Whilst this is a valid technical submission, it does not deal with the failings of the Insolvency Fund at the time, who did not deal with this matter properly (or at all) right from the start.

23.7 The Claimant has argued that, the Administrator was wrong to advance her submission of initial failure to qualify, given her own statutory failure.

THE EMPLOYMENT TRIBUNAL

24.1 This Complaint is made pursuant to regulation 14 (1) which states:-

"14(1) A worker who has made an application under Regulation 10 and who is aggrieved by the decision of the Administrator thereon, or by the failure of the Administrator to communicate a decision to him, may present a complaint to the Employment Tribunal – ".

(1A) and worker may also present a complaint to the Employment Tribunal where –

(a) the Administrator has refused an application pursuant to Regulation 13A; or
(b) the Administrator has in determining that the worker falls outside ... "

24.2 The import of this Regulation is that it places a bar on what this Tribunal can actually do. The Tribunal as an appellate jurisdiction in this application, has only a "limited jurisdiction". Unjust though it may be, the Tribunal does not have any power to correct any errors or deficiencies on the Administrator's side and/or on the part of the Company (Axiom), its Director and others.

24.3 The Tribunal agrees:-

(i) that the fact that an Administrator was not appointed for long periods of time, is simply unacceptable;

(ii) that when the Administrator was appointed, she conducted no meaningful or actual investigation;

(iii) that the fact that it took 2 years or so to conclude this first stage of enquiry, with no actual meaningful investigation, or realisation that the Claimant did not actually qualify is tantamount to unacceptable maladministration.

24.4 However, this application still needs to be considered within the context and timing of statute. The simple fact of the matter is, that Axiom was not (as required by the Regulations) (legally) insolvent within the meaning and conditions set down by law. Striking a company off the Register by asking the Registrar to exercise a discretion on the basis of an incorrect or false statement, does not equate with the conditions required by the law. Axiom did not at the time the application was made, qualify for consideration under the Regulations, because there was no extraordinary resolution passed to have the company wound up, (or) no winding-up order, (or) no receiver appointed. Therefore, technically, the application should have been immediately rejected on that basis by the Administrator in 2015. However, there was no Administrator in place to do this until 2016 and no decision or communication on this application until March 2017.

24.5 It therefore must follow that seeking to cure the winding-up deficiency after the application was made does and did not cure it. The time that Axiom should have qualified under the Regulations, was actually at the time the application was originally made.

24.6 At the hearing of 10th April 2018 I indicated that I was not satisfied that Axiom could properly be considered insolvent for the purposes of the Regulations. The case was adjourned to enable the Claimant to resolve the issues raised. A fresh application should have been made to the Administrator as soon as the Company passed the correct extraordinary resolution. This is what should have occurred. However, in this hearing the Tribunal remains constrained by the original Application and to the dates and facts that existed then, as well as by statute. The Tribunal does not have any power to grant an extension of time or to cure those deficiencies.

24.6.1. Therefore, with regret, the Application made must fail.

24.6.2 However, I would strongly urge the Administrator, given the inordinate delay in dealing with this Application and the obvious lack of investigation (whereby a quicker resolution might have allowed the Complainant to cure or at least enter a further application) to:-

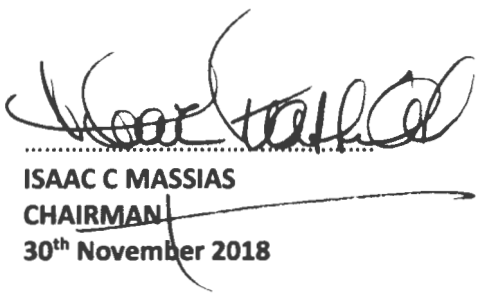
(a) allow a new application to be made, given the recent insolvency of Axiom (only formalised in June of this year);

(b) to exercise her discretion under the proviso to Regulation 10 of the Regulations to extend the time for this new application:-

"Provided that the Administrator may, in [her] absolute discretion, extend the time for making an application either before or after the expiration of such thirty days", (underlining is mine).

(c) to then fully investigate Axiom and its Director, which are at the root of this case.

I appreciate that the Tribunal does not have any power to make this into a formal Order or direction, however, justice dictates that the Administrator should strongly consider such a course of action in the interests of fairness and justice.



ISAAC C MASSIAS
CHAIRMAN
30th November 2018