EMPLOYMENT TRIBUNALS

Claimant: Miss Leanne Cooke

Respondent: Keolis - Nottingham Trams Ltd

Heard at: Midlands (East) Region by Cloud Video Platform

On: 19 April 2022

Before: Employment Judge Ahmed (sitting alone)

Representation
Claimant: Ms Andrea Pitt of Counsel
Respondent: Mr E McFarlane, Consultant

JUDGMENT

The Claimant's application for costs is dismissed.

REASONS

1. This was a hearing on an application by the Claimant for an order for costs. It arises in somewhat unusual circumstances. Following a liability hearing the Claimant was found to have been unfairly dismissed. The Claimant made an application for costs. Before any such application was determined or listed, the parties entered into an ACAS COT3 agreement. The problem for the Claimant is that she did not specifically reserve her right to pursue costs in the COT3, which both she and her advisers had intended. The issue for the Tribunal, in broad terms, is whether the Claimant can open the door to a costs application and if so is she then entitled to an order for costs.

2. The facts of this case insofar as they relate to this hearing and application are not in dispute. Consequently, neither party called any live evidence. I am grateful to both Ms Pitt and Mr McFarlane for their detailed and helpful submissions.

3. The specific issues to be determined for today were agreed at an early preliminary hearing before Employment Judge Adkinson on 21 February 2022. Those issues are

as follows:

3.1 Are the pre-COT3 negotiations in correspondence between the parties' solicitors admissible? If so on what basis?

3.2 What was the effect of the compromise agreement recorded in the COT3?

3.3 If the Tribunal has jurisdiction to consider the costs application, are one or more of the grounds for a costs order made out and if so, should the Tribunal make an order for costs?

4. Following a liability hearing on 2 and 3 June 2021 the Claimant was found to have been unfairly dismissed. The issue of remedy was adjourned to 28 September 2021. Neither party sought written reasons for the liability decision. The Judgment without reasons was sent to the parties on 10 June 2021.

5. On 22 June 2021, the parties were able to agree in principle the amount of compensation for unfair dismissal at £12,000.00.

6. On 23 June 2021, the Claimant's Solicitors wrote to the Tribunal to make an application for costs. The Respondent formally wrote to the Tribunal on 8 October 2021 opposing the application.

7. Prior to 8 October, the parties had been in discussions with ACAS. Agreement was reached and an ACAS COT3 form was signed by both parties, or their representatives, on 12 October 2021. The relevant terms of the COT3 are as follows:

> "(1) The Respondent agrees to pay, and the Claimant agrees to accept £12,000.00 in full and final settlement of the Claim and any other claims she may have, arising out of the Claimant's contract of employment with the Respondent, or against any other company in the group of companies … of which the Respondent is a member or against any employee, worker, agent or officer of the Respondent or Group Company arising out of or connected with the Claimant's employment by the Respondent and/or its termination, including, but not limited to, in respect of rights for which a conciliation officer has a duty and any other claim arising from the same or substantially similar facts as those pled in the Claim."

8. On 22 September 2021, the Claimant's representatives wrote to the Tribunal to say that the Claimant's claim had been compromised by both parties in the sum of £12,000.00 and the only outstanding matter which remained was the issue of the Claimant's costs.

9. On 23 September 2021, the Respondent's representatives wrote to the Tribunal as follows:

> "As the parties have agreed settlement in relation to liability in the above matter, the Respondent has no objection to the matter of costs being dealt with on the papers."

10. In early December 2021 the Claimant's solicitors wrote to the Tribunal to ascertain the progress of listing the costs application. On 11 December, the Tribunal sent a letter to the parties in the following terms:

> "Employment Judge Adkinson directs the following: The costs application has not progressed because the tribunal was told that the case had been conciliated to a conclusion. There was no suggestion the costs application would remain live despite the compromise."

11. On 13 December 2021, the Claimant's solicitors wrote to the Tribunal as follows:

> "The Claimant has only compromised the remedy element of the claim.
>
> As far as the Claimant's application for costs is concerned this is still very much a live issue and it was always the intention of the parties for this to remain so. Even at the point the parties were discussing suitable wording for the COT3, the parties were mindful not to compromise the Claimant's application for costs.
>
> The settlement reached between the parties does not affect the costs application and the compromise reached was never intended to be a contractual bar."

12. On 13 December 2021, the Respondent wrote to the Tribunal setting out why it believed that the costs issue could no longer be determined by the Tribunal. It is essentially the same argument they run at this hearing, namely the Tribunal has no jurisdiction having regard to the wording of the COT3.

THE LAW

13. The relevant law is not in dispute. Section 203 of the Employment Rights Act 1996 ("ERA 1996"), so far as is relevant, states:

'Restrictions on contracting out.

(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—

(a) to exclude or limit the operation of this Act, or

(b) to preclude a person from bringing any proceedings under this Act before an employment tribunal.

(2) Subsection (1)

[(a) – (d) not relevant]

(e) does not apply to any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under any of sections 18A to 18C of the Employment Tribunals Act 1996."

14. Section 18C of the Employment Tribunals Act 1996 ("ETA 1996") is headed 'conciliation after institution of proceedings' and states:

"(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, …

(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—

(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."

15. At the earlier Preliminary Hearing to which I have referred, the parties' attention was drawn to the Supreme Court case of **Oceanbulk Shipping & Trading v TMT Asia Ltd and others** [2010] UKSC 44 in relation to the issue of privilege. In that case Lord Clark (quoting Robert Walker LJ in **Unilever plc v The Proctor and Gamble Co.** [2000] 1 WLR 2436) said this:

"32. Robert Walker LJ set out (at pp 2444D-2446D) a list of what he called the most important instances. He described them thus (omitting some of the references):

"(1) … when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible. …

(2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence.

(3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel.

(4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety' … But this court has, in *Forster v Friedland and FazilAlizadeh v Nikbin,* [1993 CAT 205], warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion (emphasis added).

(5) Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence.

(6) In *Muller's* case (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffmann LJ treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver.

(7) The exception (or apparent exception) for an offer expressly made 'without prejudice except as to costs' was clearly recognised by this court in *Cutts v Head*, and by the House of Lords in *Rush & Tompkins,* as based on an express or implied agreement between the parties. ……. There seems to be no reason in principle why parties to without prejudice negotiations should not expressly or impliedly agree to vary the application of the public policy rule in other respects, either by extending or by limiting its reach."

16. In the EAT case of **Portnykh v Nomura International plc** [2014] IRLR 251 the EAT made it clear that the fact that the operation of the privilege is likely to cause a

forensic disadvantage to one party or the other is not enough to establish 'unambiguous impropriety'.

CONCLUSIONS

17. The first issue is whether the pre-contractual (COT3) negotiations are admissible as they were all undertaken under the cloak of 'without prejudice' communications. It is agreed that without prejudice communications are not admissible unless (a) the parties agree; (b) if needed to interpret an agreement; or (c) if there has been unambiguous impropriety.

18. There is no agreement to waive privilege.

19. I am satisfied it is not necessary to admit without prejudice communications to interpret an agreement as there is no suggestion of misrepresentation, fraud or undue influence. This is not a case where the Claimant relied on any statement by the Respondent - it was always the Claimant's intention to apply for costs. None of the exceptions set out in **Oceanbulk** apply to this case.

20. The argument as to unambiguous impropriety seems to be that the Respondent denies that the COT3 left open the application for costs when it knew that there was always an outstanding issue as to costs. As Ms Pitt put it: "the Respondent was playing fast and loose with the system."

21. I am satisfied that the relatively high threshold that is required to adduce without prejudice negotiations by reason of unambiguous impropriety is not reached in in this case. Playing fast and loose, even if that were true which I do not consider was the case, comes nowhere close to the required threshold. The fact that it creates a forensic disadvantage, which is the purpose of this part of the application, is not an adequate reason.

22. The real questions at this hearing, independent of the privilege issue, are what was the effect of the compromise in the COT 3 agreement and whether it determined any potential issue of costs?

23. Section 203 ERA 1996 is designed to prevent Claimants from contracting out of their employment rights save for permitted exceptions. It is agreed that a COT3 is one of those exceptions, creating a contract capable of circumventing the statutory bar in Section 203 ERA 1996.

24. It seems to be agreed and if not I agree with Mr McFarlane, that an ACAS Conciliation Officer can settle a costs application between the parties pursuant to Section 18(c) ETA 1996. The question is: did he do so in this case?

25. Section 18C(3) ETA 1996 makes it clear that settlement means that it brings 'proceedings' to an end. The word 'proceedings' must be deemed to be wider in application than 'claims' otherwise Parliament would have used the word 'claims' instead.

26. I am also satisfied that the wording of the COT3 agreement includes any potential

application for costs for the following reasons:

26.1 Clearly, an ACAS officer has the power to settle unfair dismissal claims pursuant to section 18C(2) ETA 1996. A costs application is merely parasitic to an unfair dismissal claim and not independent of it. It must therefore follow that any reference to a costs application, flowing from a section 111 ERA 1996 claim, is also something that the ACAS officer can conciliate about.

26.2 The word 'proceedings' in section 18C(3) ETA 1996 is wider than 'claims'. Costs applications are certainly part of 'proceedings' even if they are not a 'claim'.

26.3 The words "any other claims she may have" in the COT3 agreement includes any potential application for costs. That is so even if the intention of the Claimant was otherwise. What is important is the actual wording of the agreement and not what it might have said. I cannot read into it matters such as 'subject to any application for costs' which is what I am in effect being invited to do now. The Claimant, who was legally represented at the time, did not specifically exclude or reserve the right to make a costs application which would be necessary to negate the effect of the wording that she "agrees to accept £12,000.00 in full and final settlement of the Claim and any other claims she may have."

27. The effect of the COT3 agreement in my view was to settle the Claimant's costs application and the Tribunal has no jurisdiction to determine it now. The present application is therefore dismissed.

Employment Judge Ahmed

Date: 30 May 2022