



EMPLOYMENT TRIBUNALS

Claimant

Mrs G Cole

v

Respondent

Elder's Voice

PRELIMINARY HEARING

Heard at: Watford

On: 15 October 2018

Before: Employment Judge Henry

Appearances:

For the Claimant: In person

For the Respondents: Mr C McDevitt, Counsel

JUDGMENT

JUDGMENT having been sent to the parties on 6 November 2018, and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The matter comes before the tribunal on a preliminary issue whether, pursuant to s.144 of the Equality Act 2010, the tribunal has jurisdiction to determine the claimant's complaint for direct discrimination and harassment where the parties had reached a settlement with the assistance of an Acas Conciliation Officer.

The law

2. The law relevant to the issues in this case are provided for by s.144 of the Equality Act, that:

144 Contracting out

- (1) A term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act [Equality Act].
- (2) A relevant non-contractual term (as defined by s.142) is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act, in so far as the provision relates to disability.
- (3) This section does not apply to a contract which settles a claim within s.114.
- (4) This section does not apply to a contract which settles a complaint within s.120 if the contract
 - a. is made with the assistance of a Conciliation Officer, or
 - b. is a qualifying (settlement agreement).
- (5) A contract within subsection (4) includes a contract which settles a complaint relating to a breach of an equality clause or rule or of a non-discrimination rule.
- (6) ...

3. By s.120 of the Equality Act, jurisdiction is given to the Employment Tribunal to determine a complaint relating to the Act, and provides as follows:

120 Jurisdiction

- (1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—
 - (a) a contravention of Part 5 (work);
 - (b) a contravention of section 108, 111 or 112 that relates to Part 5.
- (2) An employment tribunal has jurisdiction to determine an application by a responsible person (as defined by section 61) for a declaration as to the rights of that person and a worker in relation to a dispute about the effect of a non-discrimination rule.
- (3) An employment tribunal also has jurisdiction to determine an application by the trustees or managers of an occupational pension scheme for a declaration as to their rights and those of a member in relation to a dispute about the effect of a non-discrimination rule.
- (4) An employment tribunal also has jurisdiction to determine a question that—
 - (a) relates to a non-discrimination rule, and
 - (b) is referred to the tribunal by virtue of section 122.
- (5) In proceedings before an employment tribunal on a complaint relating to a breach of a non-discrimination rule, the employer—
 - (a) is to be treated as a party, and

- (b) is accordingly entitled to appear and be heard.
 - (6) Nothing in this section affects such jurisdiction as the High Court, [the county court], the Court of Session or the sheriff has in relation to a non-discrimination rule.
 - (7) Subsection (1)(a) does not apply to a contravention of section 53 in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal.
 - (8) In subsection (1), the references to Part 5 do not include a reference to section 60(1).
4. It is not in dispute that the claimant's complaint related to a contravention of part 5 of the Equality Act 2020.
5. It is further pertinent to note the operation of section 144, within the wider context of the Employment Tribunals Act 1996, and the operation of Acas, by which provision is provided for by sections 18 and 18C, of the Employment Tribunals Act 1996 whereby, s.18(1)(e), identifies "relevant proceedings" as tribunal proceedings under section 120 or 127 of the Equality Act 2010, and s.18C, makes provision for conciliation after initiation of proceedings, as follows:

18C Conciliation after institution of proceedings

- (1) Where an application instituting relevant proceedings has been presented to an employment tribunal, and a copy of it has been sent to a conciliation officer, the conciliation officer shall endeavour to promote a settlement—
 - (a) if requested to do so by the person by whom and the person against whom the proceedings are brought, or
 - (b) if, in the absence of any such request, the conciliation officer considers that the officer could act under this section with a reasonable prospect of success.
- (2) Where a person who has presented a complaint to an employment tribunal under section 111 of the Employment Rights Act 1996 has ceased to be employed by the employer against whom the complaint was made, the conciliation officer may in particular—
 - (a) seek to promote the reinstatement or re-engagement of the complainant by the employer, or by a successor of the employer or by an associated employer, on terms appearing to the conciliation officer to be equitable, or
 - (b) where the complainant does not wish to be reinstated or re-engaged, or where reinstatement or re-engagement is not practicable, and the parties desire the conciliation officer to act, seek to promote agreement between them as to a sum by way of compensation to be paid by the employer to the complainant.
- (3) In subsection (1) "settlement" means a settlement that brings proceedings to an end without their being determined by an employment tribunal.

6. In essence, it is the tribunal's task to determine whether an agreement has been reached between the parties with the assistance of an Acas officer, in respect of the claimant's claims under the Equality Act 2020, by which the jurisdiction of the tribunal is excluded or otherwise limited.

The material facts

7. The facts relevant to the preliminary issue for the tribunal's determination can be succinctly set out as follows:
 - 7.1 By a claim form presented to the tribunal on 2 October 2017, the claimant presented a complaint for unfair dismissal and discrimination on the grounds of race, against the named respondent, Brent Floating Support Services Sanctuary Group, following a period of early conciliation through Acas between 10 July 2017 and 24 August 2017.
 - 7.2 The claimant's claim form identified that the claimant's representative was a barrister.
 - 7.3 By a letter attached to the claim form, the claimant enclosed a copy of a grievance she had raised with the company Sanctuary Housing Association/Sanctuary Group, dated 30 May 2017, by which she identifies a number of incidents, the particulars of which are not material to the preliminary issue for the tribunal's determination.
 - 7.4 By correspondence of 16 March 2018, the respondent, Sanctuary Housing Association, informed the tribunal, copy to the claimant, that the claimant's employer was "Elder's Voice", following a TUPE transfer on 1 September 2017, for which they questioned whether they were then the correct respondent to the matter and further requested particulars of the claimant's claim, on the claim form detailing no grounds for the claimant's claim at section 8.2 of that form.
 - 7.5 The claimant was then written to by the tribunal seeking confirmation of the correct name of the respondent and further asked whether she proposed to add "Elder's Voice" as a respondent to her claim.
 - 7.6 On 22 March 2018, the claimant furnished further particulars of claim, by which she stated that, with effect from 16 March 2018, she was no longer represented by her legal representative and that she was now representing herself. By these further particulars of claim, the claimant identified the claims which she brings against the respondent, as;
 - 7.6.1 Health and safety – breach of duty of care
 - 7.6.2 Harassment
 - 7.6.3 Direct race discrimination
 - 7.6.4 Health and safety – work related stress
 - 7.6.5 Public interest disclosure/whistleblowing
 - 7.6.6 Victimisation
 - 7.6.7 Constructive unfair dismissal

- 7.7 On 4 April 2018, the claimant responded to the tribunal's request for clarification, that she did not propose to add "Elder's Voice" as a respondent to her claim, stating "as at now, until I have sought legal advice". The claimant subsequently, on 5 April 2018, advised that she proposed to add "Elder's Voice" as a respondent to her proceedings, stating, "only in so far as they may be held legally responsible for any potential liability of Sanctuary to me."
- 7.8 Following a preliminary hearing on 26 April 2018, the tribunal ordered that the entity, "Elder's Voice", be added to the proceedings on their being alleged to be liable to the claimant as transferee, following a TUPE transfer on 1 September 2017. The record of the case management summary then provides the following:
- "In addition to her race discrimination claim, the claimant wishes to bring a claim for unfair dismissal against the Second Respondent. She must particularise that claim and send it to the Second Respondent if she wishes to pursue it in order for the Second Respondent to be able to respond to that claim, in addition to the race discrimination claim, and object to the amendment if so advised."
- 7.9 The case management summary identified the claimant's extant claims then before the tribunal, as; harassment on the grounds of race, pursuant to s.26 of the Equality Act and, direct discrimination on grounds of race, pursuant to s.13 of the Equality Act.
- 7.10 On 20 May 2018, further to the preliminary hearing, the claimant furnished amended particulars of claim on the First and Second Respondents, presenting four causes of action, namely:
- 7.10.1 The failure to protect the claimant from being assaulted on 27 April 2017 constituting direct discrimination because of the claimant's race.
- 7.10.2 Harassment for which the claimant sets out a number of events of less favourable treatment between March 2016 and September 2017.
- 7.10.3 Direct race discrimination for which the claimant sets out a series of less favourable treatment for the period February 2016 to November 2017. And
- 7.10.4 Race discrimination on the "failing by Mercel Hislop to take into account the claimant's past medical history when managing the claimant's files and allocating clients.
- 7.11 On 27 September 2018, a further preliminary hearing was held. The claimant attended in person. The respondents, Sanctuary Housing Association, and Elder's Voice were represented by Counsel respectively. By this hearing, the First Respondent, Sanctuary Housing Association, was dismissed from the proceedings. It was further noted and agreed by

all parties in attendance that, there had been a TUPE transfer from the First Respondent to the Second Respondent in September 2017 and that the Second Respondent, "Elder's Voice", stated that there had been an agreement reached between it and the claimant and a COT 3 document signed.

- 7.12 The matter was accordingly set down for a preliminary hearing to consider whether the claim of race discrimination and harassment related to race, should be struck out under Rule 37 of the Employment Tribunal Rules of Procedure, on the Second Respondent's case being that, a COT 3 was entered into in December 2017, with Acas.
- 7.13 With reference an agreement having been reached with the assistance of Acas, following the transfer of the service in which the claimant worked, from Sanctuary Housing Association to the respondent Elder's Voice, it is not in dispute that there was a valid TUPE transfer and that the rights, responsibilities and liabilities against Sanctuary Housing Association in favour of the claimant, transferred to the respondent Elder's Voice. The transfer took effect on 1 September 2017. It is particularly relevant here to note that as part of the notification of employee liability information, the respondent, Elder's Voice, was made aware that the claimant had outstanding a live grievance awaiting determination and that an appeal would lie there against.
- 7.14 Following the transfer, on the respondent, Elder's Voice, determining to reduce its head count, they commenced consultation on redundancy with staff, to include the claimant. On the claimant raising an appeal against her grievance outcome, Elder's Voice thereon advised that, it would make arrangements to hear her appeal upon a resolution of the redundancy consultation process.
- 7.15 Following a redundancy selection exercise, the claimant having scored lowly in the exercise, she was identified as at risk of redundancy. On the claimant being identified as at risk of redundancy, discussions ensued via Acas, as to the claimant's contract coming to an end on 30 November 2017, which was then recorded by an Acas COT 3 document, for which it is pertinent to note that, the claimant was, at all material times in respect of the discussions, receiving advice and support from a legally qualified individual.
- 7.16 The COT 3 agreement, provides at clause 3 thereof, the following:

"3...in full and final settlement of:

- a) The claim(s) referred to Acas during the early conciliation (EC) process by the employer against the employee under EC number R177201/2017 ("The claim(s)"); and
- b) All and any claims which the employee has or may have at the time of this agreement and in the future against the employer or any of its

associated companies or its or their officers or employees whether arising from her employment with or appointment by the employer or its termination or otherwise. For the avoidance of doubt, Sanctuary Group is not an associated company of the employer.

.....

7. The employee shall refrain from instituting any further proceedings against the employer or any of its associated company or its or their officers or employees in relation to the claims listed at Clause 3 above.”

7.17 In discussions relevant to this agreement, it is noted that the claimant had asked whether the agreement would prevent her from pursuing a complaint against Sanctuary Housing Association for which it was made clear to the claimant that, the respondent, Elder’s Voice, had no relationship with Sanctuary Housing Association and did not represent them and therefore could not comment on their behalf. It was further noted and recorded by the agreement that, Sanctuary Housing Association was not an associated company of Elder’s Voice. It was also made clear that the agreement compromised all claims arising out of her employment and the termination thereof, as well as the specific complaint she had further raised under EC number R177201/2017.

- 8 These are the salient facts which are not in dispute. The claimant’s submission to the tribunal is that on the respondent, Elder’s Voice, informing her that they were not reaching any agreement in respect of any claims she may have as against Sanctuary Housing Group, she states she did not then understand that it compromised her claim as she had presented against Sanctuary Housing, where at the material time Elder’s Voice was not then a respondent to her proceedings then before the tribunal.
- 9 The respondent’s submission is quite simple, namely that, on there being a valid agreement reached with the assistance of Acas, in circumstances where the claimant was represented by a legally qualified individual, being a barrister, and had received advice and clarification from an Acas Officer, the agreement reached was a valid agreement for the purposes of excluding s.144 of the Equality Act 2010.

Conclusion

8. On the issue for the tribunal’s determination being ostensibly one of whether an agreement was reached with the assistance of Acas, in their role as Acas officers, in respect of the claims which the claimant pursues against the respondent Elder’s Voice, there is nothing before me for which I can find otherwise. At the material time, the complaints against Sanctuary Housing for which an appeal lied, it had specifically been confirmed that it was a matter that the respondent, Elder’s Voice, were responsible for on there having been a TUPE transfer of the claimant’s employment from Sanctuary Housing Group to Elder’s Voice, and that the discussions thereafter had, and agreement reached, was to resolve all matters for which Elder’s Voice were then responsible or should become liable.

9. On the issue of liability of Sanctuary Housing, having been specifically addressed and the position explained as herein recorded, I find that the situation had thereon been reasonably explained to the claimant, and I am of the opinion that on the claimant having raised the issue and having received the explanation given by Elder's Voice, she would, in all probability have, or could reasonably have been expected to have, clarified the position with her representative and/or the Acas Conciliation Officer, and would have been fully aware of what the consequences of her agreeing to the agreement as set out in the COT 3 meant, in all its consequences.
10. I accordingly find, on the claimant's complaints for direct discrimination and harassment, where the parties have reached a settlement with the assistance of a Conciliation Officer on 11 December 2017, where the claimant had been legally represented during the negotiations and subsequent agreement, that there is a valid Acas conciliated agreement for the purposes of s.144(4)(a) of the Equality Act 2010.
11. The tribunal accordingly finds that it does not have jurisdiction to entertain the claimant's claims for direct discrimination or harassment pursuant to the Equality Act 2010 against the respondent Elder's Voice.
12. The claimant's claims against Elder's Voice are dismissed.

Employment Judge Henry

02.03.2020

Sent to the parties on:

...02.03.2020....

For the Tribunal:

.....