EMPLOYMENT TRIBUNALS

Claimant: Ms Zoe Phillips

Respondent: A. Menarini Farmaceutica International SRL

Heard at: Watford Employment Tribunal **On:** 7 July 2023

Before: Employment Judge Young (sitting alone)

Representation
Claimant: Mr R Beaton (Counsel)
Respondent: Ms S Crawshay- Williams (Counsel)

JUDGMENT

The Employment Tribunal does not have jurisdiction to hear the Claimant's claim. The Claimant's claim is dismissed.

REASONS

1. Written reasons were orally requested at the conclusion of the hearing and so are provided below.

Introduction

2. The Claimant was employed as a UK Senior Brand Manager by the Respondent. The Respondent is an overseas Italian company selling and distributing pharmaceutical/medical products. The Claimant contacted ACAS on 3 August 2021. The ACAS early conciliation certificate was issued on 14 September 2021. On 1 September 2021, the Claimant signed a settlement agreement with the Respondent. The Claimant then presented her claim form on 24 September 2021.

Hearing & Evidence

3. The claim was listed for a public preliminary hearing for 1 day. The Claimant attended with Counsel, Mr Beaton through Advocate, the free

representation charity. The Respondent did not attend, but was represented by Ms Crawshay-Williams of Counsel.

4. In Employment Judge Quill's order dated 30 April 2022, the parties were directed by 28 June 2023, to send to each other copies of written statements for any witnesses they intended to call at the preliminary hearing. It was directed that the statements should be confined to the issue of whether a settlement agreement was reached and, if so, on which date, and what were the effects. There was also a direction for a joint bundle on 30 April 2023 order.

5. I was provided with 2 bundles. There was a joint bundle which the Respondent produced that had both the Claimant's and the Respondent's documents in it. The Claimant however, wanted to add additional documents to that joint bundle but those documents were not added and so provided her own supplemental bundle electronically. The Claimant referred to a number of documents in her witness statement and so those documents were copied so that the witness could refer to them whilst giving evidence.

6. I was told the Claimant did not understand the order, and did not provide a statement on or before 28 June 2023. However, the Claimant subsequently obtained free legal representation and on 6 July 2023, had a short conference with Mr Beaton who then advised her to comply with the order. The Claimant then complied with the order as best she could and sent in a written paragraph typed witness statement with a supplemental bundle containing all the documents that the Claimant said was missing from the joint bundle to the Tribunal and the Respondent in the early hours of 7 July 2023. Consequently, Ms Crawshay- Williams only saw the supplemental bundle and the witness statement on the morning 7 July 2023 at 09:00. The Respondent objected to the Claimant being allowed to rely upon her statement. The Respondent was given an opportunity to take instructions on the statement and explain why they did not provide their own witness statement and witness. The Respondent's position was the Claimant's witness statement provided more detail. The Respondent applied for a postponement as no witness could attend from the Respondent and they needed to address the Claimant's allegations in the statement. The Respondent's application was refused on the grounds that the Respondent had already been given an opportunity to provide a witness statement. They chose not to. The Respondent knew the Claimant relied upon duress as that was disclosed in the Claimant's response to the Respondent's response form dated 2 May 2023, where the Claimant stated that she was forced to sign the agreement.

Claims and Issues

7. The Claimant's claim form included a claim for constructive unfair dismissal on the grounds of age, sex, race, and civil partnership discrimination as well as sexual harassment. The Claimant clarified she was not bringing a breach of contract claim that was within the jurisdiction of the Employment Tribunal. Ms Crawshay-Williams accepted on behalf of the Respondent that if the Claimant were not bringing a breach of contract claim, the Respondent could not pursue their breach of contract

counterclaim in the Employment Tribunal.

8. The Claimant's case was that the reason the settlement agreement was not valid was because she was made to sign the agreement under economic duress.

9. The issues in the case were set out in the notice of preliminary hearing dated 30 April 2023 as follows:

    1. Did the parties execute a valid and binding settlement agreement? If so, from which date?

    2. If there is a valid and binding settlement agreement, does it have the effect of preventing the Claimant continuing with any of the complaints mentioned in the claim form. If so, which?

    3. Should there be a judgment dismissing any complaint as a result of the decisions on the preliminary issues?

    4. Should any of the complaints be struck out as having no reasonable prospects of success?

    5. Should any deposit order be made?

Findings

6. I make the following findings of fact on the balance of probabilities.

7. I have had careful regard to all the evidence that I have heard and read about concerning the Claimant's personal circumstances. It is not necessary for me to rehearse everything that I was told in the course of this case in this judgment, but I have considered all the evidence in the round in coming to make my decision. All numbers in square bracket are page references to the joint bundle.

8. Unless stated otherwise on particular points or issues, I found the Claimant to be a truthful witness.

9. In April 2021, the Claimant was told her salary pay rise was to be withheld and she was not to be paid a bonus because the company had not performed. The Claimant believed that she was the only person who had her salary withheld. In June 2021, the Claimant was told that if she accepted Keith Eeley as her line manager her salary pay rise would be paid in July. The Claimant accepted Mr Eeley as her line manager and her salary pay rise was paid in July 2021 which was backed dated to April 2021. The Claimant was also paid her bonus from April 2021.

10. The Claimant raised a grievance dated 30 July 2021. Prior to raising the grievance, the Claimant sought advice from the CAB. The Claimant was advised that she could bring a claim in the Employment Tribunal but that she could not bring an unfair dismissal claim as she did not have 2 years' service. On 4 August 2021, the Claimant's grievance was acknowledged. On 6 August 2021, the Respondent requested a meeting with the Claimant to investigate overspending of expenses. Following this notification of an

investigation, the Claimant spoke to the CAB on 13 August 2021. The CAB advised the Claimant that it was likely that the Respondent was trying to get rid of her and so advised her to prepare a letter of resignation and ask for a settlement if that is what she wanted. The Claimant attended her grievance investigation meeting on 17 August 2021. On the same day, the Claimant received a letter inviting her to attend a disciplinary hearing to answer an allegation of falsification of a business expense for 23 August 2021. The letter stated that if the Claimant was found to have committed gross misconduct, the Claimant may be dismissed without notice. On receipt of the invitation to the disciplinary hearing, the Claimant did as the CAB had previously advised and prepared a letter of resignation **[109]** which stated in particular *"I have decided to resign subject to an agreed settlement"*.

11. The Claimant attended the disciplinary hearing on 23 August 2021. The Claimant was first interviewed by Ms Harj Dhariwal who was Finance and Operations Director and Mr Chris Eringher, Director of Medical Marketing. Both reported either directly or indirectly to Mr Francis Lynch who was the general manager. At the disciplinary hearing, the Claimant says that she was told that she would not receive pay if it was found she committed gross misconduct. The Claimant said in evidence that she interpreted this to mean she would not be paid at all. There are notes of the disciplinary hearing in the joint bundle, but the Claimant says that she had not seen the notes and that they are not an accurate record. Notwithstanding, I find that the Claimant was not told that she would not receive any money. I find that she was told she would not receive notice pay if she was found to have committed gross misconduct. There was no decision on the outcome of the Claimant's disciplinary hearing as the decision was to be made by Mr Lynch. Mr Lynch met with the Claimant after the disciplinary hearing. The Claimant says when she met with Mr Lynch, he looked angry and red. The Claimant presented her resignation letter to Mr Lynch who accepted the letter and the Claimant's resignation.

12. Following the Claimant's resignation, there was correspondence between the Claimant and Mr Lynch via email and text message. The Claimant was emailed on 25 August with the settlement agreement by Ms Kelly, Mr Lynch's PA on his behalf. In that email of 25 August 2021 **[117 & 121-122]**, the Respondent said that the terms of the settlement agreement were not negotiable. The Claimant relied upon this email as evidence of economic duress. However, the Respondent did not maintain this position because they did agree to increase the amount of legal fees from £250 plus VAT to £300 plus VAT. The Claimant chose the solicitor's firm to advise her on the agreement. The Claimant did not have detailed conversations with her solicitor but did tell him the circumstances surrounding the settlement agreement. The Claimant was advised by her solicitor following which the Claimant signed the agreement. The Claimant's solicitor expressly states he advised her in the advisor certificate which formed part of the agreement. The Respondent had also told the Claimant in that correspondence **[117]** that if she did not sign the settlement agreement then the disciplinary hearing would be reinstituted. When the Claimant received an invite to another disciplinary hearing on 31 August 2021, the Claimant made it clear that she had left the company and so would not be attending a disciplinary hearing in any event. **[120]**

13. The Claimant also relied upon a text message exchange with Mr Lynch **[123]** as economic duress. The Claimant said that text made it clear to her that if she did not sign the settlement agreement she would not be paid. I find the text message does not say that the Claimant would not be paid unless she signed the agreement but that the text is saying the agreement set out the terms which covered what the Claimant would be paid including an ex gratia payment. The Claimant would be paid after the signing of the agreement because it was a term of the agreement.

14. The Claimant was at the time of resigning in financial dire straits. The Claimant was having to pay legal fees in another case and had used all her savings including a small inheritance from her mother. The Respondent knew of the Claimant's financial woes, and they had in 2020 provided the Claimant with a loan.

15. The Respondent had expressed their displeasure to the Claimant regarding the circumstances of this other case, which had been reported in the press where the Claimant's name had been associated with the Respondent. The Respondent was worried about the potential reputational damage. There was also an incident in July 2021 where the Claimant was threatened by Mr Kevin Eeley (the Claimant's line manager) who threatened to tell staff about the Claimant's situation.

16. The settlement agreement proposed to pay the Claimant an ex gratia sum on top of her contractual entitlements. The Claimant was required to sign the agreement by 1 September 2021, 5 days after receiving it. The Claimant had time to speak to a friend about the settlement agreement and seek recommendations regarding who to use as a lawyer, before the Claimant signed the agreement on 1 September 2021.

The Law

17. An agreement is invalid at common law if either party can show that it was induced to enter into the contract because of *duress* by the other side.

18. The Court of Appeal authority o*f* Hennessy v Craigmyle and Co Ltd and anor 1986 ICR 461, CA, provided clear support for the proposition that Employment Tribunals do have jurisdiction to deal with the validity of a settlement agreement. That case was about a COT3 but the EAT decision of in Horizon Recruitment Ltd and anor v Vincent 2010 ICR 491, EAT was about a settlement agreement. In that case the EAT held that the ET have jurisdiction to consider settlement agreements too.

19. The commercial case of Pao On v Lau Yui Long [1980] AC 614, established the common law principle of economic duress which can make an agreement voidable.

20. Pao On v Lau Yui Long is referred to in the more recent EAT decision of Sphikas & Son v Porter (1997) EAT/927/96, which concerned the efficacy of a settlement agreement on the grounds of economic duress. Morison J in Sphikas suggests that based upon the review of the authorities of the law of duress as summarised in Chitty on Contracts, 27th edition paragraphs 7-001 to 7-018 in order to have economic duress *"there must be a combination of pressure and the absence of practical choice"*. Duress

requires the *"overt application of pressure*." The pressure must be regarded as illegitimate and that for a party in the midst of negotiation to prey on the other sides weakness is to be expected. Not every threat to break a contract is illegitimate pressure or where a party unwilling agrees to a variation of a contract. For example, threats not to pay where there may be a legitimate reason not to do so made in good faith will not ordinarily be regarded as illegitimate. Tribunals ought to analyse what the employee says the employer said that is relied upon as the duress not what the employee feared.

21. Morison J gives the specific example *"it would not be sufficient for the employee to say they have been slow payers in the past, I thought they would pay me nothing if I did not settle*."

22. It is worth also noting Sir John Donaldson MR's remarks in Hennessy that "*[i]t is entirely sensible to observe that in real life it must be very rare to encounter economic duress of an order which renders actions involuntary"* [see page 470, paragraph A]. The implication being, Sir John Donaldson MR concludes that if the situation is uncommon, it is highly unlikely that, in that case at least, the Claimant was subject to the necessary degree of economic duress.

23. There was no dispute that the settlement agreement complied with all the formalities required by section 203(3) Employment Rights Act 1996 or section 147(3) of Equality Act 2010.

Submissions

24. In summary, Ms Crawshay- Williams' submissions were that I should follow the reasoning set out in Sphikas. The Claimant had not provided sufficient evidence of overt pressure and the Claimant had the alternative of going to the Employment Tribunal and had the benefit of legal advice as well as the assistance of the CAB. It would be bad to set a precedent regarding the Respondent's behaviour as duress as it would discourage settlements. In the submissions from Mr Beaton, I was urged to distinguish Sphikas from Hennessey and from the facts of this case. Mr Beaton said that the Claimant's case had exceptional facts and was not a run of the mill case, as the Claimant's financial situation was known to the Respondent as dire, and the Claimant had taken a loan from the Respondent. I was to look at all the background including the Claimant's assertions of duress in respect of incidents that predated the proposal of the settlement agreement as relevant to the economic duress.

Analysis and Conclusions

25. I considered both Hennessy and the principles espoused in Sphikas. Both Counsel assisted me greatly in the consideration of these cases, it seemed to me, contrary to the Claimant's submissions, that both authorities were requiring me to look at whether there was undue pressure in the absence of practical choice. There must be no real alternative. This was a matter of fact.

26. I had to consider whether the pressure the Claimant was subjected to was illegitimate. Whether what the Respondent had done was the overt

application of illegitimate economic pressure. In that analysis, I considered all the circumstances as to what was overt? In doing that I took into account all the matters set out in Sphikas.

27. It seemed to me highly relevant that firstly the Claimant was the one who suggested the settlement agreement. This was not a case where the Claimant was faced with a fait accompli regarding the proposition of a settlement agreement. It was what she wanted, she suggested it. The real issue for the Claimant was the terms of the agreement that were not to the Claimant's advantage in her view. That alone is not economic duress.

28. Secondly, it was also not a case where the Claimant was just being paid her contractual entitlements. She was given an ex gratia payment as part of the agreement and the sum was not insubstantial.

29. Thirdly, in signing the agreement the Claimant had legal representation of her choice. The Claimant had advised her advisor of the circumstances, I of course do not know what the advice was, but the Claimant has never said that she signed the agreement against her advisor's advice.

30. Fourthly, the Claimant had 5 days to consider the agreement. It is not a great deal of time, but it was time to speak to friends, seek legal advice and consider her alternatives.

31. Fifthly, the Claimant had a feasible alternative and that was to bring an Employment Tribunal claim. She knew this as she had been advised on this very point from the CAB.

32. I could not view this case as exceptional and so I did not think it could be distinguished from Sphikas. Although Sphikas did not refer to Hennessy, I did not think Sphikas departed from Hennessy in substance in any event. It was pertinent that the Respondent knew about the Claimant's financial situation and had loaned the Claimant money. I did not think it was relevant to what I had to decide that the Claimant had been threatened in the past either in relation to the Respondent telling her clients about her previous case or threatening her with a disciplinary hearing. The threat regarding the Claimant's client was made before the settlement agreement was on the table so could have negligible impact. There was a question mark over the Claimant's expenses. The Respondent was entitled to ask the Claimant to come to a disciplinary hearing. After the Claimant's resignation the Claimant was not obliged to attend a disciplinary hearing and refused to do so, so it was not much of a threat. The fact that the person who negotiated the agreement was senior would be usual as they would hold the purse strings and in the meeting with the Claimant angry or not, Mr Lynch did not require the Claimant to sign a settlement agreement then.

33. In Hennessy, the Claimant was also threatened with a gross misconduct dismissal but this was not enough to amount to economic pressure there and it did not amount to economic pressure in this case either.

34. The Claimant may have been convinced that she would not get any money if she did not sign the settlement agreement but at no point can I see that the Respondent actually said this. It may be as Sphikas said that

is the Claimant feared she would not be paid. There was no evidence that the Respondent had previously failed to pay the Claimant anything. The bonus and pay rise were paid admittedly late but they were paid in any event so there was no precedent for the Respondent not paying at all. There was no overt pressure in either the Respondent's email dated 25 August 2021 or the text message correspondence between the Claimant and Mr Lynch.

35. Although the Claimant was clearly under financial pressure and the Respondent knew that I cannot find that it was in the absence of a practical choice.

36. In those circumstances, there was no economic duress applied to the Claimant. The settlement agreement dated 1 September 2021 is a valid settlement agreement and the Employment Tribunal has no jurisdiction to consider the Claimant's claim. The claim is therefore dismissed.

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Employment Judge Young

27th July 2023_____

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON
3 August 2023
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FOR THE TRIBUNAL OFFICE