EMPLOYMENT TRIBUNALS

Claimant: Miss Angela Robinson

Respondent: Dodd Group Ltd

Heard at: Birmingham **On:** 10 February 2020

Before: **Employment Judge Dimbylow**

Representation
Claimant: In person
Respondent: Mr J Merry, Solicitor

JUDGMENT having been sent to the parties on 11 February 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The claim

1. The claimant brings a claim is for victimization contrary to section 27 of the Equality Act 2010 (EqA).

The issue to be determined at this Open Preliminary Hearing (OPH)

2. The issue for me is to decide is whether the settlement agreement in the form of a COT3 agreement ("the COT3 agreement") that was entered into by the parties via ACAS, disqualifies the claimant from proceeding any further with the present claim, which was presented after the date of the COT3 agreement. The respondent asserts that it does; and the claimant asserts that it does not.

The evidence

3. I did not receive any oral evidence. I invited the claimant to give oral evidence, if she wanted; but she preferred not to and relied upon what she had told me in her submissions. As far as the respondent was concerned, Mr Merry did not wish to cross-examine the claimant, did not want to call any witnesses; and he too relied upon oral submissions only.

4. I received two documents, which I marked as exhibits as follows:

   R1 which is a copy of the COT3 agreement which was signed by the claimant on the 1 May 2018 and by Mr Merry's firm on behalf of the respondent on the 3 May 2018, and

   R2 which is a copy of a case report submitted by Mr Merry from the Employment Appeal Tribunal being a decision delivered on 14 August 2002 Royal National Orthopaedic Hospital Trust -v- Mrs LA Howard EAT/861/01

The law

5. The law on this case is largely derived from statute, and in particular, the EqA section 144(1). This provides that a contract term is unenforceable in so far as it purports to preclude a person from bringing proceedings under the EqA in the Employment Tribunal. There are similar provisions under section 203 of the Employment Rights Act 1996. However, section 144(1) EqA does not apply to any agreement or contract to refrain from instituting or continuing proceedings where a Conciliation Officer has taken action to settle a complaint (section 144(4)(a)).

The submissions

6. These can be stated shortly. In summary, the claimant submitted that notwithstanding the wording of the COT3 agreement that she entered, she was still able to continue these proceedings and it was not contemplated that they would be precluded by the COT3 agreement. The submission of Mr Merry was entirely to the contrary; and that the claimant signed the COT3 agreement in full knowledge of what was going to happen about future claims, that is, that they could not be brought.

My findings of fact and the approach of the parties

7. These are the brief facts. The claimant is 45 years of age. She states that she commenced work for the respondent on 6 May 2013. The respondent says the correct date is 20 May 2013, although nothing turns on this point. She left the respondent's employment on 2 March 2018, which is an agreed date. The claimant went to ACAS in connection with these proceedings on 16 January 2019 and the second date on the certificate is 3 February 2019. She issued the claim form on 27 March 2019 and the Tribunal gave notice dated 15 May 2019 of a three-day Hearing on 10, 11 and 12 March 2020. The response form was received at the Tribunal office on the 10 June 2019. The respondent made an application for the Tribunal to consider whether the respondent's defence concerning the COT3 agreement should be dealt with as a preliminary issue. The tribunal agreed that the case would be listed to determine that point. Notice of an OPH was sent out to the parties on 19 August 2019, for it to be heard on 6 January 2020; but the claimant was unwell at the time and it was

postponed until today. The case was listed for 1½ hours and no case management orders were made for today's OPH. Orders were made for the just disposal of the final Hearing; but those Orders have fallen by the wayside, as the parties have been awaiting the outcome of today, before proceeding with them.

8. The respondent's case is that the claimant entered the COT3 agreement on 27 April 2018 when it was concluded orally. That date is confirmed in the COT3 agreement. The claimant signed the COT3 on 1 May 2018, and the respondent's solicitors signed it on 3 May 2018.

9. The COT3 agreement at paragraph 3 states this: "The Claimant and the Respondent each acknowledge that it is their express intention when entering this Agreement that (save for any Permitted Claims) it covers all future claims which the Claimant has or might have against the Respondent, any Associated Company or any Associated Person arising out of her employment or its termination whether known or unknown to all or any of them, and whether or not the factual or legal basis for the claim is, or could have been, known to all or any of them or may arise in the future. In particular, without prejudice to the generality of the foregoing, the Claimant agrees that should a claim emerge which was not known or foreseeable or contemplated at the date of this Agreement, she shall have no recourse or remedy in respect of the same."

10. The respondent accepted that there had been complaints by the claimant about discrimination because of maternity and that led to the COT3 agreement being concluded. The present claim, stated shortly, is that the claimant failed in various job applications to the respondent. Mr Merry asserted that the claimant's March 2018 Job Application in any event failed because that was before the COT3 agreement. Nevertheless, there were three later applications in September, November and December 2018 which were precluded by the COT3 agreement and following the case of Howard, all claims were released.

11. The claimant's position, and her explanation to me, was that all the treatment now complained of was new treatment in relation to further job applications. She referred to the draft reference that was attached to the COT3 agreement which she asserted was not properly used by the respondent. She told me that globally, she had applied for some 220 jobs and had not heard anything. She said that the wrong reference had been issued in some cases. She confirmed that she was working at present. She asserted that she submitted five grievances, or grievance appeals on: (1) 16 October 2017, (2) 18 November 2017 an appeal, (3) 6 February 2018, (4) 15 February 2018 and (5) 21 March 2018, a second appeal. These matters provide a protected act, or protected acts under the EqA. The respondent did not really dispute that there was a protected act; but Mr Merry reminded me of the date of the COT3 agreement on 27 April 2018. The acts of victimisation, or the detriments relied upon by the claimant, were four jobs that she failed to obtain with the respondent: (1) in March 2018 as a Contract Support Officer based at Chelmsley Wood, (2) in September 2018, again as Contract Support, working in

Nuneaton, (3) in November 2018 as a Tenant Liaison Officer in the Coventry/Nuneaton area and (4) in December 2018, as a Senior Contract Support role in Solihull (which was a job that the claimant had done previously). The claimant put her case in this way. By not being shortlisted or offered employment in respect of those four jobs, was an act of detriment by the respondent in the victimization claim. The claimant drew my attention to letters that had passed between her and the respondent, dated 2 January 2019 which she had written, and the reply dated the 10 May 2019, which had been sent to the tribunal. After we had discussed the facts of the claim and the approach of both sides, I gave the opportunity to both parties to make any further and final submissions if they wished to do so. Neither of them had anything further to add and relied on their construction of the COT3 agreement, which they had asked me to follow.

My conclusions and reasons

12. I considered the case law that had been provided by Mr Merry. Since it was quite an old case and predated the EqA, I had a look at Harvey on Employment Law and there I saw was another case MacLean -v- TLC Marketing plc & Others UKEAT 0429/08. Again, this predates the EqA; but is still good law. This makes a reference to the Howard case, but there were different facts. Nevertheless, there was nothing to suggest that Howard was wrong, and I couldn't see anything there that would change the legal guidance. I did consider Harvey where it set out the history of the effect of a general release on a claim. It includes this: "The need for precision in drafting COT3 agreements is emphasized in the EAT in [Howard], where it was held that a form of general release was not effective to exclude the claimant from bringing a victimisation claim under the [Sex Discrimination Act] in respect of an act that occurred some two years after the date of agreement. The EAT held that, on its proper construction, the agreement did not show any intention to contract out of future claims, and so did not bar the claim in question. However, giving judgment, Judge J R Reid QC said (at para 9) that, "as a matter of public policy, there was no reason why parties should not be able to contract out of claims of which they have and can have no knowledge, whether or not such claims have already come into existence at the date of the agreement, but if the parties seek to achieve such an 'extravagant' result, they must do so in the language which is 'absolutely clear and leaves no room for doubt as to what they are contracting for.' That analysis was approved in MacLean -v- TLC Marketing. When holding that the words of release in the COT3 agreement which precluded the claimant from making any other claim whatsoever arising out of or in connection with employment and its termination, it did not prevent the claimant in MacLean bringing a victimization claim on the respondent's failure to implement terms of the settlement, which was a slightly different claim. In the final analysis, clear words are required to preclude claims arising from facts which had not arisen as at the date of agreement, but which may arise at any time thereafter. If the clause lacked the necessary clarity to achieve that objective, then it could not be relied upon.

13. The narrative in Harvey goes on to say that whilst it may be possible to contract out of such 'extravagant' claims, by means of a COT3 agreement, it should also be noted that it will not be possible to do so by way of a Settlement Agreement, although such an agreement was not involved in the case before me.

14. There were a number of other terms to the COT3 agreement, which contained things that might happen in respect of the claimant if she did bring proceedings, including potentially the repayment of the settlement monies paid to her, and issues over any future references.

15. Regrettably for the claimant, considering the statutory provisions and applying them and the case law to the facts before me, I conclude that the claimant is precluded from bringing this claim because she had entered an 'extravagant' COT3 agreement on 27 April 2018. I don't know what legal advice the claimant had at the time, whether she had Solicitors or not or relied solely upon ACAS, but paragraph 3 is widely drawn. No doubt Mr Merry, and the respondent, aimed for that to start with in their negotiations over the wording of the COT3 agreement. Although the claimant says she has recently had advice that paragraph 3 of the COT3 agreement isn't enforceable, I don't know what the nature of that advice was, or how that conclusion was arrived at. However, it seems to me that having considered the long history described in Harvey of the effect of a general release, such as that given by the claimant, she has effectively released those claims which she now brings. That being so, the tribunal has no jurisdiction to hear the claim and it is dismissed.

Signed by: Employment Judge Dimbylow

Signed on: 24 February 2020