Appeal No. UKEAT/0251/14/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 14 November 2014

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

(SITTING ALONE)

MR J O ZINDA — APPELLANT

ARK SCHOOLS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JUSTIN ZINDA (The Appellant in Person)
For the Respondent	MISS SHERYN OMERI (of Counsel) Instructed by: Lewis Silkin LLP Solicitors 5 Chancery Lane Clifford's Inn London EC4A 1BL

SUMMARY

PRACTICE AND PROCEDURE - Compromise

A compromise agreement containing a term (clause 5(a)) that:

> **"The Employer agrees not directly or indirectly to publish or otherwise make any statement in respect of you which is intended to or might reasonably be expected to damage your reputation or be detrimental to or otherwise critical of you"**

is not void because the employer intends to and does report the dismissal of an employee, a teacher, for gross misconduct to the Independent Safeguarding Authority as required by the **Safeguarding Vulnerable Groups Act 2006**, section 6.

THE HONOURABLE MR JUSTICE SUPPERSTONE

1. The Appellant appeals against the Decision of the Central London Employment Tribunal (Employment Judge Goodman, sitting alone) sent to the parties on 15 July 2013 that the Tribunal had no power to consider a claim which he presented on 27 June 2013 against the Respondent. The appeal was considered first on paper and found to disclose no reasonable grounds for appealing on any question of law. The Appellant then applied under Rule 3(10) of the **Employment Tribunal Appeal Rules** for an oral hearing. On 3 July 2014 HHJ Richardson found that there were errors in the decision to reject the claim at the preliminary stage and ordered that the appeal would go to a Full Hearing on the points identified in his Judgment.

2. The Appellant appears in person. Miss Omeri appears for the Respondent.

3. The Appellant was employed by the Respondent as a Teacher and Subject Leader for Technology at Burlington Danes Academy from 1 September 2007. He was suspended pending investigation and disciplinary proceedings on 19 March 2008, the principal allegation being that he submitted two false claims for expenses. He was dismissed summarily for gross misconduct on 8 July 2008.

4. The Appellant commenced two sets of proceedings in the Employment Tribunal. In 3301727/2008, lodged before his dismissal, he claimed direct discrimination, victimisation, and unlawful deduction from wages. In 330510/2009, lodged some months after his dismissal, he repeated earlier claims, added a claim that the dismissal and the appeal process were acts of discrimination and also added a claim for wrongful dismissal.

5. In February 2009 the Appellant, who for this purpose was being assisted by his trade union, the National Union of Teachers, entered into a Compromise Agreement with the Respondent. The terms of the Compromise Agreement, so far as is material, provided:

> **"1. Background.**
>
> **Your employment terminated on 8 July 2008 (the "Termination Date") by reason of the Employer terminating your employment for gross misconduct. You appealed against this decision and brought a claim in the Employment Tribunal against the Employer and Named Parties.**
>
> **2. Termination payment and arrangements**
>
> > **2.1. By way of compensation in connection with the termination of your employment with the Employer, without admission of liability, the Employer will pay you the gross sum of £20,000 (the "Termination Payment").**
>
> **…**
>
> **3. Full settlement**
>
> > **3.1. You agree to withdraw any Issued Claims within two working days of the date of this Agreement and agree to consent to an application made by the Employer to dismiss the Issued Claims and accept the Termination Payment, in full and final settlement of all claims … and the Issued Claims that you have or may have against the Employer**
>
> **…**
>
> **5. Non-financial obligations of the Employer**
>
> **In exchange for you agreeing to enter into your non-financial obligations set out above, the Employer agrees to the following:**
>
> **Detrimental remarks**
>
> > **(a) The Employer agrees not directly or indirectly to publish or otherwise make any statement in respect of you which is intended to or might reasonably be expected to damage your reputation or be detrimental to or otherwise critical of you.**
>
> **…**
>
> **9. Representations and previous agreements**
>
> **This Agreement represents the whole and only agreement between the parties in relation to the termination of your employment and other matters referred to in this Agreement. It supersedes any previous agreement or representation (whether written or oral) between the parties in relation to such matters. By signing this Agreement, you confirm that you are not entering into it in reliance upon any oral or written representation made to you by or on behalf of the Employer. Nothing in this Agreement shall exclude or limit liability for fraud or fraudulent misrepresentation.**
>
> **…**
>
> **12. Confirmation regarding your adviser**
>
> > **12.1 You confirm that you have received advice from your Adviser regarding the terms and effect of this Agreement and in particular its effect on your ability to pursue your rights before an employment tribunal. You warrant that you have agreed these terms and conditions in the light of this advice."**

6. The Compromise Agreement was signed by the Appellant on 19 February 2009 and by the Respondent's representative on 23 February 2009. On 25 February 2009 it was also signed by the Appellant's advisor, Mr D M Long of the NUT, who certified that he had advised the Appellant as to the terms and effect of the Compromise Agreement and in particular its effect on his ability to pursue his rights before an Employment Tribunal.

7. Subsequently, on 24 April 2009 the Respondent reported the Appellant's dismissal for gross misconduct to the regulatory authority, the Independent Safeguarding Authority ("ISA"). There had been a report prior to dismissal that I will return to in a moment. Before the Tribunal the Appellant contended that he was not bound by the Compromise Agreement, essentially for two reasons. First, he put his case in misrepresentation. He contended it was implicit in the Respondent's promise not to make any statement which would damage his reputation or be detrimental to him that at the time of entering into the agreement that the Respondent had no intention of doing so. This implied representation was, he says, untruthful. The Respondent had already made a preliminary report to the ISA in July 2008 without telling him and had done so even though he requested this information, and it subsequently became clear to him that the Respondent had always intended to report him again. Before the Tribunal, he submitted, as I understand it, that there was no duty to make any such report to the ISA. The Appellant says that he would not have entered into the Compromise Agreement if he had known it was the intention of the Respondent to make this report.

8. Second, the Appellant contends that the requirements of section 203 of the **Employment Rights Act 1996** were not met in respect of the Compromise Agreement. In particular, he says that he did not receive from the NUT the advice required by section 203(3)(c) of the **1996 Act**. Section 203(3)(c) provides that:

> **"the employee or worker must have received [advice from a relevant independent adviser] as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an [employment tribunal]"**

9. HHJ Richardson noted at paragraph 12 of his Judgment that the Appellant has engaged in various forms of civil litigation including proceedings for defamation, breach of contract and judicial review and did so until an extended civil restraint order was made against him. The Appellant has informed that that order has now expired.

10. One set of proceedings was brought against the Respondent, alleging breach of contract in respect of the report to the regulatory authority. These proceedings were unsuccessful. The Respondent obtained summary judgment at a hearing before Master Eastman on 11 November 2011. Another set of proceedings was brought before the Employment Tribunal in 2012, which the Appellant described as a claim to reinstate the two claims that were the subject of the Compromise Agreement. Employment Judge Manley rejected the application by a decision dated 20 January 2012. The Appellant applied for a review. That application was rejected by Judge Manley on 3 October 2012.

11. The reasons of Employment Judge Goodman for rejecting the present claim are, so far as is material, set out in paragraphs 11(1) and (2) and 12 to 14 of the Decision of the Tribunal. They read as follows:

> **"11. The claim now presented asks the Tribunal:**
>
> **(1) to declare the compromise agreement void for mistake or misrepresentation**
>
> **(2) to declare that it did not comply with the statutory requirements for compromise agreements"**

(We are not concerned with (3), which was to decide a claim that he has been victimised post-employment.)

> **"12. The claim that the compromise agreement was void has already been decided by the High Court. These points cannot be relitigated in the Employment tribunal.**
>
> **13. The point about the compromise agreement not meeting the statutory requirement has already been considered by Employment Judge Manley. If it is considered her reasoning was wrong an appeal should be made to the Employment Appeal Tribunal, though the time for doing so has long passed. If it was considered that there were other grounds for review, an application could have been made to the tribunal, but it was not, and the time limit for doing so was 14 days.**
>
> **14. In any case, it appears that the claimant received oral advice at the time, and was told not to sign the agreement before he received written advice. The written advice was sent to him on 20 February 2013 [that should be 2009], the day after the claimant signed, and three days before the employer signed, and he made no objection. The letter told him that the school had an obligation to refer the dismissal to DFSF (it was DCSF which told the school to report the matter to ISA). On these facts it appears that the claim that the agreement was not valid is without merit."**

12. The Appellant drafted the Grounds of Appeal himself. HHJ Richardson, at paragraphs 18 to 20 of his Judgment, identified points that he considered to be arguable, which he said were to be found in the Notice of Appeal, adding that if he had thought they were not in the Notice of Appeal he would have given leave to amend the Notice of Appeal to raise them. They read as follows:

> **"18. In paragraph 12 of her reasons the Employment Judge said that the claim that the Compromise Agreement was void has already been decided by the High Court so that the points cannot be re-litigated in the Employment Tribunal. So far as I can see, the claim that the Compromise Agreement was void has not already been decided by the High Court. I think the Employment Judge must be referring to the claim dismissed by summary judgment on 11 November 2011. It is arguable, however, that Master Eastman specifically refused to entertain or adjudicate on any such claim: see paragraphs 13 and 14 of Master Eastman's approved judgment.**
>
> **19. In paragraph 13 of her reasons Employment Judge Goodman concluded that the point about the Compromise Agreement not meeting the statutory requirement had already been considered by Employment Judge Manley. Implicit in this paragraph appears to be the proposition that Employment Judge Manley's decision operates as a bar on her considering the matter. I think it arguable that Employment Judge Manley's brief reasons for rejecting the claim cannot be taken as adjudicating upon its validity. In any event, it is arguable that a summary rejection under rule 3 of the 2004 Rules of Procedure is not the kind of judgment or decision which attracts res judicata or issue estoppel. Rule 3(9) certainly indicates that such a decision does not bind any future Tribunal or Employment Judge later in the proceedings. If so, it is arguable that it should not bind an Employment Judge or Tribunal in subsequent proceedings.**
>
> **20. In paragraph 14 of her reasons the Employment Judge seems to have made an express finding that the written advice was sent to the Claimant on 20 February without his objection. This, however, he denies; a factor which the Employment Judge does not appear to have taken into account. It is arguable that it is no part of the function of an Employment Judge exercising powers under rule 3 to take a view on questions of fact which are disputed."**

13. I shall consider each ground of appeal as identified by HHJ Richardson in turn.

Ground 1: that the Compromise Agreement was void

14. The Appellant submits, adopting the point as identified by HHJ Richardson at paragraph 18 of his Judgment, that Master Eastman specifically refused to entertain or adjudicate on his claim that the Compromise Agreement was void. It is necessary, in my view, to read paragraphs 13 to 15 of the Judgment as a whole.

> **"13 Today Mr Zinda argues that, no, he is not trying to run the case as understood by the defendant and, indeed, as hitherto understood by me when I read the particulars of claim, his case is that he was induced into entering into the contract by misrepresentation, namely the misrepresentation which he alleges is that if you look at clause 12 of the contract the implication of clause 12 is that the defendant was not going to continue to make any reports about it."**

Just pausing there, the reference to Clause 12 should, I think, be a reference to Clause 5(a) of the Compromise Agreement. Then it continues:

> **"Therefore, the slate was effectively to be wiped clean and on that understanding he entered into the contract and as a result of entering into the contract he was denied the right to pursue his claim in the employment tribunal.**
>
> **14. That is not his pleaded case at all and, as Mr Segal [Mr Segan, who appeared for the Defendant] says, there is no actual allegation of misrepresentation in the pleaded case. I think it will be wholly wrong of me to try and interpret these particulars of claim as being advanced on the basis which Mr Zinda now tries to say they are. I am quite satisfied that certainly the second ground of the challenge to this claim brought by the defendants, namely that there was an implied term enabling the defendant to make such disclosures to the relevant authorities as were required by law, is in the circumstances a good one and that there was such an implied term in the contract.**
>
> **15. It is axiomatic that when there are legal duties, to make factual statements such as those which were made by this defendant to statutory bodies, no contract between the parties can be made and legally made and made by parties, both of whom had received legal advice which would effectively get round the legal obligations. In the overall context of both public policy and contractual law it seems to me as plain as a pikestaff that in the absence of an express term to that effect there will have had to have been an implied term of that sort so as to make this contract legally operable which was clearly the intention of the parties."**

15. In **Industrious Ltd v Horizon Requirement Ltd and Vincent** [2010] ICR 491 this Tribunal, differently constituted, approving the decision (again of this Tribunal) in **Greenfield v Robinson** (unreported, 16 May 1996) makes clear that an Employment Tribunal has jurisdiction to determine whether an alleged compromise agreement is unenforceable on the ground of misrepresentation notwithstanding that the agreement complies with the section 203(3) requirements. There is no issue between the parties as to this proposition.

16. Whilst Master Eastman refused to adjudicate on the Appellant's case, as argued before him in relation to the misrepresentation that the Appellant said had been made, it is plain that the Master decided that there was an implied term in the Compromise Agreement enabling the Respondent to make such disclosures to the relevant authorities as required by law.

17. As for the relevant law, section 35 of the **Safeguarding Vulnerable Groups Act 2006** required the Respondent as a regulated activity provider within the meaning of section 6 of that Act to make a report to the ISA, to report disclosures to the ISA, if it thought that a teacher might harm or tend to harm a child or put the child at risk. The history of the referral is set out at paragraph 5.7 of the Respondent's Answer in these terms:

> **"As the Respondent has previously explained to the Claimant, it was required, upon the Claimant's dismissal, to provide information about the Claimant, to the Department for Children Schools and Families ('DCSF') (prior to January 2009). The DCSF referred the Respondent to the General Teaching Council ('GTC'). The Respondent discovered that the Claimant was not registered with the GTC and therefore contacted the DCSF which in turn advised the Respondent to report the Claimant's dismissal to the ISA. …"**

18. The Respondent had in fact asked whether it was required to make a report, and there is in the documentation before me an e-mail from Miss Miller, HR Manager of Ark Schools, to Tracey Broughton, Children's Safeguarding Team, DCSF, following a telephone conversation between the two of them, in which it is said:

> **"Tracey - just to summarise our telecom yesterday, record that ARK Academies are following departmental, and GTC guidance in terms of referral requirements for teacher misconduct"**

19. The false expenses charge related to the provision of pizza for children, which was considered by the Respondent potentially as a "grooming" issue. One sees that from the initial assessment made by the ISA on 7 May 2009. Ultimately the case worker has recorded in the decision note the view was not taken that what had happened constituted

> **"relevant conduct or risk of harm under [paragraphs] 3 and 4, Schedule 3 of the SVGA 2006".**

But that is not the point. The important question is what the school thought to be the position in terms of what had occurred by reference to the statutory provisions.

20. The Appellant has told me that he does not now challenge the decision of the High Court. Just pausing there, the decision of Master Eastman and the decision of the High Court are one and the same, Master Eastman being a Master in the Queen's Bench Division of the High Court. Thus the Appellant does not challenge the decision of the High Court that the Respondent had an obligation to report his dismissal for gross misconduct to the regulatory authority. I am informed that the Appellant did appeal the decision of Master Eastman, and the appeal was dismissed. However, the Appellant says that in fact the Respondent had no duty to report his dismissal because it had nothing to do with child protection. The Appellant referred me to the ISA guidance in support of this submission. However, as I have observed, the Respondent considered that there was a duty to do so, having sought advice, in the circumstances, on the basis that there was potential grooming.

21. In 2012 the Appellant applied for permission to judicially review a decision of the ISA, to make enquiries of the police and to keep material in confidence following the report to them by the Respondent of the Appellant's dismissal. Permission was refused. Dismissing the renewed application on 28 November 2012, Blake J had this to say of relevance to the present appeal:

> **"4. The Claimant submits that the employer should never have referred his case to the ISA because, having regards to its policy guidance of referrals although the first condition is met because the claimant has ceased to be employed as a teacher, the second condition was not made out and could not have been made out. The second condition relates to why a person has withdrawn from a regulated activity and whether a person has engaged in relevant conduct.**
>
> **5. When the ISA received the information it did from the claimant's former employers, it made contact with the police to clarify that there had been no caution or pending investigation into relevant conduct. Having done [so] it concluded that this was not a case in which it could exercise their powers to restrict the Claimant from having contact with children.**
>
> **…**
>
> **12. The most that could be said in the Claimant's favour is that when the ISA received information which, on assessment, did not meet the criteria for referral, it could have stopped the matter there. …"**

22. The Appellant submits that what he was told by the Respondent before he entered into the Compromise Agreement amounts to a misrepresentation and provides the basis for setting aside the Compromise Agreement. He relies on two documents. First, during pre-contractual negotiations, he was told that if he entered into an agreement on certain terms, that he would not be referred to the regulatory authority, which made him think that the Respondent was not required to report him. Second, he relies on a letter that was written to the Department to assist him to obtain benefits dated 17 July 2008, which states in part:

> **"As Mr Zinda was a teacher and it is a legal requirement that we report the matters and manner of his dismissal to the General Teaching Council via the Department of Children Schools and Families. The DCSF and GTC will decide whether Mr Zinda will be able to work as a teacher in future."**

23. He says that letter was incorrect because in fact there was no such obligation. He says that, if he thought the Respondent was going to report him to the regulatory authority, he would not have entered into the Compromise Agreement. Clause 5(a) of the Compromise Agreement made him think that he would not be reported. He said that clause was in the draft agreement that he read.

24. The report that had been made by the Respondent to the ISA, which the Appellant complains about, cannot in my view provide any basis for a submission that the Compromise Agreement is void by reason of the Respondent's alleged misrepresentations. Further, the issue of an implied term enabling the Respondent to make such disclosures to the relevant authorities, as required by law, having been determined by Master Eastman in the High Court proceedings, is not one that can be re-litigated in the Employment Tribunal. In any event, and most importantly, in my judgment a term of the Compromise Agreement prohibiting Safeguarding Disclosures would be contrary to public policy and therefore void as such. In a recent decision Sir Colin Mackay in the case of **C v T** [2014] EWHC 2482 (QB) provides an analysis at

paragraphs 65 and 67, in particular, in line with the conclusion I have reached, supporting the conclusion of Master Eastman in this regard.

25. I am informed that that decision is under appeal and that permission to appeal has been granted by the learned Judge. However, the grounds of appeal are not known.

Ground 2: the Compromise Agreement does not meet the statutory requirements; and Ground 3: the finding that the written advice was sent to the Appellant on 20 February 2009

26. The Appellant submits that Employment Judge Manley's brief reasons for rejecting the claim on this basis cannot be taken as adjudicating upon its validity for the reasons given by HHJ Richardson at paragraphs 19 and 20 of his Judgment. The reasons of Judge Manley are set out in a letter dated 30 January 2012 as follows:

> **"The claimant suggests that he has been unable to enforce that agreement because it is illegal. He does not suggest that he has not received the sum agreed but has attempted to argue before the High Court that there has been some failure by the proposed respondent to adhere to paragraph 5 a) about detrimental remarks. The proposed claimant provided a copy of the High Court judgment of 11 November 2011 where his claim was struck out as having no merits. That judgment does not say that the compromise agreement was "illegal" as suggested by the proposed claimant.**
>
> **The claims he issued in 2008 and 2009 have been settled by him under a compromise agreement. They cannot be "reinstated", are way out of time and the tribunal has no jurisdiction to hear them, the claimant himself having withdrawn them. The claim form is rejected."**

27. The way the Appellant has put his case on this appeal is that clause 12.1, which is the important clause, headed "Confirmation regarding your advisor", was not in the draft document, that is the draft Compromise Agreement that he read. As for the document, the agreement in its final form, which he did sign at the NUT offices, he says that he did not read it and therefore cannot say whether that clause was in the document or not. The Appellant was dismissed over six years ago. There has been extensive litigation in relation to his dismissal,

the reporting to the regulatory authority of it, and the Compromise Agreement. I understand, and the Appellant has not asserted to the contrary, that is the first time today in his oral submissions that the Appellant has said that clause 12.1 was not in the draft Compromise Agreement and that he did not read the agreement in its final form when he signed it. I have difficulty, given that background, and in these circumstances, in accepting these statements. Certainly the Appellant did not raise the point before Master Eastman, when one might have thought that he would, when clause 12 was under consideration.

28. There was e-mail correspondence between the Appellant and Mr Long of the NUT on 19 February, shortly before the agreement was signed by the Appellant. It is not necessary for me to read out the e-mail trail, but at page 99 in the supplementary bundle, the e-mails are there set out. On 19 February at 09:25 there is an e-mail from Mr Long to the Appellant saying that he had no particular concerns about the detail of the agreement and he would be happy to explain any paragraphs he was concerned with or that were unclear to him. At 13:41 the Appellant said that he was happy to accept the Compromise Agreement. At 14:30, importantly, Mr Long wrote:

> **"That is fine but I need to send you my advice letter. I am required to do this as the independent adviser. I will email this tomorrow and will need an email response from you confirming that you have read it and still wish to proceed. If we move quickly tomorrow I can arrange for the documents to be posted to ARK before the weekend.**
>
> **The signed copies need to be the second version and include my details. These will be available at the office."**

29. The Appellant says that he did not read or see that last e-mail until a few days later, he at the time being on the way to the offices of the NUT where he signed the agreement just before 16:00 on 19 February. As I have already said, Mr Long signed the certificate, it appears, on the same day as the date of the letter, 20 February 2009. On that date he wrote a letter to Mr Zinda

that appears at pages 101-102 in the supplementary bundle. In that letter Mr Long states, so far as is material, as follows:

> **"You should bear in mind that when a teacher has left employment in circumstances where otherwise their continuing employment might have been called into question, the employer is required to report those circumstances to the DCSF and/or GTCE who may in due course make a determination as to the teacher's suitability for membership of the profession. I understand from John Walker that a report will be sent."**

30. The Appellant, as I understand, is now critical of the advice he was given and says that he did not receive the advice letter dated 20 February 2009. However, he does not say why he did not contact Mr Long if he did not receive his advice letter, Mr Long having made quite clear in his e-mail of 19 February that he was obliged to write such a letter and would be sending it to him. In any event, I accept the submission of Miss Omeri that the Appellant's criticism of the advice he was given is no answer to the Respondent's point with regard to that advice because he gave the warranty that he did in clause 12.1 of the Compromise Agreement. This is indeed the answer to both grounds 2 and ground 3. If the Appellant challenges the quality of the advice he received, that is a matter for the High Court proceedings that he has instituted against the NUT.

31. In **McWilliam & Ors v Glasgow City Council** this Tribunal, again differently constituted, had this to say at paragraph 23 of the Judgment of Lady Smith:

> **"… it is of note that he [counsel for the Claimant] also observed, appropriately in my view, that the policy of the law is that disputes should be settled and if agreements in which employees give up their rights to bring tribunal claims were always void, employers would be deterred from settling disputes."**

At paragraph 35 Lady Smith stated:

> **"The statutory requirement is that the employee must have received advice from a relevant independent adviser but only as to the "terms and effect of the proposed agreement". It does not require that the relevant independent adviser offer a view as to whether or not the deal that is on offer is a good one or whether or not he thinks that the employee should accept it."**

32. In my judgment the Compromise Agreement is a valid agreement. The terms of the Agreement are clear. There is no basis, on the evidence before this Tribunal, nor on the evidence before Judge Goodman, for going behind the Agreement. Clause 12.1 records that the Appellant gave a warranty that he had received advice, and that determines the matter. Clause 12.1 is in the final agreement that he signed. The Appellant must have had an opportunity to read it before he signed it. If he did not avail himself of that opportunity that does not assist him in his present claim. For the reasons I have given, the Tribunal had no power to consider the Appellant's claim.

33. Accordingly this appeal is dismissed.