EMPLOYMENT TRIBUNALS – JURISDICTION – INSOLVENT EMPLOYER

The Employment Appeal Tribunal has held that an employment tribunal has jurisdiction to determine a claim made by an employee against the insurer of an insolvent employer under the Third Parties (Rights against Insurers) Act 2010

Watson v Hemingway Design Ltd (In liquidation) & Ors [2019] UKEAT 0007/19

Introduction

The Employment Appeal Tribunal has held that an employment tribunal has jurisdiction to determine a claim made by an employee against the insurer of their insolvent former employer under the Third Parties (Rights against Insurers) Act 2010 ("the Act"). The EAT held that it was necessary to interpret the word "court" in section 2 of the Act as including an employment tribunal in order to give effect to the clear purpose of the Act, which was to enable the liability of the insolvent insured and the claim against the insurer under the Act to be determined in the same set of proceedings. It rejected the insurer's argument that an employment tribunal was not a "court" and so any claim against the insurer by an employee pursuing a claim against their insolvent employer in an employment tribunal had to be brought as a separate claim in the County Court or High Court.

The Third Parties (Rights against Insurers) Act 2010 applies to liabilities incurred and insolvencies which occur after 01 August 2016. It replaced the Third Parties (Rights against Insurers) Act 1930, and was intended to address what were perceived as a number of deficiencies in that legislation. The purpose of the Act is to protect third parties in the event of an insured's insolvency. It enables a third party who has a claim against a person who may have liability insurance cover in respect of the claim but who becomes insolvent to receive compensation for the claim from the insurer. The Act makes it possible for the third party to make the insurer a party to the proceedings against the insured party. The rights which the insolvent insured had under the contract of insurance against the insurer then vest in the third party, which is able to enforce them directly against the insurer.

The Background

Mr Watson brought a complaint of unfair dismissal against his employer, Hemingway Design Ltd ("Hemingway") as well as complaints of disability discrimination against Hemingway and one of its directors, Mr Draycott. Hemingway had an insurance contract with Irwell Insurance Company Ltd ("Irwell") covering Hemingway's liability in respect of the employment tribunal claims. Hemingway went into creditors' voluntary liquidation and Mr Watson applied to join Irwell as a Respondent under the Third Parties (Rights against Insurers) Act 2010. An employment tribunal granted the application. Irwell disputed cover because of alleged policy breaches by the insured then applied for the claim against it to be struck out. An employment tribunal refused the application but stayed the claim, holding that it had no jurisdiction to hear and determine the claim against Irwell, which would therefore have to be the subject of separate proceedings in the civil courts. Mr Watson appealed.

The EAT's Judgment

The EAT (Mr Justice Kerr, sitting alone) adopted a purposive approach when determining the issue of whether an employment tribunal is a "court" under the Act. The EAT observed that there was a clear policy behind the 2010 Act, which was to enable liability against the insolvent insured and the insurer to be determined in a single set of proceedings (under the predecessor legislation it had been necessary to bring a separate claim against the insurer). This was clear from the Law Commission reports which led to the passing of the 2010 Act and the Explanatory Notes to the Act. It held that in order to ensure that the policy objective was fulfilled it was necessary to interpret the word "court" in the Act as including an employment tribunal. The EAT stated that an employment tribunal has the essential characteristics of a court and rejected any suggestion that a dispute over insurance cover would not be within an employment tribunal's "comfort zone".

The EAT also held, obiter, that the arbitration clause in the insurance contract, was likely to be void because it would infringe section 203 of the Employment Rights Act 1996 and section 144 of the Equality Act 2010, emphasizing the wide application of these provisions.

Conclusion

The EAT's judgment has obvious practical implications for employees who are bringing claims in an employment tribunal against an employer who is, or who becomes in the course of the proceedings, insolvent, where the employer has insurance covering liability for the employment tribunal claims. As well as reminding employees and their advisers of the potential of a claim against the insurer if the Respondent becomes insolvent the EAT's

judgment means that an employee can apply to an employment tribunal to add the insurer as a Respondent to the existing tribunal proceedings and the employment tribunal can determine the claim against the insurer at the same time as it determines liability against the insolvent employer. If the EAT had accepted the insurer's argument that an employment tribunal lacked jurisdiction to determine such a claim then the employee would have to bring a separate claim against the insurer in the County Court or High Court to enforce their rights against the insurer under the 2010 Act, increasing the costs, time and complexity of the litigation.

The EAT's obiter statements on the arbitration clause in the insurance policy and its view that such a clause was likely to be void are also of significance, given that arbitration clauses are extremely common in insurance policies.

David Gray-Jones of The 36 Group represented the Appellant in Watson v Hemingway Design Ltd (In Liquidation) and Others UKEAT/0007/19.