EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss C. SHARP	**v**	**CATALYST HOUSING LTD.**

Heard at: London Central (via video)

On: 24 February 2022

Before: Employment Judge P Klimov, sitting alone

Representation:

For the Claimant: in person

For the Respondent: Mr T. Stephenson (solicitor)

JUDGMENT having been sent to the parties on 24 February 2022 and written reasons having been requested by the claimant on 7 March 2022, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. This was an open preliminary hearing to determine the issue:

   "*Whether the Tribunal has jurisdiction to hear the claim bearing in mind the settlement agreement of 13 July 2021*"

2. The Claimant represented herself. Mr Stephenson appeared for the Respondent. I was referred to various documents in the bundle of documents of 84 pages. The Respondent prepared skeleton arguments.

3. The Respondent also applied a costs order. In support of the application, the Respondent prepared a costs application document and a bundle of six pages.

4. The Claimant was engaged by the Respondent through an agency in an interim capacity between 9 May 2016 and 31 March 2020. She was then employed directly by the Respondent from 1 April 2020 until 9 July 2021. The Claimant's role was most recently Head of HR Business Partnering.

5. On 7 June 2021, the Claimant raised a grievance to Ian McDermott (the Respondent's Chief Executive Officer) about her line manager. The Respondent commenced investigation, however, before it was able to complete it, the Claimant's line manager had left the Respondent. Her departure was discussed with the Claimant.

6. On 6 July 2021, the Claimant resigned with immediate effect. The Respondent offered the Claimant to come back to work, but she declined. The parties then negotiated and signed a settlement agreement dated 13 July 2021.

7. The following are the key terms of the settlement agreements

Clause 1.1

The Employee agrees to accept the terms set out in this Agreement in full and final settlement of the Claims (as defined in clause 6.1below) which she has against the Employer or any of its officers or employees as a result of her employment with the Employer or its termination, save for latent personal injury claims, claims against the Trustees of the Standard Life for accrued pension rights, or claims for any breach of this Agreement.

Clause 6.1

The Employee acknowledges that this Agreement relates to any claims including tortious claims, statutory claims and contractual claims which exist or may exist (irrespective of whether the Employee is aware of such claims at the date of this Agreement) or which may exist in the future which the Employee has or may have against the Association and its respective officers and employees arising out of or in connection with or as a consequence of her employment and/or its termination (the Claims), including:

…

(c) unfair dismissal Employment Rights Act 1996 ;

….

(g) detriment suffered under Part V of the Employment Rights Act 1996"

Clause 6.2

In consideration of the Employer providing the Employee with the reference as set out in Schedule 1(sic) to this Agreement the Employee agrees to waive the claims as set out in this clause 6.1

Clause 7

The Employee confirms that she has taken legal advice from the Legal Adviser, who has a practising certificate and contract of insurance covering that advice as to the terms of this Agreement and its effect and, in particular, its effect on her ability to pursue her rights before an Employment Tribunal.

8. Schedule 1 of the settlement agreement contained Adviser's Certificate signed by the Claimant's solicitor, confirming that he was a solicitor, maintained a contract of insurance, was a relevant independent adviser as defined, *inter alia*, in the Employment Rights Act 1996, and including his confirmation that he has "*advised [the Claimant] of the Claims and the terms and effect of the Agreement and its effect on his(sic) ability to pursue a claim before an Employment Tribunal or other court with relevant jurisdiction*".

9. On 7 October 2021, the Claimant, having completed ACAS Early Conciliation on 6 August 2021, presented a claim form making complaints of automatic (constructive) unfair dismissal (s.103A Employment Rights Act 1996 ("**ERA**")) and "whistleblowing" detriment (s.47B ERA). All the complaints were in relation to the matters pre-dating the settlement agreement.

10. On 20 December 2021, the Respondent presented its response, *inter alia*, seeking to strike out the Claimant's claims, as being settled under the settlement agreement.

The Law

11. Sections 203(3) ERA states that to be a valid settlement of statutory claims the agreement must:
    (a) be in writing,
    (b) relate to the particular proceedings,
    (c) only be made where the employee or worker has received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his or her ability to pursue his or her rights before an employment tribunal,
    (d) There must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a professional body, covering the risk of a claim by the worker or employee in respect of loss arising in consequence of the advice,
    (e) identify the relevant independent adviser, and
    (f) state that the conditions regulating settlement agreements have been satisfied.

12. In **Hinton v University of East London** 2005 ICR 1260, CA, the Court of Appeal considered the requirement in s.203(3)(b) for a settlement agreement to "*relate to the particular proceedings*".

13. Lord Justice Mummery, giving the leading judgment, rejected the contention that, for a settlement agreement to relate to "the particular proceedings", tribunal proceedings must have been initiated before the agreement was signed. He held that a settlement agreement can apply '*to the compromise of anticipated proceedings in relation to a claim or complaint raised between the parties prior to the compromise, though not the subject of any actual proceedings*'.

14. The Court of Appeal said that the policy behind S.203 was '*to protect claimants from the danger of signing away their rights without a proper understanding of what they are doing*'. To achieve this, the requirement that an agreement '*relate to*

the particular proceedings' had to mean that the particular proceedings were clearly identified, either by a generic description such as "unfair dismissal" or by reference to the section of the statute giving rise to the claim. It was not sufficient for a settlement agreement to use '*a rolled-up expression such as "all statutory rights*"', nor even to identify the proceedings only by reference to the statute under which they arose.

15. The Court of Appeal also held that "*If the compromise is of a particular claim raised which is not yet the subject of proceedings, it is good practice for the particulars of the nature of the allegations and of the statute under which they are made or the common law basis of the alleged claim to be inserted in the compromise agreement in the form of a brief factual and legal description*."

16. As with any other legal contract, the validity of a settlement agreement may be challenged on common law grounds (duress, misrepresentation, mistake, capacity, lack of consideration, etc.).

Discussion and Conclusions

17. The Respondent submits that the settlement agreement is valid in common law and satisfies s.203 ERA requirements and therefore - binding on the Claimant. Accordingly, her claims must be struck out as being compromised and settled, and the tribunal does not have jurisdiction to consider them.

18. The Claimant accepts that she has entered into the settlement agreement at her own free will. She did not challenge its validity on any common law grounds. She, however, argues that the settlement agreement did not include "whistleblowing" or "personal injury". She said that she had done *some investigation and found out that signing a settlement agreement does not include whistleblowing or personal injury*. The Claimant also said that she had not foreseen the long-term impact on her mental health she claimed her line manager had caused.

19. With respect to "whistleblowing", it appears that the Claimant must have mixed up the issue of the effect of s.203 ERA-compliant settlement agreement on the ability to pursue actual or potential "whistleblowing" claims with the issue of the application of a confidentiality term in a settlement agreement on the employee's ability to make a subsequent protected disclosure. The confidentiality clause in the settlement agreement contained a specific carve out to that effect:

    "*4.2 Nothing in this clause 4 shall prevent the Employee from:*

    4.2.2 making a protected disclosure under section 43A of the Employment Rights Act 1996"

20. With respect to personal injury claims, claims *"for latent personal injury"* were outside the scope of the settlement agreement. However, while the Claimant sought damages for personal injury with respect to her s.47B claim, she did not bring a free-standing claim for latent personal injury. In any event, under Article 3 of the Employment Tribunals (Extension of Jurisdiction) (England and Wales)

Order 1994 claims *for damages, or for a sum due, in respect of personal injuries* cannot be brought in an employment tribunal.

21. I examined the terms of the settlement agreement. Under those terms the Respondent agreed to pay to the Claimant sums of money: (i) in lieu of notice, (ii) for accrued but untaken holiday, and (iii) a pension contribution for her notice period, but no additional sums for waiving the claims. Therefore, it appears that the Claimant was paid what she would have been entitled to receive under her contract of employment upon termination. However, the consideration for waiving the claims was expressly stated as the Respondent's agreement to provide the Claimant with the reference set out in Schedule 1(sic) of the agreement. The agreed reference stated the Claimant's position and the dates of her employment.

22. It is trite law that the consideration need not have a monetary value, but it must be of benefit to the person who has made the promise ("the promisee"). The benefit must have some legal worth ("sufficient value"), but it does not need to be "adequate". The fact that the promisee receives "too little" for their promise does not of itself affect the validity of the contract. The principle is well illustrated in the decision in **Chappell & Co Ltd v Nestlé** [1960] A.C. 87 where chocolate manufacturers sold records for one shilling and sixpence plus three wrappers from their sixpenny chocolate bars. It was held that the wrappers formed part of the consideration, even though they were of little value. The wrappers would, in fact, have amounted to sufficient consideration even if they were the sole payment for a record.

23. Turning to the statutory requirements under s.203. Clause 6.1 (a) of the settlement agreement clearly contracted out claims for unfair dismissal under ERA. Therefore, I find that the Claimant's s.103A claim for automatic (constructive) unfair dismissal is within the scope of the settlement agreement.

24. Clause 6.1 (g) contracted out detriment claims under Part V of ERA. Part V contains a number of sections protecting employees' rights not to suffer a detriment for various prescribed reasons, including for making a protected disclosure (s.47B).

25. The settlement agreement did not specifically refer to s.47B and did not describe a waived claim as a claim for being subjected to a detriment on the ground that the employee made a protected disclosure.

26. The Court of Appeal in **Hinton** suggested that it was "good practice" to include "*the particulars of the nature of the allegations and of the statute under which they are made or the common law basis of the alleged claim to be inserted in the compromise agreement in the form of a brief factual and legal description".* However, it did not say that not having such particulars would render the waiver ineffective.

27. Lady Justice Smith held that s.203(3)(b) "*must be construed as requiring the particular proceedings to which the agreement relates* ***to be clearly identified****. It is not sufficient to use a rolled-up expression such as 'all statutory rights*" (***my emphasis***).

28. Lord Justice Mummery formulated the critical question as follows:

    "*For me the decisive point is in the formulation of the key question. I would formulate it in this way: how does the Agreement relate to the particular proceedings under s47B ?*"

29. He went on to analyse the waiver and found that it was not effective to contract out s.47B claims for the following reasons: "*It relates to proceedings, but not to "particular proceedings." Particularity on this point is required, but it is missing from clause 9: no particular statute is stated expressly; no particular description is supplied of the legal nature or the factual basis of any proceedings "arising under statute"; no mention is made of public interest disclosures or of any detriment suffered by Dr Hinton as a result of making them*.

30. It appears the relevant clause in the compromise agreement in **Hinton** "*did not include any claim of the kind falling under section 47B of the 1996 Act*".

31. I find that Clause 6.1 (g) in the Claimant settlement agreement does refer to claims of the kind falling under s. 47B ERA. It specifically refers to "detriment suffered" and to Part V ERA, where s. 47B is located.

32. Although it does not refer to s.47B by number, and it does not use such terms as "protected disclosure" or "whistleblowing", in my judgment, on balance, it has sufficient particularity to bring s.47B claims within the scope of the settlement, as being part of "the particular proceedings".

33. While it might be argued that because Part V, in addition to "whistleblowing" contains 15 other grounds for detriment claims that can be brought in an employment tribunal, and therefore the description "*detriment suffered under Part V"* lacks sufficient particularity to satisfy s.203(3)(b) requirement, I find that such approach would be pernickety and not in accordance with the purpose of the legislation.

34. Accepting that s.203 ERA is designed to protect employees from unintentionally signing away their rights, it is also designed to give employers and employees a legal instrument to draw a line under any actual or potential disputes and part companies amicably. S.203 ERA contains other safeguards, most notably - the requirement to receive advice from a relevant independent adviser, which protect employees' interests.

35. Requiring that every potential employment related claim be specifically linked to a particular section in the relevant statute or be given a precise description, would make settlement agreements running for dozens and dozens of pages, with no added protection to employees. That will make them a "form over substance" exercise in elaborate legal drafting, which cannot be what the Parliament intended when introducing s.203 into ERA.

36. Further, such interpretation would be inconsistent with the generally accepted practice that reference to "unfair dismissal" claims under ERA is sufficient to contract out "ordinary" unfair dismissal claims as well as "automatically" unfair dismissal on all various grounds, which broadly follow Part V detriment cases.

37. For these reasons, I find that the Claimant's s.103A and s.47B claims have been compromised and settled under the terms of the settlement agreement and they must be struck out, and the tribunal does not have jurisdiction to consider them.

Costs Application

38. The Respondent applied for a costs order against the Claimant pursuant to rules 76(1)(a) and (b) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (**ET Rules**).

The Law

39. Rule 76(1) states:

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;

(b) any claim or response had no reasonable prospect of success….

40. The following key propositions relevant to costs orders may be derived from the case law:

41. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order. Only if the tribunal decides to exercise its discretion to make an award of costs the question of the amount to be awarded comes to be considered (**Haydar v Pennine Acute NHS Trust** UKEAT/0141/17).

42. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not. Litigants in person should not be judged by the standards of a professional representative (**AQ Ltd v Holden** [2012] IRLR 648).

43. For term "vexation" shall have the meaning given by by Lord Bingham LCJ in **AG v Barker** [2000] 1 FLR 759:

> "*[T]he hallmark of a vexatious proceeding is … that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be , its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which*

is significantly different from the ordinary and proper use of the court process." (**Scott v Russell** 2013 EWCA Civ 1432, CA)

44. 'Unreasonable' has its ordinary English meaning and is not to be interpreted as if it means something similar to 'vexatious' (**Dyer v Secretary of State for Employment** EAT 183/83).

45. In determining whether to make a costs order for unreasonable conduct, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct — (**McPherson v BNP Paribas (London Branch)** 2004 ICR 1398, CA)

46. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant. However, the tribunal must look at the entire matter in all its circumstances. **Yerrakalva v Barnley MBC** [2012] ICR 420 Mummery LJ gave the following guidance on the correct approach (at para 41):

47. "*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the Claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in McPherson's case was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the employment Tribunal had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances*"

Discussion and Conclusions

48. The Respondent submitted that the Claimant acted unreasonably in pursuing the employment tribunal claims after having signed a settlement agreement and for the purposes of Rule 76(1)(b) that her claims had no reasonable prospect of success because she had signed a settlement agreement.

49. With respect to Rule 76(1)(a) ground the Respondent argued that the Claimant's conduct in bringing a claim and continuing to pursue it to this hearing was unreasonable because:

    i. she received legal advice on or before 8 July 2021 from a qualified solicitor on the terms and effect of her settlement agreement, including her ability to pursue complaints in the employment tribunal;
    ii. The Respondent placed the Claimant on notice in its defence and its application to the tribunal for rejection or strike out of the claims and pursue her for costs;
    iii. On 4 January 2022, the Respondent's solicitors wrote to the Claimant on a without prejudice save as to costs basis reiterating the Respondent's position,

repeating the costs warning, urging the Claimant to seek legal advice and offering a "drop hands" settlement.

iv. On 28 January 2022, the Claimant refused the offer via ACAS and said that she would "take her chances at the tribunal".

50. With respect to the 76(1)(b) ground the Respondent argued that the Claimant acted unreasonably because her claims "*arise from matters which pre-date the settlement agreement. At no stage has the Claimant raised any credible arguments that call into question the validity of the settlement agreement. The Claimant incorrectly formed the view that settlement agreements do not cover whistleblowing or personal injury. To the extent that the Claimant was not advised on this issue prior to signing the settlement agreement, it would have been reasonable for the Claimant to seek further advice before issuing her claim or at the latest, after the Respondent's solicitors placed the Claimant on notice (in its defence and subsequently in a cost warning letter), that her position was misguided*". The Respondent further submitted that the Claimant had submitted irrelevant evidence for the hearing (pages 61-84 of the hearing bundle).

51. The Respondent seeks the costs it has incurred defending the Claimant's claims in the amount of £8,745.04. The Respondent said that its costs was higher because the Claimant also had asked her claim to be referred to the Respondent's regulator and it had to deal with that matter too.

52. The Claimant argued that she did not act vexatiously or unreasonably. She said that:
    i. she seriously believed the tribunal would take into account what had happened to her;
    ii. the Respondent had swept under the carpet her complains against her former line manager;
    iii. she wanted to be heard;
    iv. she believed that "whistleblowing" was not covered by the settlement agreement;
    v. she did not have funds to take legal advice and instead read what was on the government website;

53. I refused the Respondent's application for the following reasons:

54. Rule 76(1)(a) – Although I found that the Claimant's S.47B claim was within the scope of the settlement agreement, that was by no means a foregone conclusion. I found that "on balance", and the margin in favour of the Respondent was fairly thin. Therefore, it cannot be said that the Claimant's claim had no reasonable prospect of success, at least with respect to S.47B claim.

55. Rule 76(1)(b) – I find that the Claimant genuinely, albeit mistakenly, believed that "whistleblowing" was not covered by the settlement agreement. She must have misread or misunderstood information on the government website.

56. She chose not to seek legal advice, despite being urged to do so by the Respondent, but she was not obliged to. It will be wrong to penalise litigants in person with costs for not seeking legal advice. Employment tribunals are meant to

be forums in which parties can represent themselves and the overriding objective requires the tribunal to ensure, so far as practicable, that the parties are on an equal footing.

57. I accept that she was seriously distressed by what had happened to her and wanted the matter to be aired at a public hearing. There is a particular public interest in whistleblowing complaints to be heard (see **Ezsias v North Glamorgan NHS Trust** [2007] EWCR Civ 330).

58. Considering my finding on "no reasonable prospect of success" ground, it was not unreasonably for the Claimant to continue to pursue her claim and to turn down the "drop hands" settlement offer.

59. The fact that the Claimant submitted irrelevant evidence for the hearing, by itself, is not sufficient to hold that her conduct of the proceedings was unreasonable. She is a litigant in person and is not expected to have the same level of appreciation as a specialist employment lawyer as to what evidence are relevant for the purposes of the issues to be determined.

60. For these reasons, I found that the Claimant's conduct was not unreasonable in the bringing of the proceedings or the way that the proceedings have been conducted by her.

Employment Judge P Klimov
14 March 2022

Sent to the parties on:

15/03/2022

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For the Tribunals Office

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