



EMPLOYMENT TRIBUNALS

BETWEEN
and

Claimant

Respondent

Mr Edward Learman

Hampshire County Council

Held at: Exeter by Video

On: 11 May 2023

Before: Employment Judge Smail

Appearances

Claimant: In Person

Respondent: Ms T. Nestour (Solicitor)

JUDGMENT having been sent to the parties 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:

PRELIMINARY HEARING REASONS

1. This is a preliminary hearing to determine whether this claim is an abuse of process because the subject matters are otherwise covered by a COT3 agreement concluded between the parties.
2. There was a comprehensive discussion of the issues before Employment Judge Cadney on 29 December 2022. It is useful to recite some of that. At paragraph 48 of the case management record, Judge Cadney stated that following the discussion with the parties that day, the following propositions appeared to have been agreed by the claimant:
 - (a) First, it was not alleged that there was any basis for setting aside the COT3 agreement other than the assertion that it is invalidated by a prior misrepresentation, that is to say it is not alleged there was any technical or procedural error which invalidated it.
 - (b) Secondly, it was not alleged that there was any specific misrepresentation as to or in respect of the terms of the effect of the COT3 agreement; rather the claimant

contended that he would not have entered into the COT3 agreement but for misrepresentations as to his right to be redeployed as part of or in the application of the respondent's other policies.

- (c) Thirdly, all of the claims the claimant sought to present are based on factual allegations which predate the COT3 agreement and all of his claims will be caught, by it if he is unsuccessful in his application to set it aside. That is to say, there is no allegation of any post termination discrimination or other claims.
3. The Judge rightly recorded that the Tribunal does have the jurisdiction to set aside COT3 agreements in the light of actionable misrepresentations (see Industrious Ltd v (1) Horizon Recruitment Ltd (2) Vincent, EAT on 11th December 2009 reported at [2010] ICR 491 (also reported at [2010] IRLR 204).
 4. That is to say, there needs to be a misrepresentation as to fact or law which had the effect of inducing or encouraging the claimant to enter into the COT3 agreement. There was discussion of the claimant's case which has been consistent today as it was articulated in front of Judge Cadney, that the misrepresentation relied upon is the failure in effect to inform him as to or to draw to his attention to the contents of the respondent's managing absence redundancy or grievance policies, and in particular what he contends is his right to be redeployed whilst on long-term sick and/or having lodged a grievance, which had in fact resulted in a recommendation for redeployment, which had not been acted on at the date of the COT3 agreement and the termination of employment.
 5. It is fair to say that the claimant has been consistent in his position both at the preliminary hearing and before me. Perhaps the most relevant policy provision on redeployment is that in the sickness absence management policy (page 218 of this bundle), which provides as follows:

"Redeployment: Redeployment can be considered at any stage in this policy and must not be used as a sanction. It should result in satisfactory attendance in the new role and is subject to a suitable opportunity being available'.

That issue of suitable opportunity being available, if not directly raised under the policy at the time, is nonetheless of factual significance in this case.
 6. It will have been on the claimant's mind as to whether in fact there was a suitable alternative role for him in the Council at the time the discussion or negotiation around the COT3 agreement was taking place.
 7. The claimant had started his employment in the Pension Section. He tells me that position had not gone that well, there were relational difficulties there. He then transferred to the Disabled Children's Department. Relationships there had soured. The claimant had been off sick for six months. It seems that he had brought a grievance against colleagues; and colleagues had brought a grievance against him. It was an uncomfortable state of affairs.
 8. Mr Burrige had investigated the claimant's grievance and had come up with a recommendation in the following terms relating to the claimant's continued employment in that department under the heading Further Recommendations 8.1. Mr Burrige wrote:

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“8.1 Because of this investigation and other grievance proceedings currently ongoing against Edward Learman, it is obvious that relationships within the DCT have reached a stage where they have completely broken down and cannot be recovered or resolved. I recommend that Edward Learman does not return to working within the same district or team.

8.2 Edward Learman requires a role within HCC with a structured approach to training with documented task procedures to refer to when required with reasonable adjustments made to working times and conditions to accommodate the support required with mental and physical health issues.”

9. The claimant is right that the matter of alternative employment does not seem to have advanced. The respondent submits that it did not advance for two reasons.
10. First of all, the claimant appealed the grievance outcome internally; and secondly, he initiated ACAS early conciliation. It is clear from emails passing between the claimant and ACAS, which have been disclosed for present purposes, that the claimant did have it in mind to claim, conditionally at least, a constructive unfair dismissal. There was further correspondence I have seen relating to the grievance. I am told by Mr Burridge that at a meeting on 29 July 2021 there was discussion as to what the best outcome would be. Mr Burridge wrote:

“You did not tell me the outcome that you were looking for, or the resolution that you would prefer as you indicated that you did not want this to influence the investigation or the outcome. Therefore, the recommendations that are being shared following this investigation have been made on the information that was available.

However, given the nature of the concerns that you have raised, it may be reasonable to consider that your preferred outcome is to consider a move to a different team or department. However, this needs to be explored by an open conversation with yourself as to whether you feel this is a preferred outcome.”

11. The claimant wrote on 8 November 2021, saying:

“I do not expect my appeal to resolve [matters either] or that sick pay will be extended and so will request my holiday leave entitlement while I wait for this decision. I will make a constructive dismissal following this leave entitlement if the mediation discussions for another position fail and my sick pay extension request is denied.”

12. The claimant was in something of a financial hole at the time. His entitlement to sick pay was about to expire and as he tells me he had no money. The issue of whether the contractual sick pay would be extended was something that was going to be put before the grievance appeal chair. The 24 November and a rescheduled date on 3 December 2021 had been appointed as dates for the appeal hearing of the grievance outcome. Parallel to that though, was the ACAS early conciliation process, and the respondent had responded to that without prejudice, all in the context of the ACAS early conciliation provisions, that they would offer a severance agreement, that being perhaps best for all concerned.
13. The claimant repeated his position on or around 24 November 2021 that in terms of Mike Burridge’s recommendation that another suitable position should be found for him with the Council, no-one had yet contacted him to discuss this. He requested sick pay to be extended by a further three months whilst this was mediated. He expected that this would not be implemented

and his only alternative would be to resign once holiday pay had been depleted following December. That again indicates the financial pressures the claimant was under.

14. There are several messages between ACAS and the claimant. One of them dated 24 November 2021 was in the following terms from the ACAS conciliator Samantha Brewin:

“I have spoken with the respondent in relation to your early conciliation. One thing they have asked for is what your desired outcome would be. This does not mean that they will agree to it, but are asking for an indication to determine if they will enter into conciliation.”

15. The claimant was being forced into stating a position. He repeated his position that he wanted an extension by three months of sick pay. That would assist his recovery, he said, whilst he received treatment from his GP and attended alcohol support services and until these workplace issues had been properly resolved and he can consider mediation as to whether it is possible to return to employment with HCC.

“In light of Mike’s report, the outcome completely fails to acknowledge the incidents of bullying and misconduct I was subjected to during my service and the impact that this had on my mental health and that a constructive dismissal would be the only alternative”.

16. It is clear that the claimant is split between on the one hand engaging with consideration of coming back to work and on the other hand resigning and claiming constructive dismissal. He ends that communication in these terms:

“I expect my request will be disregarded as they have been consistently throughout these proceedings and my service with the DCT, and that a constructive dismissal with an Employment Tribunal will likely be my only option in accordance with my rights under my employment contracts and the Equality Act 2010.”

17. On 10 December 2021 he wrote:

“I have already had three separate occupational health meetings which I have discussed with you, agreed to a consent to share with GP, and described my health issues at length in my grievance in the subsequent appeal documents. I do not know what other information or updates I could possibly give you that I have not already. I am signed off sick due to the workplace issues in my grievance which have impacted on my health. The workplace issues have not resolved since it completely failed to acknowledge any of these issues or the impact on my health, therefore, I have no intention of returning to (Disabled Children’s Team) DCT as it would simply result in the same outcome, or I would likely make a constructive dismissal.”

18. There then followed negotiation about the amounts of money. The Council understood that the claimant did not intend to continue to work with it. The claimant sought to correct that in a communication dated 17 December. He wrote:

“This is simply not true. For the past several months during the grievance investigation with Mike Burridge and subsequent appeal I repeatedly said I was open to discussions about returning to the Council in some capacity and said I would discuss following Burridge’s formal recommendation in October that I would not return to my previous team and the arrangements for another position be found for me. I had requested an extension of my sick pay for three months to assist in my recovery whilst we negotiate Burridge’s recommendation, but I received no response from anyone about this. I said I would make a claim for constructive dismissal, rather

than return to my previous team or allow Burrridge's investigation to simply deny any of the issues raised in my grievance as stated in my appeal.

Little has been done by the HCC team to rectify this, except to respond to my ACAS request with this proposal which is the extent of their effort to resolve the matter.

I would like to receive an assurance that in future when I feel recovered and confident to do so, if I apply to positions with the Council following my resignation, that details of this grievance and my resignation would not interfere with this process and my ability to apply for vacancies or to be considered for roles following a formal interview. I am concerned about my ability to find employment following this resignation and therefore do not wish that my grievance will penalise me for pursuing further jobs within the Council. I would agree of course to confidentiality."

19. The Council then set out a proposal. The money was increased from £5,000 to £7,000 and ACAS quoted the Council's position on 22 December 2021:

"With regards to re-employment, it is the Council's policy that where employment ends by mutual agreement via a settlement agreement or severance arrangement that it will not re-employ within twelve months. I have referred to this [says the Council] at paragraph 10 of the draft agreement. This is not related to the claimant's raising a grievance it is a policy applied where employment ends in these circumstances."

20. That clause was incorporated into the settlement agreement at paragraph 10 which provided that the claimant is aware of the respondent's policy that it will not for a period of twelve months following the termination date re-employ the claimant in any capacity, including in schools where Hampshire County Council is the employer and they agree that they will not apply for any positions with the respondent during that period. That clause was in the COT3.
21. The respondent submits the claimant went in with his eyes open. He resigned his job, he withdrew his grievance, he agreed not to apply for another job with the Council for twelve months. The claimant duly signed the agreement via ACAS. He received the £7,000. However, a few days later he sought to reopen the negotiation, suggesting an additional £10,000 if he was not going to be considered for alternative employment such as the grievance outcome had recommended.
22. In an attempt to set aside this agreement, the challenge brought by the claimant has been to claim that there was an actionable misrepresentation. The claimant has struggled to articulate what that misrepresentation was. He has struggled at the beginning of the hearing today; he has struggled to put it in questioning to the respondent's witness Mrs Sandy Gregory; and he has struggled to put it in his final submissions. The reason why he has struggled, in my judgment, is that there was no actionable misrepresentation. There was no misrepresentation of fact or law made by the respondent that induced the claimant to enter into the COT3 agreement.
23. He has with hindsight a disappointment that he has not been redeployed into alternative employment. We see from the history of communications between him and ACAS that he was very divided at the time between resigning on the one hand, and continuing with the grievance process on the other, which included dealing with negative adverse findings made by Mr Burrridge against him in respect of conduct at the workplace and the deterioration of relationships with colleagues.

24. In my judgment, the claimant did not think, in reality, that it was viable for him to return to work - in the state of health that he then had - to another position in the Council. Whether he had the policy in front of him or not, the ill health redeployment policy envisages that there needs to be suitable alternative employment which is likely to improve attendance. The claimant, for financial reasons, assessed that it was in his best interests to take the £7,000 and resign at that time. That decision I suspect was entirely rational; an entirely reasonable one for him to take. But for him to set aside the COT3 agreement, he needs to show an actionable misrepresentation as to fact or law by the respondent.
25. There was, as I say, no actionable misrepresentation as to fact or law explaining why he signed the agreement. The respondent cannot be held responsible for the claimant entering into the agreement based upon a misrepresentation of fact or law. The claimant found himself in a position whereby it was probably the best decision for him then to take the money and to resign, rather than to continue with a grievance process with uncertain outcome, and to engage with further consideration of alternative employment, again with uncertain outcome as to whether it might have resulted in more successful employment than he had previously enjoyed.
26. I understand his disappointment in hindsight but he entered this agreement freely and fully informed. He cannot point to any misrepresentation which entitles him to set the COT3 aside.

Employment Judge Smail
Date 24 July 2023

Reasons sent to the Parties on 07 August 2023

For the Tribunal Office

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