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EMPLOYMENT TRIBUNALS

Claimant: **Mr T Gebre-Michael**

Respondent: **Tesco Stores Limited**

Heard at: **East London Hearing Centre**

On: **19 February 2019**

Before: **Employment Judge M Warren**

Members: **Mr S Dugmore**
Mr J Quinlan

Representation

Claimant: In person

Respondent: Mr P Gorasia, Counsel

JUDGMENT having been sent to the parties on 1 March 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Background

1 Mr Gebre-Michael's complaints are of having been victimised for earlier bringing proceedings claiming discrimination and protected disclosures, the detriment being that he was not paid as he should have been under a COT3 agreement. Further, that he entered into the COT3 agreement as a result of misrepresentations by the Respondent.

The Issues

2 The case had been case managed by Employment Judge Allen who identified the issues as follows:

5. It is agreed that in bringing previous ET claims, the Claimant did a protected act.

6. Did the following amount to detriments because the Claimant had done a protected act:

a. The manner in which the Claimant was paid (there having been a deduction to the amounts paid in February 2018, which was later rectified in June 2018);

b. The total sums which he was ultimately paid (being on the Claimant's argument, less than those identified in the COT3).

7. Does the tribunal have jurisdiction to hear those victimisation claims or are they excluded by the terms of the COT3?

8. Should the COT3 agreement be set aside and the Claimant's previous claims reinstated on the basis of misrepresentation by the Respondent?

3 Missing from that note of the issues, is that if the tribunal does have jurisdiction to consider the victimisation claim, was the amount and manner in which Mr Gebre-Michael was paid his settlement sum, a detriment inflicted on him because he had issued proceedings claiming discrimination?

Evidence

4 I had before me witness statements from Mr Gebre-Michael and Ms Kirsty Lay, "Colleague Relations Partner" with the Respondent. I had a properly paginated and indexed agreed bundle of documents running to page 271. Mr Gorasia produced a photocopy of a chapter from Foskill on Contract on misrepresentation and a chronology.

5 During a break, we read the witness statements and read or looked at in our discretion, the documents referred to therein. I warned the parties not to assume we had read everything and to make sure they took us to what they regarded as important during the hearing of evidence.

Facts

6 Mr Gebre-Michael's employment commenced on 13 October 2008 and certainly latterly, his role was pharmacy manager. He was dismissed on 3 January 2017. He issued proceedings under case number 3200431/2018 on 11 May 2017. His claims included detriment and dismissal for making protected disclosures, disability discrimination, race discrimination, unfair dismissal, breach of contract, holiday pay and unpaid wages. He was represented throughout by a legal team, including a solicitor and a legal adviser with the Pharmacist Defence Association. There had been judicial mediation in respect of that claim on 1 November 2017. The claim was not settled, but discussions continued. The case was scheduled for a 7 day hearing commencing on 23 January 2018. In the meantime, a second claim was issued under case number 3200098/2018 complaining of victimisation after the outcome to his appeal against dismissal.

7 We were taken to a letter setting out the outcome of that appeal, which referred to Mr Gebre-Michael's reinstatement upon certain conditions being fulfilled. For the purposes of these reasons at this point, we merely note that those conditions were never fulfilled.

8 There continued correspondence between the Respondents and the Claimant's legal representatives with a view to trying to achieve settlement. Thus we saw on 17

January 2018, correspondence from the Respondent's representative to the Claimant's representative, (pages 85 and 86) then further correspondence on 18 January from the Claimant to the Respondent's representative, (pages 83 – 85). That led to a withdrawal from discussions by the Respondent's representative, (page 94).

9 The upshot of all that was that the Respondents made clear that they were prepared to pay a total, (inclusive of any Tax or National Insurance liabilities) of £55,000 only. The debate was whether the Claimant could squeeze more out of the Respondents by getting them to accept Tax and National Insurance liabilities.

10 Things were in abeyance for a few days and then on 22 January 2018, the Claimant's representative wrote to the Respondent's representative to try and reopen negotiations, (page 104). That was followed by telephone conversations, (pages 105 – 107) and arising out of those conversations, the Claimant's representative suggested amendments to the previously drafted COT3 agreement, (page 109). The subject matter for amendment included how the total sum of £55,000 was to be divided between, "Reinstatement Pay" (from which tax and national insurance would be deducted and paid by the Respondent to HMRC) and the "Settlement Payment" which was to be paid to the Claimant without deduction. How the total of £55,000 was to be divided between those two elements depended on the, "Reinstatement Date" which was moved from 17 January to 22 January 2018.

11 The Respondent's replied with amendments to the COT3, (page 117). The Claimant's representative then confirmed agreement had been reached, (page 116). And ACAS confirmed that the parties had entered into a binding agreement, (page 125). Subsequently, on ACAS notifying the Tribunal of the settlement, a Judgment was issued dismissing the claims on 20 February 2019.

12 It is necessary for me to set out the two key provisions of the COT3 agreement, page 30 of the bundle:

> *"1 The Respondent agrees that the Claimant shall be reinstated to his employment with effect from the date that these terms are agreed as binding by ACAS, (the Reinstatement Date) and the Respondent shall, without admission of liability, pay to the Claimant all loss of earnings from 3 January 2017 to the Reinstatement Date, subject to all income tax and National Insurance deductions that the Respondent is required to make by law, (the Reinstatement Pay). As at 22 January 2018, the Respondent confirms that this amount to £40,937.12 … In addition on the Reinstatement Date, the Claimant resigns from the Respondent's employment with immediate effect and agrees that his employment with the Respondent will be terminated by reason of resignation on that date.*
>
> *2 Additionally, the Respondent shall without a question of liability, pay to the Claimant the sum of £14,062.88 … (Settlement Payment) in full and final settlement of all and any claims, whether contemplated or not, whether an existence of the date of this Agreement or not, whether contractual, statutory or otherwise, including but not limited to the Claimant's claims for unfair dismissal (ordinary and automatic), direct discrimination because of disability and/or race, harassment related to disability and/or race, detriment on the ground that the Claimant made a protected disclosure, victimisation, unlawful deduction from wages (including*

holiday pay) and breach of contract/wrongful dismissal lodged at the East London Employment Tribunal on 11 May 2017 and 18 January 2018 (claim number 3200431/2017) (claims) and of all other claims to the High Court, County Court or Employment Tribunal that the Claimant has or could bring against the Respondent or any of its associated companies or its or their officers or employees, arising out of or in relation to the Claimant's contract of employment, or its termination."

13 In essence, what that deal meant was that Mr Gebre-Michael would be reinstated to the Respondent's employment. He would receive his loss of earnings to date in the figure mentioned, (£40,339.08) which was to be subject to tax and National Insurance deductions. He was then to immediately resign and he would receive an additional sum of compensation, (£14,660.92) in full and final settlement of all claims without deduction. Mr Gebre-Michael accepted that he would be liable for any tax the revenue found payable on the compensation sum. On that basis he was to withdraw his claims. The total amount payable under the agreement was £55,000.

14 Payment was made on 9 February 2018, (page 129). Here we can see that deductions were made for holiday pay in the sum of £3,436.29 and pensions payments in the sum of £1537.61, so that the amount Mr Gebre-Michael received was some £4,973.90 less than he was expecting. It was not, we note, until May, (page 136) that his legal advisers wrote to protest that he had not been paid what he was due. They in fact claimed he should have received an additional £10,299.08. Solicitors for the Respondents replied on 23 May, (page 139) to the effect that they acknowledged that incorrect deductions for holiday pay and pensions had been made and that those payments would be reimbursed. Those correcting payments were subsequently made on 1 June 2018, the payslips are at page 150 and 151.

15 Mr Gebre-Michael issued these proceedings on 19 July 2018. He is no longer represented.

Conclusions

16 First of all, we deal with the COT3 and Mr Gebre-Michael claimed that he entered into that agreement by reason of misrepresentation and that the agreement should therefore be rescinded. He argues that the figure used by the Respondent for calculating his backdated pay was wrong, that no account was taken of a pay rise and that they should also have taken into account a bonus he would have received. It is clear from the email correspondence, (and this is why the correspondence is relevant) that the representatives clearly understood what they were agreeing to. A figure was proposed for the reinstatement pay and that figure was agreed by Mr Gebre-Michael's legal advisers. If they thought that figure was wrong, it was up to them to challenge it. Also, as it happens, it is clear from the mechanism of the deal reached, that the maximum the Respondent was ever going to pay was £55,000 which meant that if the amount of reinstatement pay went up, the compensation payment would correspondingly go down. Thus, it could not be said that any mistake about the pay figure induced Mr Gebre-Michael into entering into the COT3 agreement. But over and above that, he had legal representation; his representatives negotiated a deal and he agreed to the deal and to be bound by it. There is no basis on which we could say that he had entered into the agreement by reason of misrepresentation and that it should be rescinded. If he wishes to complain that there was some breach of that agreement by the Respondents and the amount paid, that is a matter

for him to take up in the Civil Courts, as Employment Judge Allen explained to him at the Preliminary Hearing.

17 The pay slip at page 129 dated 9 February 2018 showing the settlement and reinstatement pay, shows basic pay before tax of £41,875.45 and an ex gratia payment of £14.062.88, the total of which is £55,938.33. Holiday pay of £3436.29 and pension payments of £1537.61 were wrongly deducted. The Claimant was reimbursed in respect of those incorrect deductions on 1 June 2018. He therefore ultimately received the full sum he was entitled to under the COT3 agreement, (apparently £938.33 more in fact).

18 Turning now to the victimisation claim. The Respondents say the Tribunal does not have jurisdiction to consider this claim because it is excluded by the terms of Clause 2 of the COT3, which includes settlement of claims that could be brought or whether in existence at the date of the agreement or not, (i.e. future claims). Intuitively, one thinks to one's self, " how on earth could it be the case that a settlement agreement could settle claims that do not even exist at the time the agreement was reached?" However, on the authorities, it is clear that is certainly possible: Royal National Orthopaedic Hospital Trust v Howard [2002] IRLR 849 and McLean v TLC Marketing EAT 04230/08. However, whilst those cases acknowledge that it is possible to exclude or settle future claims that do not yet exist, that, "extravagant proposition" (as it was described in the Royal National Orthopaedic Hospital case) can only come to pass if the wording of the settlement agreement is in the clearest possible terms. When we look at Clause 2 of the COT3, it refers to the claims in the proceedings and then, "all other claims … the Claimant … could bring … arising out of or in relation to his contract of employment or its termination". Victimisation post termination Section 108 Equality Act 2010 is something quite different from that and it would be extraordinary if one was to settle a potential claim in the future of such post termination, post settlement, victimisation for then the Respondent would be at liberty to, for example, sabotaging the Claimant's new employment by ringing up his employer and casting aspersions on his character. To exclude such a claim, we think, would have required the Respondents to have expressly stated that it included any potential future claim for victimisation contrary to Section 108. We therefore find that we do have jurisdiction to consider Mr Gebre-Michael's complaint of victimisation.

19 Are there facts from which we could conclude that the reason Mr Gebre-Michael was not paid the agreed figure in February 2017, in other words those deduction for holiday pay and pension pay, was because of his protected act of bringing the earlier proceedings? On the bare facts, we say yes, because one has to look to the Respondent for an explanation. We do so and the Respondent provides its explanation, which is that it was an administrative error.

20 We have seen the form to which Mr Gebre-Michael referred us in the bundle at page 128 that was completed by Ms Lay. She provides basic information on that form as required, to a specialist department based in Bangalore which deals with the Respondent's COT3 settlements and included within that information, was information relating to any payments which had earlier been made with regard to holiday pay or pension. The way that Ms Lay completed the form makes complete sense. The Respondent's COT3 department in Bangalore then processed the information with which it had been provided and the computer programme will have registered that on his earlier dismissal, Mr Gebre-Michael had received payments in lieu of holiday and pension payments, which would then have to be credited upon his reinstatement. We can see at

page 154 that once the problem has been drawn to the attention of Ms Lay, she promptly contacted the relevant people, where she notes that, *"for some reason we have taken money for his pension and also holiday pay".* She says, "for some reason" because she does not understand at that point, why the deduction had been made. That is corroborative evidence and consistent with Ms Lay's position that her actions were not in any way consciously or unconsciously, motivated by the fact that Mr Gebre-Michael had made or brought Tribunal proceedings of discrimination and protected disclosures.

21 It is a good point made by Mr Gorasia that had this been a case of simple unfair dismissal, with in all other respects: the amount of money, the earlier dismissal, the reinstatement, all the same, that the same mistake would have been made on the basis of the Respondent's administrative processes. Truth be told, we do not think Mr Gebre-Michael really believes that Ms Lay was motivated consciously or unconsciously by his earlier complaints; he spoke highly of her.

22 For these reasons, we accept the Respondent's explanation, we find there was no victimisation and the Claimant's claim therefore fails.

Employment Judge M Warren

13 March 2019