EMPLOYMENT TRIBUNALS

Claimant: Mr I Mclellan

Respondent: Healthwork Group Limited

Heard at: Manchester Employment Tribunal by CVP **On:** 2 November 2022

Before: Employment Judge Cookson sitting alone

REPRESENTATION:

Claimant: In person
Respondent: Ms H Bell (Counsel)

JUDGMENT having been sent to the parties on 4 November 2022 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

1. These reasons relate to a judgment given at open preliminary hearing on 2nd November 2022 which was heard by CVP.

2. This hearing had been ordered by Judge Brian Doyle to determine a number of preliminary matters come on including in particular whether an ACAS COT3 settlement on 1st September 2012 served to lawfully and effectively exclude the jurisdiction of the employment tribunal in this claim.

Background

3. The claimant is a former police officer and was employed by the Chief Constable of Greater Manchester Police ("GMP") between 23 March 1998 and 25 March 2019.

4. The claimant has brought a number of linked claims against both GMP and the respondent in this case which provides occupational health services including to GMP. In the claimant's case, that advice was part of a process relating to the claimant's ability to continue in this duties and in particular to assess

whether the claimant should be considered permanently disabled for the ordinary duties of a police officer following an injury at work in 2015.

5. It is relevant to note that the respondent company is registered under number company number 08842488. Between 13 January 2014 and 24 June 2021 this company was called Gel Limited. It has or had a parent company which from 8 October 2003 to 25 June 2021 was called Healthwork Limited which registered under company number Company number 04925014. On 25 June 2021 that company changed its name to Gel Limited (it is now in members' voluntary liquidation).

6. It is unfortunate that there has been a certain amount of confusion about the correct name of the company. In particular, the tribunal proceedings against the respondent were continued to be defended in the name of Gel Limited by the respondent's solicitors after the change of name. It is that name which appears on the COT3 Agreement referred to below even though by that time the name had changed. However, the claimant has never asserted that he has a claim against the parent company. It is clear therefore that at all relevant times it is the legal entity registered under number 08842488 which has been the subject of legal proceedings from the claimant, and it is that company which entered into the COT3 Agreement in respect of the legal proceedings which had been issued against "Gel Limited". The legal entity registered under company number 04925014 has never been party to legal proceedings from the claimant.

7. On 8 October 2017 the claimant brought a claim against GMP under case number 24208671/2017 which claim was settled via ACAS on 19 November 201. That claim has been referred to in these proceedings as Claim 1.

8. The claimant brought a further claim against GMP and the respondent under case number 2408099/2020 ("Claim 2") on 18 June 2020. It was clarified at a a preliminary hearing for case management purposes before Employment Judge Allen on 1 February 2021 that this was a claim for victimisation under section 27 of the Equality Act 2010 ("the EqA"), the claimant relied upon Claim 1 as the protected act.

9. The respondent defended Claim 2 on the basis that it was not liable under the Equality Act. It was not the claimant's employer, nor could it be a responsible person under section 61 of the EqA and it denied that it could be vicariously liable for the actions of Dr Lister who was the doctor whose actions the claimant complained about. The Tribunal listed a preliminary hearing to consider an application from the respondent to strike out Claim 2 on the basis that it had no reasonable prospect of success or that the claims against the respondent should be subject to a deposit order.

10. However, before that application was determined, the claimant entered into a COT3 settlement agreement through the auspices of ACAS in relation to the proceedings in Claim 2 ("the COT3 Agreement").

11. Under the terms of the COT3 Agreement, in return for the claimant withdrawing Claim 2 against the respondent, the respondent agreed to issue a letter of regret

to the claimant in agreed terms. That letter of regret was duly issued by the respondent and Claim 2 against the respondent was duly withdrawn.

12. Shortly afterwards, the claimant entered into a separate agreement with GMP to withdraw Claim 2 against GMP. Under the terms of the COT3 agreement, in respect of that claim, GMP agreed to a reconsideration of the claimant's case pursuant to regulation 32 of the Police (Injury Benefit) Regulations 2006 ("the Regulations") and that claim too was withdrawn.

13. On 26 January 2022 the claimant received an early conciliation certificate relating to Dr David Gidlow/Healthworks Limited trading as Gel Limited, and 31 January 2022 an early conciliation certificate relating to GMP. On 1 February 2022 he presented a further claim against both GMP and "Gel Limited/Dr David Gidlow as Healthworks Limited trading" under case number 2400551/2022 ("Claim 3"). On 11 May 22 the claim against GMP was withdrawn.

14. The respondent defended the claim brought against it on a number of grounds including that the matter had already been resolved via a COT3. On the question of the correct respondent it said this

    "This Response is submitted on behalf of the Second Respondent. It is unclear who the Second Respondent in this matter is. The Tribunal has accepted "Gel Limited/Dr David Gidlow as Healthworks" as the Second Respondent. No such entity exists.

    As a protective measure these Grounds of Resistance are submitted on behalf of Gel Limited and/or Healthwork and/or Dr David Gidlow. Gel Limited and Dr David Gidlow and Healthwork are hereinafter referred to as the Second Respondents. Gel Limited trades as Healthworks. The Second Respondents seek urgent clarity as to who the Respondent is intended to be. It is likely that the correct Second Respondent is Gel Limited trading as Healthwork."

15. I will pause there to observe that this was not correct. On the basis of Companies House records it would appear that the correct respondent was Healthworks Group Limited which had previously been known as Gel Limited, that is the company is registered under number company number 08842488.

16. Claim 3 came before Judge Doyle at a preliminary hearing for case management purposes on 8 June 2022 when he listed the case for the hearing before by this tribunal to determine a number of matters including, as noted above, whether an ACAS COT3 settlement made 1st September 2012 served to lawfully and effectively exclude the jurisdiction of the employment tribunal in this claim.

17. Some time was spent at the hearing before this tribunal seeking to understand and define the claimant's claims against the respondent. It was also confirmed that the name of the respondent in these proceedings needed to be amended to reflect the correct name of the legal entity against which the claimant had brought his claim, that is the company registered under number 08842488, and an order was made to this effect with the claimant's consent.

18. The claimant confirmed that the only claims he brought to against the respondent were under the Equality Act 2010 related to acts of victimisation he says occurred after the COT3 agreement was signed.

The legal issue in this case

19. I had before me an agreed bundle of documents and I heard oral submissions from both parties and received detailed written submissions from the respondent.

20. The respondent asserted that the terms of the COT3 Agreement agreed in September 2021 meant that this tribunal had no jurisdiction to determine Claim 3.

21. The arguments it advanced on the basis of section 144 of the EqA in light of the terms of the COT3 Agreement.

22. Section 2 of the COT3 Agreement states,

    "The letter of regret referred to in clause 1 above is in full and final settlement of the claim brought by the Claimant against the Second Respondent in the Employment Tribunal under case number 2408099/2022 (the "Claim") and "*all and any claims which the Claimant has or may have in the future against the Second Respondent or any of its associated companies or its officers or shareholder or employees or workers whether existing at present or arising from events occurring after this agreement has been entered into including but not limited to, claims under…the Equality Act 2010… excluding any claims by the Claimant to enforce the terms of this agreement, any personal injury claims which the Claimant is not aware and could not reasonably be expected to be aware at the date of this agreement and any claims in relation to the Claimant's accrued pension entitlements*."

23. By virtue of section 144 of EqA 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 the EqA but this is subject to the exception under section 144 (4) of the EqA. That sub-section provides that the prohibition against contracting out of the EqA under section 144 of the EqA does not apply to a contract which settles a complaint within section 120 of the EqA if the contract,
    "(a) is made with the assistance of a conciliation officer, or
    (b) is a qualifying settlement agreement."

24. The respondent points out that in this case, the COT3 Agreement was made with the assistance of an ACAS conciliation officer and it therefore argues that that this exception under section 144 (4) (a) applies if the terms of the COT3 can be said to apply to Claim 3.

25. Ms Bell drew my attention to the decision of the Employment Appeal Tribunal in *Royal National Orthopaedic Hospital Trust v Howard* [2002] IRLR 849, which confirms that a settlement reached through ACAS conciliation may in principle cover any disputes between the parties, including disputes that have not arisen

at the time of the settlement. She highlighted the following paragraph to me Judge Reid QC's judgment,

"The law does not decline to allow parties to contract that all and any 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. If the parties seek to achieve such an extravagant result that they release claims of which they have and can have no knowledge, whether those claims have already come into existence or not, they must do so in language which is absolutely clear and leaves no room for doubt as to what it is they are contracting for. We can see no reason why as a matter of public policy a party should not contract out of some future cause of action. But we take the view that it would take very clear words for such an intention to be found."

26. Ms Bell also referred me to guidance given in the case of *Investors Compensation Scheme Limited v West Bromwich* [1998] 1 WLR 896 in which it was made clear that a tribunal 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."*

27. Ms Bell submitted that the COT3 Agreement properly interpreted nevertheless precluded the claimant from pursuing any Equality Act claim against the respondent because, with reference to the terms of the COT3 Agreement, Claim 3 is a claim, "*which the Claimant…may have in the future against the Second Respondent or any of its…employees…arising from events occurring after this agreement has been entered into including but not limited to, claims under…the Equality Act 2010…*".

28. Ms Bell acknowledged that in the *Howard* case it had been found that the wording was insufficiently clear to indicate an intention to contract out of future claims) but she submitted that could not be said to the case here because the parties had agreed not only that the COT3 Agreement would settle claims "which the Claimant has or may have in the future", the COT3 Agreement went on to expressly state that it also settled claims "whether existing at present or arising from events occurring after the agreement had been entered into". This, Ms Bell argued, leaves no room for doubt that the claimant and the respondent had agreed to settle Claim 2 and any future cause of action under the EqA.

29. Further, Ms Bell suggested that this might not be as surprising as it might at first appear. The respondent made clear in its response to Claim 2 that it considered the claimant's claims entirely without merit and had already seen the claimant settle one claim only to reissue legal proceedings. In those circumstances it might be expected to be looking for certainty in any future settlement.

30. In his submissions the claimant referred me to the decision of the EAT in *Bathgate v Technip UK Ltd and others* [2022] EAT 155 and quoted from a comment article produced about that case by the respondent's solicitors. Mr Bathgate was an employee who took voluntary redundancy from his employer

and entered into a settlement agreement, under which his employer agreed to make various enhanced redundancy and other payments in return for Mr Bathgate settling all claims. Over a month after Mr Bathgate's redundancy, the employer decided that it was not going to make any payment under a collective agreement which Mr Bathgate had expected to receive. Mr Bathgate claimed that the decision not to make the payment amounted to age discrimination. The Employment Tribunal who heard his claim determined that he had waived any age discrimination claims under the settlement agreement. Mr Bathgate appealed against that decision and was successful. The Employment Appeal Tribunal held that Mr Bathgate waived his right to sue for age discrimination before he knew whether he had a claim or not and it was found that settlement agreements could not settle such future claims that had not arisen at the date of the agreement.

31. The claimant before me argued that the same principle must apply here and that the COT3 Agreement could not be said to apply to a claim which arose after the date of that agreement.

32. Ms Bell submitted however that the Bathgate decision did not assist the claimant. Mr Bathgate had agreed to a settlement agreement which falls within the exception in s144(4)(b) of the EqA and the key issue was whether a future claim can be a "particular complaint" within the meaning of s147(3)(b). Those requirements do not apply to COT3 agreements which are entered into with the assistance of a conciliation officer.

33. The claimant also argued that it would not be fair if the COT3 agreement had the effect the respondent argues that must have. However, I am satisfied that this is not a relevant consideration. What matters is what was within the contractual scope of the terms of the COT3 Agreement.

Conclusion

34. In order for the terms of a COT3 agreement to waive future claims it would have to be clear that was the intention of the parties viewed objectively from the wording of the agreement. I acknowledge it will be unusual situation where this is the case, but I am satisfied that such an intention must have existed between the claimant and the respondent because the wording highlighted to me by Ms Bell expresses this intention in clear and unequivocal terms. I cannot see how the words *"which the Claimant…may have in the future against the Second Respondent or any of its…employees…arising from events <u>occurring after this agreement has been entered into</u> including but not limited to, claims under…the Equality Act 2010…"* [my emphasis] can be interpreted in any other way. The claimant was unable to explain to me any alternative interpretation.

35. I also accept that the Bathgate decision does not does assist the claimant in this case for the reasons submitted by Ms Bell. Parliament has chosen to have in place two routes to an agreement which may exclude the Tribunal's jurisdiction and the Bathgate decision affects only the scope of one of them, that where terms are agreed though a settlement agreement.

36. In the circumstances I accepted the submissions of the respondent and found that, for the reasons set out by Ms Bell, the employment tribunal has no jurisdiction in this case.

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Employment Judge Cookson

Date: 9 January 2023

REASONS SENT TO THE PARTIES ON

11 January 2023

FOR THE TRIBUNAL OFFICE