



EMPLOYMENT TRIBUNALS

Claimant: Mr Alan Pearson

Respondent: Cumbria County Council

Heard at: Remotely by CVP **On:** 25 April 2022

Before: Employment Judge Holmes (sitting alone)

Representatives

For the claimant: Ms B Davies, Counsel

For the respondent: Mr A Maitra, Counsel

RESERVED JUDGMENT

It is the judgment of the Tribunal that the claimant's claim for unpaid holiday pay has no reasonable prospect of success, and is struck out pursuant to rule 37(1)(a) of the Tribunal's rules of procedure.

REASONS

1. By a claim form presented on 9 September 2021 the claimant brought a claim of failure to pay holiday pay, in the form of pay in lieu of untaken holiday upon the termination of his employment. His employment with the respondent terminated on 5 May 2021, pursuant to the terms of COT3 agreement, made on 6 May 2021, whereby the parties settled the claimant's previous Employment Tribunal claim against the respondent, under case no. 2420668/2020. The terms of that settlement included that his employment would terminate by mutual agreement on 5 May 2021.

2. There was some delay in the respondent complying with the payment terms of the agreement, but it was duly complied with on 29 June 2021. The claimant, however, was under the impression that he would also be entitled, upon termination of his employment, to a further payment in lieu of untaken holidays. When he was not paid this sum (which he calculates at £3,072.25) he raised this with the respondent, then obtained another early conciliation certificate on 9 August 2021, and then presented this claim for the unpaid holiday pay.

3. The respondent responded by a response filed on 19 October 2021. In the Grounds of Resistance the response contends that the claimant is precluded by the terms and effect of the COT3 settlement of his previous claims, from pursuing this claim. By email of 20 December 2021 the respondent sought a preliminary hearing to determine (primarily) whether the claim should be struck out pursuant to rule 37(1) of the Tribunal rules of procedure.

4. After a postponement of a hearing listed on 4 January 2022, this preliminary hearing was listed to determine the respondent's application. There was a bundle, running to some 106 pages, and witness statements were adduced from the claimant, and George Sowerby and Stella Armstrong on behalf of the respondent. The claimant was represented by Ms Davies of Counsel, and the respondent by Mr Maitra, also of Counsel. There was a Skeleton Argument prepared by the respondent.

5. At the outset of the hearing the Employment Judge raised the question as to whether evidence would be heard. His understanding of strike out applications such as this was that, unless based upon inherent and manifestly clear deficiencies in the evidence of a party, the Tribunal should not embark upon determination of any disputed questions of fact, but should assume facts in favour of the party at risk of being struck out. The parties' representatives agreed with this approach, and the claimant who was present, did not give evidence.

The application.

6. The issues for the Tribunal to determine were agreed to be (taken from the respondent's Skeleton) as follows:

9.1. Does the Employment Tribunal lack jurisdiction to hear the present claim on the basis that the issues which are raised in it were compromised by the COT3?

9.2. If so, does the effect of late payment of the settlement sum prevent the respondent from relying upon the COT3 terms?

7. In relation to the first issue, Mr Maitra submitted that COT3 agreements were a major exception to the general rule that contracting-out agreements are void in so far as they purport to exclude a claimant from bringing a complaint before an employment Tribunal is where the agreement has been reached under the auspices of an ACAS conciliator. He referred to s. 18 of Employment Tribunals Act 1996 which lists the proceedings, referred to as 'relevant proceedings', in which ACAS has a legal duty to conciliate, which include the first and present claims and claims for breach of contract.

8. It is perfectly permissible, and indeed common, to state in a COT3 that the agreement is in full and final settlement of all claims arising out of a claimant's employment, or out of its termination, reference being made to **Livingstone v Hepworth Refractories plc [1992] IRLR 63** and **BCCI SA v Ali [2001] IRLR 292**. COT3 agreements do not need to relate to any particular proceedings and can go further than settling any matter that is the subject of the complaint and can preclude all rights of further complaint to a Tribunal. He made references also to other features of ACAS negotiated settlements.

9. In answer to the question of whether the present claim settled under the COT3, he submitted that there is no dispute between the parties that there was a binding COT3 agreement in place. The dispute is whether the current claim was settled under the COT3 terms.

10. he referred the Tribunal to the case of **Arvunescu v Quick Release (Automotive) Ltd 2022 EAT** 26 Michael Ford QC in EAT states:

*53. The second and most difficult question is, on that premise, was the claim caught by the COT3 agreement? The parties do not disagree about the relevant legal test which I have to apply. It is summarised in **Royal Orthopaedic Hospital v Howard [2002] IRLR 849** at [6], even if the EAT was there recording a submission from counsel for the respondent. The EAT cited the familiar approach to construction from **Investors Compensation Scheme Ltd v West Bromwich [1998] 1 WLR 896** in which a court must ascertain:*

"the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

*That is the ordinary rule for construing a contract. It is common ground that that same rule of construction applied to COT 3 settlement agreements: see **BCCI SA v Ali [2001] ICR 337**. As it was put by the EAT in **Howard** at [9]:*

"The law does not decline to allow parties to contract that all or an claims, whether known or not, shall be released. The question in each case is whether, objectively looking at the compromise agreement, that was the intention of the parties, or whether in order to correspond with their intentions some restriction has to be placed on the scope of the release."

11. The respondent's submission was that that the current claim is caught by the terms of the agreement at clause 4.2, which is clear. In any event, though unnecessarily, the terms makes specific reference to the Working Time Regulations 1998, the latter which are specifically relied upon for the purposes of the current claim. Further, the current claim was clearly "arising from" the termination of employment on 5th May 2022. It did not arise until that point and it was expressly settled under the agreement.

12. In conclusion, looking objectively at the agreement, it was clearly not the intention of the parties to place any limitation on the scope of the agreement. That would have needed to be specified, and it was not.

13. Turning to the discussions with respondent's service centre administrators (the claimant refers to them as "the Respondent's HR and Payroll department"), on 30th April 2021 these are said to be wholly irrelevant to the intention of the parties. The discussions were had with administrative staff with no knowledge or involvement of the COT3 negotiations (or the first claim that had led to these discussions). Any comments made in respect of holiday pay, as alleged by the claimant, were made in the normal course of their duties referencing what would normally occur on termination. Moreover, they lacked any relevant authority to indicate that any entitlement to holiday pay was expressly waived under the COT3.

14. He went on to refer to the email trail in the bundle, which he argued demonstrated that, prior to the claimant's discussions with the administrators on 30th April 2021, it was clear from the bundle that the respondent's intention was to settle all claims arising from the termination of employment and no intention to waive holiday pay. This was clear from the email from the claimant's representative on 16th April 2021 [page 78 of the bundle] and on the 19th April 2021 [page 79 of the bundle], the respondent makes it clear that the offer of settlement (in addition to the first claim), "...and termination of employment (and all claims arising from the termination)." This was 11 days before the discussions that the claimant had. Once the financial sums were agreed, the COT3 was then finalised with clause 4.2 reflecting the email of 19th April 2021.

15. It was open to the claimant (through his nominated representative), to inform the ACAS conciliation officer that he wanted a waiver applied in respect of the current claim. That did not happen. This is not a case of excluding claims that were not known about at the time or, indeed, future claims. The exact opposite is the case.

16. To the extent that the claimant was seeking to argue in the alternative that late payment of the sums due under the COT3 agreement was a repudiatory breach, which then released the claimant from the restriction upon further claims which was imposed by it, the respondent submitted that there was, in any event, no repudiatory breach. Time of payment was not of essence to the agreement. Alternatively, by seeking to enforce payment of the sums due under the agreement, the claimant was waiving that breach and affirming the agreement.

The claimant's submissions.

17. For the claimant Ms Davies started with the issue of whether the current claim had in fact been compromised by the COT3 agreement. She made reference to the passages from **Royal Orthopaedic Hospital v Howard [2002] IRLR 849** cited by Mr Maitra, and submitted that in these circumstances some restriction had to be placed upon the scope of the release from future claims that was argued for by the respondent.

18. She went on to make it clear that the claimant's case is not based upon any claim of misrepresentation as to the terms and effect of the COT3 agreement, but rather upon what meaning the COT3 document would convey to a reasonable person, in this instance the claimant, in the light of the assurances he had been given by agents of the respondent as to what he would be entitled to if he agreed to terminate his employment. Those discussions, she submitted, formed the factual matrix against which the construction of the terms of the COT3, as it would appear to a reasonable person aware of those discussions, should be construed.

19. The claimant had made it clear in his later emails that he expected to be paid this holiday pay, and the Tribunal should treat the emails leading up to the conclusion of the COT3 agreement with some caution. The whole of the communications should be considered, the respondent cannot "cherry pick". The claimant's primary case is that because of the assurances he was given as to his entitlement to holiday pay, the COT3 agreement should be construed so as to limit the extent to which the claimant agreed to release the respondent from future claims.

20. In the alternative, the claimant does rely upon the respondent's late payment of the sums due under the COT3 as amounting to a repudiatory breach of contract, which the claimant accepted by initiating ACAS early conciliation in respect of the current claim on 30 July 2021. Ms Davies accepted, however, that time had not been stipulated as to be of the essence to the payment provisions.

Discussion and Findings.

21. The starting point for this discussion has to be the terms of the COT3 agreement. The relevant provisions are these:

4. The Compensation Payment is in full and final settlement of:

4.1 the claim brought by the Claimant against the Respondent In the Employment Tribunal under case number 2420668/2020 (claim); and

4.2 all and any claims which the Claimant has or may have; in the future against the Respondent or any of its officers or employees whether arising from, his employment with the Respondent or its termination including, but not limited to, claims under contract law, the Equality Act 2010, the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Trade Union and Labour Relations (Consolidation) Act 1992, the Disability Discrimination Act 1995, the Employment Rights Act 1996, the Working Time Regulations 1998, the National Minimum Wage Act 1998, the Transnational Information and Consultation of Employees Regulations 1999, the Employment Equality (Sexual Orientation) Regulations 2003, the Employment Equality (Religion or Belief) Regulations 2003, the Information and Consultation of Employees Regulations 2004, the Occupational and Personal Pension Schemes (Consultation by Respondents and Miscellaneous. Amendment) Regulations 2006, the Employment Equality (Age) Regulations 2006, the Transfer of Undertakings (Protection of Employment) Regulations 2006 or European Communities' law, excluding any claims by the Claimant to enforce the Agreement, any personal injury claims which have not arisen as at the date of this Agreement and any claims in relation to the Claimant's accrued pension entitlements.

22. A number of points arise. Firstly, the agreement settles not only the existing Tribunal claim, but also any future claims. Whilst, as Ms Davies conceded it could, that would include future claims without any being specified, these provisions do go on to specify, by way of non – exhaustive examples, the types of claim that are thereby being compromised, which include any claims under the Working Time Regulations, the claim that the claimant seeks to make in these proceeding.

23. It is also to be noted that there are also express exclusions, in respect of (post termination) personal injury claims, and accrued pension entitlements. Those, apart from the right to enforce the agreement, are the only exclusions. To them however, should be added, on the claimant's case, an exclusion in respect of a claim for holiday pay , accrued up to the date of termination.

24. The sole basis for this is the (accepted for these purposes) discussions between the claimant and agents of the respondent (whose ostensible authority to make the

representations that they did is also accepted, in the claimant's witness statement, as follows:

"4. Before agreeing to terminate my employment and whilst negotiations were ongoing, I contacted the Respondent's HR and Payroll department to obtain some missing payslips and to ask why I hadn't been paid that month (AP3, 17). I called them on 30 April 2021, using the telephone number that is printed on the payslips. I refer to the screenshot at AP1 which shows three telephone calls to that number, one on 30 April 2021, and two on 30 July 2021. During that first call at 10:14 on 30 April, I spoke to a female colleague, whose name I cannot recall. It turned out that my contractual sick pay had been reduced to zero, and a letter should have been sent to me back in February. I also queried why some of my payslips had not been sent out to me and she said that my employment record 'hadn't been updated for some reason'.

5. I explained about my ongoing situation with the Council, and that I was thinking about agreeing to terminate my employment. I specifically asked about my accrued holiday and whether it would be paid to me in lieu if I left, as I hadn't taken any holidays for the whole holiday year (which runs from my birthday on 17 July to 16 July the following year). My HR colleague told me I would 'automatically get it' when I left, and that the payment would include bank holidays as well as my contractual leave. Based on this assurance, I did not think it necessary to have any specific reference to my holiday pay in the COT3 agreement, and didn't think to raise it at the time the agreement was concluded.

6. I agreed to the financial settlement set out in the COT3 terms, based on the assurance I had received from the Respondent's payroll people beforehand, that I would also receive pay in lieu of my 35 days' holiday 'automatically' when I left."

25. What then did these assurances amount to? They were not, and were not argued to be, assurances or representations as to the terms and effect of any agreement, as no draft was available, nor does the claimant say that these persons were aware of the terms of , or the basis of, any offers that had by that date been put forward by the respondent. They were therefore n more than a statement of general principle, applicable to any employee who made such an enquiry.

26. Ms Davies, however, argues that on this basis any reasonable person would read the provisions of the COT3 agreement as excluding compromise of any further holiday pay claim, as it would be paid "automatically".

27. With all due respect, Ms Davies overlooks the totality of the quotation from **Investors Compensation Scheme Ltd v West Bromwich [1998] 1 WLR 896** where it was said that a court must ascertain:

"the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

28. The background knowledge includes firstly knowledge of the negotiations. In the negotiations, the respondent, in proposed settlement of claims which were for sums arising out of the claimant's employment, which was continuing, considered a

settlement on the basis of his employment terminating. The respondent put forward the terms upon which it would settle the claims, and any future claims. In fact the first proposal (from the bundle) was made on 16 April 2021 by the claimant's solicitor [page 78 of the bundle], in which she said "*and if he is to terminate his employment as part of the settlement , then he will be entitled to an additional amount in respect of his contractual notice pay, of £4800. Total £14,558.51.*" She did not mention any additional holiday pay entitlement. The respondent on 19 April 2021 put forward a counter offer, on the basis of termination of the employment) of an ex gratia payment of £1500, plus £4800 for notice pay. That was rejected the same day, and on 27 April 2021 the respondent threatened to withdraw it [page 80 of the bundle] . On 5 May 2021 , i.e after the claimant had had his discussions on 30 April 2021, his solicitor made an offer to settle the claims , and for the claimant to cease his employment "*in return for his contractual notice pay less deductions, plus an ex gratia of £4500.*" That was accepted by the respondent by email the same day at 14.20, subject to the "attached terms" being agreed. What the attached terms were is not apparent, but they are presumed to be in the same or similar terms to the COT3 which was then executed on 6 May 2021, signed, in fact, by the claimant's solicitor on his behalf.

29. The claimant's right to notice pay, of course, like his right to pay in lieu of untaken leave, would arise on termination. That right was expressly referred to, but the other was not. The claimant nowhere in his witness statement says what he did or did not discuss with his solicitor before authorising her to sign the COT3 on his behalf. The implication of his evidence is that he did not mention this aspect to her at all, and nor did she. That is very surprising, but seems to be the case.

30. In those circumstances would a reasonable person, with this knowledge of the negotiations, the discussion about holiday pay, and access to a legal representative who was indeed going to sign the agreement on their behalf, believe that the COT3 conveyed a meaning that , although not expressly excluded, it did not in fact have the effect of excluding the right to make a further claim for holiday pay? The answer is clearly no. That would not be a reasonable conclusion to come to, and no reasonable person would have done so. A reasonable person, having had the discussion that led them to believe that they would automatically be entitled to holiday pay, when confronted with an agreement , and preparatory communications, which make no reference to that right, would have at least asked their legal representative whether they were giving up that right by entering such an agreement. It seems that the claimant did not, or that his solicitor did not, or did not adequately, advise him of the terms and effect of the COT3 agreement upon his ability to bring any further claims. Where responsibility for this confusion on the part of the claimant lies, and whether there has been any breach of duty on the part of the claimant's solicitor in the advice given, or not given, or the execution of the COT3 agreement on his behalf in these circumstances are matters that are not for this Tribunal. As between these parties, the claimant is bound by the actions of his solicitor in signing the agreement.

31. In effect, what the claimant seeks to rely upon, it seems to the Tribunal, is his mistaken belief as to the terms and effect of the COT3 agreement. No plea of misrepresentation is made, and hence this is an instance of unilateral mistake. That does not vitiate the agreement, nor does it warrant a construction of the terms of the agreement which flies in the face of the clear and comprehensive express terms of

Clause 4.2 whereby the type of claim that the claimant now seeks to make in these proceedings is expressly compromised.

32. On that basis the claimant has no reasonable prospects of success, and, there being no other residual reasons why it should not be, the claim is struck out.

33. Whilst unnecessary to do so, strictly speaking, the Tribunal would also find that the second limb of the claimant's argument, the effect of the late payment, does not succeed, time for payment not being stipulated as being of the essence, and the claimant, in any event, electing to enforce the agreement by threatening enforcement action, rather than accepting the repudiatory breach by seeking to resume the original claims.

Employment Judge Holmes

Date: 25 April 2022

RESERVED JUDGMENT SENT TO THE
PARTIES ON

4 May 2022

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