FortyTwo Talks:
Kankanalapalli v Loesche Energy Systems

Amy Stroud & Andrew Carter

Amy Stroud: Hello and welcome to FortyTwo Talks, the podcast which takes a deep dive into the legal world, led by the experienced members of 42BR Barristers.

I'm Amy Stroud, a member of the employment team at 42BR, and I'm delighted to be joined by Andrew Carter to discuss ***Kankanalapalli and Loesche Energy Systems***.

We thought this was quite an interesting little case. Employment law is such a complicated and fast-developing field of law that sometimes aspects of law get overlooked, and this case is about the interrelationship of employment law with contract law, and the case is about offers of employment and the status of conditions attaching to an offer of employment and we thought it was definitely worth a discussion.

Andrew Carter: The facts of this case were that the claimant was offered a job on the 23 September with a proposed start date of the 1 November. The offer letter included the following:

"*I am pleased to offer you the position of project manager. This is subject to receipt of satisfactory references, a right-to-work check, and a successful six-month probation period, which will commence on your first day.*"

Then there were some inquiries between the claimant and employer about relocation expenses and the claimant responded that the terms were acceptable and he would sign and return the offer letter in a few days.

But he said, "*Please take it that I accept the offer*."

The respondent said, "*That's excellent news, and we look forward to you joining us*."

And the claimant then provided referee details and later, by email, right-to-work checks on the 6 October, so about three weeks before the intended start date.

Amy Stroud: The day after that, the 7 October, the respondent said, the employer said, 'Well there was a delay on the contract notice to proceed' and that, in fact, the employee's role wasn't required until some two months later, and they asked if the employee still wanted the role.

And the claimant said he'd booked flights already for himself and his wife, and he asked about what the payment would be for the upcoming two months, November and December. And the company then said, replied to him saying,

'*Well, we're no longer offering the project manager contract beginning on the date we'd originally said. We can consider a conditional offer based on the notice to proceed, but we understand if you no longer wish to be considered for that role.'*

There wasn't ever any written contract of employment sent. The claimant presented a claim for breach of contract on the basis that the offer was withdrawn without appropriate notice. The company said, well, the claim wasn't accepted, or the conditions hadn't been satisfied by the date that the offer was withdrawn, and there was no agreement regarding notice, or alternatively, the claimant had received reasonable notice.

Now, the tribunal essentially made two key findings. The tribunal found that there was no binding contract as the offer was still conditional when the company withdrew and that was because it was subject to the first two conditions in the offer letter, namely a receipt from the claimant of satisfactory references and the right to work check; so the claimant's right to work and the need for the company to check that. And neither of these had been satisfied.

The fact that the claimant had sent contact details of his referee was not the same as receiving satisfactory references, so that condition wasn't satisfied, and the right to work check couldn't, in any event, have been completed until the company had seen the original documents, which was going to happen on the claimant's first day of work.

And the claimant appealed that on four grounds.

Andrew Carter: And we'll get into those four grounds now.

The first ground was that the claimant had argued that the conditions in the offer letter were intended to operate post-contract as conditions subsequent to the agreement. That is to say that they were not conditions that had to be fulfilled as a condition of validly accepting the offer.

Now, in the EAT, the judge held that that contention by the claimant had not been considered at all and that it might have had a significant impact on the outcome. I think that clearly has to be correct because it was totally determinative of the position. You either have an offer which is conditional and things have to happen before you have a fully formed contract, or you have an agreement with conditions that have to be satisfied thereafter, and if you don't satisfy those conditions, then the contract is terminated.

But having failed to even consider that at the first instance, the judge, I think, was bound to find that that ground was well-made.

Amy Stroud: And then the second ground really emerges from ground one, and it was a question about what was the lawful degree of obligation between the parties at the time that the respondent withdrew as a result of the status of the conditions.

Could the respondent withdraw unrestrictedly from the contract for any other operative reason at a time when the conditions could still be satisfied? So, the company said that it could, without restriction, withdraw on the basis being conditions precedent were not fulfilled. It relied on a 1990 Court of Appeal case, *Wishart v National Association of Citizens Advice Bureaux*, and another case, *Mellors v RPS Rainer* [2001].

Those cases were different on their facts. *Wishart*, for example, in that situation, the condition for satisfactory references was found not to be fulfilled because the employer had actually received the references and regarded them as unsatisfactory. On that basis, there were no ongoing contractual obligations.

Now, the claimant had argued that the company didn't have an unrestricted right to withdraw. The company had elected to verify the original right to work documents at a time after the performance of the contract began. And in terms of the reference checks, he said, 'Well, I've supplied the details. It's up to the company to check those out and get the references.'

And the tribunal had found that at the time that the company withdrew, it hadn't contacted the claimant's referees, although he had sent their contact details.

Now, the EAT finding on ground two was that the conditions hadn't been fulfilled by the point of withdrawal, is what the respondent party said. The references hadn't been provided, the original documents hadn't been checked, but the tribunal hadn't considered whether there was a subsidiary condition which obliged the company not to withdraw before the date by which the conditions had to be fulfilled, and that was an argument that the claimant had raised in the hearing and hadn't been considered by the tribunal.

And the EAT went on to say, 'Well, *Wishart* clearly isn't applicable here. It doesn't address a case where no references have been supplied as of yet, i.e., the status of a conditional contract before the fulfilment period of conditions has concluded, and also it's not applicable in a situation where the company terminates for a reason which doesn't in any event relate to the supply of references.'

Andrew Carter: Yes, and that reflects four of the reasons or four of the degrees of obligation that you can have: the unrestricted right, a restricted right, and in this case, the duty not to prevent the occurrence of an event that will then lead to the contract being fully formed. So, here, an employer can't say, 'Give me the contact details of your referees' and then rely on their own failure to not contact those referees in order to withdraw from the offer.

Amy Stroud: Exactly. Yes.

Andrew Carter: And that's what's happened in this case, and it might be said that that is a form of condition of acting in good faith, not arbitrarily, in considering the references. One can imagine a case where stunning references emerge with no reason for concern at all. There's no question about the capability of the employee to take on the role and the employer simply cannot turn around and say, 'Well, I'm sorry, I'm not satisfied with that.'

Amy Stroud: No. No.

Andrew Carter: So now that we've dealt with ground one and two, let's now consider what the disposal of those grounds were. So, ground one was the issue about whether the conditions were precedent to a contract or subsequent to the contract, and the EAT considered that decision afresh by agreement, and it found that there was a fully formed agreement that was subject of termination if the conditions were not satisfied.

So that is to say, those conditions were conditions subsequent to the agreement, not precedent. In so finding, the EAT considered the words of the offer letter. We had a start date, salary, hours, job description, holidays, et cetera, et cetera. It was clear the content of the contract and what had to be done under the contract.

Also, the document contained an express acknowledgment from the claimant in the following terms: "*I understand that my employment may be terminated without the provision of satisfactory references*." The implication being that there had to be a contract of employment capable of being terminated.

Further, there were not only two conditions, there were three that were contained in that offer letter.

The first was about satisfactory references, the second about right to work, but the third, which was also in the same breath, referred to six-month probation, and that six-month probation had to be a condition subsequent to the contract. And when the judge considered all of those and in its context, it held that all three conditions were grouped together: they were all regarded as a single set of conditions. And so, as a matter of construction, because one of them had to be subsequent to the entry into the contract, therefore all of them were grouped together, all of them were conditions subsequent.

Amy Stroud: On the question of ground four, it's probably worth talking about this briefly because this concerned the slightly different question of the implied notice period.

The company had argued, the respondent had argued at first instance, that there was no agreement regarding notice, or alternatively, that in fact any way the claimant had received reasonable notice.

In support of that, the respondent had introduced in the evidence before the tribunal at first instance, a standard set of terms and conditions that actually related to the contract of another employee in order to try and demonstrate what notice would have been given or should be given to the claimant. In that case, it was a week. The respondent argued, 'Well, this shows our custom and practice, and in fact, there's no reasonable basis for concluding that it should be longer than a week.'

The claimant argued before the first instance tribunal, "Well, you can't define the contract between the parties at the time the parties enter into it using the terms of a future contract."

The question is, for the tribunal, what is in the party's minds at the date of the formation of the contract? The claimant referred to the case of *Yoo Design Services Ltd v Iliv Realty Pte Ltd*, which is a 2021 Court of Appeal case. And the date, obviously the tribunal had already found that the date on which the claimant accepted the terms of the offer letter was the 26 September, I think it was, was it Andrew?

Andrew Carter: That’s correct.

Amy Stroud: Yes. So therefore, you couldn't simply import a future contract to try and define the terms of that agreement. The claimant also relied upon a 1990 EAT case, *IPC Magazines Ltd v Ebner*, which says exactly that, "*A future unexecuted contract can't define the legal contents of an existing agreement*."

The tribunal as well, a point taken in the EAT, had interpreted Section 86 of the Employment Rights Act, so as to conclude that a notice period of zero days would be appropriate. And the claimant said, ‘*Well, this is in conflict with common law principles which govern the incorporation of onerous terms and the greater obligation to draw onerous terms to the attention of a party who's adversely affected*.’

So, the claimant's argument in the tribunal was that three months was a reasonable period of notice.

Andrew Carter: The onerousness point is quite interesting in this case, given that the claimant had to move countries and the respondent, the employer, had said, "*We would recommend you getting a twelve-month rental somewhere*."

So, it's particularly onerous.

Amy Stroud: Yes. You could say that, couldn't you?

Andrew Carter: And it's, I think, interesting how those background facts which inform the reasonable intentions of the parties, so understood, influence how onerous a term is going to be. You know, if you were taking a retail job somewhere which was around the corner, which was easy for you to get to and without the need to expend all this money as occurred in this case, it might be arguable that actually a zero period of notice in the first three months is in fact reasonable, because in fact nothing has happened, everyone's basically in the same position they were in before the entry into the contract. But in this case, there had been spending of money, there'd been probably a range of other decisions that have to be made in order to make this contract of employment work such that it is more onerous. It's almost unarguable that it's not an onerous provision.

Amy Stroud: Yes. No, exactly. And those considerations feed into the EAT's decision about what length of notice should be implied. But it's worth saying before that, that the finding of the EAT on this was that the tribunal was in error in speculating what the respondent's position would've been and whether the claimant would have accepted the standard terms.

And, in terms of the EAT's finding on this, it said that since there wasn't a term as to the notice period at the time of entering into the contract, the EAT had to imply a term of reasonable notice. It wasn't the case that the tribunal should start at zero and require a reason to increase it, harking back to the Section 86, that's just the minimum statutory threshold, and the contractual notice term for another employee is entirely irrelevant.

So, you were going on to say, weren't you, what the considerations were by the EAT for...

Andrew Carter: Yes...

Amy Stroud: ... what that implication should be.

Andrew Carter: Yes, and we've touched on it a little bit already. Of course, the claimant's traveling to a different country. He's told to get a 12-month rental. He's taking on a reasonably senior role as a project manager and there's significant upheaval in his life.

So here there was a period of three months, which was deemed to be a reasonable period of notice.

Amy Stroud: So, the conclusion of the EAT was that the respondent was in breach of the contract by failing to give reasonable notice to the claimant, i.e., three months' notice in accordance with the implied term.

So, it's worth looking, isn't it, at what we can take away from this case in terms of future practice?

I was struck by how the EAT's view of the conditions means that employers are probably going to have to be much clearer, aren't they, in considering their drafting and the documents that they prepare for potential employees.

Andrew Carter: Yes.

Amy Stroud: They have to almost elect now, don't they, as to whether they're going to stipulate that no contract arises until specific conditions are met, so that everyone is clear as to what the status is until those conditions are fulfilled, or whether they accept or have a situation where the contract is formed immediately and potentially clearer for everybody and perhaps fewer risks of delay in recruitment, faster processes, potentially less chance of candidates withdrawing, which is always a danger.

But, at the same time, you get this contractual obligation on the part of the employer arising at an earlier stage.

Andrew Carter: Yes. I think this case really puts into relief the issue of merits and the way that the merits and the broader factual circumstances can influence the construction, the interpretation, of the contractual documents.

Here, there was some ambiguity, so that worked in the claimant's favour. So, when it said 'this is subject', what is the 'this'?

Is it the offer or is it the position?

And that was really what I think permitted the claimant to say, '*Actually, there was already an agreement when I said, 'Please take it that I accept the offer.*" And the judge, at first instance, did find that there was an accepted offer at that point, so we know that there's a contract.

I think the problem may be that, in these extreme cases for employees or prospective employees who are making big efforts, say, the outlay of money, moving country, moving region in order to take up these positions, that the employment tribunal probably will be more alive to those facts influencing the meaning of the words reasonably understood that the parties were using at the time.

I think that there's a risk of understanding this decision as a call for ever greater stitching up of the position in the terms. I'm not sure that it would've worked necessarily on the facts of this case to say, '*The parties hereby agree that there shall be no contract between them until all these things happen*'.

Amy Stroud: Yes.

Andrew Carter: Because the reality was that the employer said, '*Get a rental*.' You know, 'Yes, we're going to start.' And it's only sort of after that that we see the brakes being applied by the employer at a time when the prospective employee has been acting to their detriment.

Amy Stroud: Yes, yes. But it's helpful as well though, isn't it? I think it does provide, or it reminds us of the protection that employees should be entitled to if employers withdraw for reasons that are entirely unrelated to the conditions that they themselves have applied.

And I think also it's good in that it puts orthodox contractual principles front and center again, and a reminder that they are necessary, and they apply, and tribunals need to sometimes tribunals approach these questions gingerly. They have a great many areas to consider, and sometimes they can get overlooked, and I think this case is very helpful in reminding us of those core principles.

Andrew Carter: Yes, and I think the contractual position was actually quite complex when you really stand back and look at it. There's a question first whether there's an agreement at all. If there is an agreement, is it a conditional agreement? And, if it is a conditional agreement, what happens if the conditions aren't met? What powers do the parties have to withdraw?

Amy Stroud: Yes.

Andrew Carter: Or is there no power to withdraw but only a power to terminate the contract?

Amy Stroud: Yes.

Andrew Carter: And that distinction's quite important, because if you've got a power to withdraw from the agreement, then that could be for all sorts of reasons that are unconnected with the conditions. Say, for example, in this case, that the project that the claimant was going to come onto wasn't going ahead or was being delayed or whatever. But if it's only a condition subsequent, then the employer is confined to those conditions as set out in the contract. So this was, I think, an important illustration of the care that judges are going to have to take in these types of conditional agreements or conditional offers, because sometimes it's not clear whether it's the offer that's conditional, it's the agreement that's conditional, and the consequences in terms of performance that flow from that.

Amy Stroud: Yes. Absolutely.

Well, thank you very much for listening to FortyTwo Talks.

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