EMPLOYMENT TRIBUNALS

Claimant: **Mrs Anne Darlington**

Respondent: **London Borough of Islington**

Heard at: **Watford Hearing Centre (by cloud video platform)**

On: **22 August 2022**

Before: **Employment Judge Tobin (sitting alone)**

Appearances
For the claimant: In person
For the respondent: Mr R Willis (counsel)

JUDGMENT FOLLOWING PUBLIC PRELIMINARY HEARING

The Judgment of the Tribunal is:

1. **The Westbourne Early Years Centre cannot be a respondent to the action herein, so should be removed. The respondent is properly identified as the London Borough of Islington.**

2. **The Employment Tribunal does not have jurisdiction to hear the claimant's complaint, so proceedings are dismissed under rule 27 of the Employment Tribunal's Rules of Procedure 2013.**

REASONS

The hearing

1. This has been a remote hearing which has been consented to by the claimant and the respondent. The form of remote hearing was a video hearing through the HMCTS cloud video platform and all the participants were remote (i.e. no-one was physically at the hearing centre). A face-to-face hearing was not held because the issues could be determined at this video hearing.

2. The hearing was originally set for a telephone case management hearing on 19 May 2022. Following the respondent's application of 24 May 2022, the hearing was converted to an open or public preliminary hearing by video.

Proceedings

The claim

3. The claimant issued proceedings on 17 February 2022 following a period of ACAS Early Conciliation from 15 December 2021 to 25 January 2022. The Claim Form identified 2 respondents: the (first) respondent herein and Westbourne Children's Centre. The Claim Form said that the claimant was an Early Years Educator from 1 September 2020 to 25 May 2021 – but these dates do not relate to this dispute because this dispute applies to a recruitment process following the claimant's application on 4 July 2021, the withdrawal of the job offer on 9 August 2021 and her subsequent non-appointment in the subsequent recruitment process. The claimant claimed whistleblowing detriment. The details of complain provided a helpful overview and then extensive Further Details.

4. The claimant said that she was offered a job with Westbourne Children's Centre, an Islington Children's Centre, on 19 July 2021, as a teacher for under-3s, subject to references. The claimant said that the job was withdrawn 1 month later due to an "unsatisfactory" reference from Hargrave Park Children's Centre (another Islington Children's Centre where she worked previously). The claimant contended that the reference given by Hargrave Park was misleading and inaccurate and had been given because she had raised a safeguarding alert about a member of staff and had made a complaint to Ofsted. The London Borough of Islington investigated this and came to a settlement with the claimant. The settlement agreement retracted the "unsatisfactory" reference and provided an agreed reference. The job at Westbourne was readvertised and the claimant contended that Islington Council was aware of the retraction of the "unsatisfactory" reference and an agreed reference.

5. The claimant applied for the readvertised job on 13 September 2021 and was asked to provide additional or further references. On 20 October 2021 the claimant was told that she was unsuccessful in the second recruitment process. The claimant contended that Westbourne Children's Centre and The London Borough of Islington knew that she had made a protected disclosure, which the claimant said was the only reason the job offer had been withdrawn the first time. The claimant said that the

second exercise adopted a different procedure and applied a different criterion but that her experience and skills had been deemed sufficient in the first exercise and she contended there was no better candidate in the second recruitment exercise. However, she was unsuccessful, and the job was readvertised for third time.

6. The claimant said that Islington Council in capacity as her employer acted in bad faith in regard to the settlement agreement. She said that once the "unsatisfactory" reference had been retracted then it was "arguable" that Westbourne Children's Centre should have reinstated the job offer as the only reason the initial job offer was withdrawn was the unsatisfactory reference. The claimant contended that, in fact, Westbourne Children's Centre acted as if the "unsatisfactory" reference had not been redacted. As they pursued a different process, added additional checks and failed to appoint anyone.

7. The claimant said that during the ACAS Early Conciliation process the London Borough of Islington raised that she could not pursue a claim because the COT3 agreement prevented this. The claimant disputes this.

The response

8. The Response Form was received by the Tribunal on 31 March 2022 and accepted on 12 April 2022. A Response Form was provided for the London Borough of Islington and Westbourne Early Years Centre. The grounds of resistance said that the previously identified second respondent – Westbourne Children's Centre – is an Early Years Centre, directly run and managed by the first respondent (the London Borough of Islington). The respondent contended that Westbourne Early Years Centre is not a separate legal entity capable of being named as a respondent. The correct respondent for claims involving Westbourne Early Years Centre was the London Borough of Islington. The respondent contended that the Employment Tribunal had no jurisdiction to consider a claim because: (1) there is a legally binding agreement between the claimant and the respondent which concluded this claim; and (2) the named second respondent (Westbourne Early Years Centre) is not a legal entity capable of being named as a respondent.

9. The respondent provided a summary factual background which differed little in the core facts, although the respondent said the claimant had been unsuccessful in her application for employment at the Westbourne Early Years Centre as the references process had revealed that the claimant had insufficient experience working directly with children under 3, which was an essential requirement for the role. The respondent contended the claimant had not fully particularise to claim and did not demonstrate how the requirements for a qualifying and protected disclosure were met.

Findings of fact

10. The claimant entered into an ACAS COT 3 settlement agreement with the Governing Body of Hargrave Park School ("the School)" and the London Borough of Islington ("the Employer"). This recorded the settlement being reached on 20 September 2021 as a result of conciliation action. The agreement was signed by all 3 parties, and specifically for our scrutiny, by the claimant on 20 September 2021 and

by the Employer/respondent's representative on 22 September 2021. The agreement stated at clause 3:

The employee accepts and agrees that the terms set out in this agreement are in full and final settlement of:

- all and any claims which the Employee has or may have in the future against the School, the Employer or any of its governors, officers or employees whether arising from the employment with the Employer, its termination or from events occurring after this agreement has been entered including, but not limited to, claims under contract law, the Equality Act 2010, the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Trade Union and Labour Relations (Consolidation) Act 1992, the Disability Discrimination Act 1995, the Employments Rights Act 1996, the Working Time Regulations 1998, the National Minimum Wage Act 1998, the Transnational Information and Consultation of Employees Regulations 1999, the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, the Employment Equality (Sexual Orientation) Regulations 2003, the Employment Equality (Religion or Belief) Regulations 2003, the Information and Consultation of Employees Regulations 2004, the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendments) Regulations 2006, the Employment Equality (Age) Regulations 2006, the Transfer of Undertakings (Protection of Employment) Regulations 2006 or European Communities Law, excluding any claims by the Employee to enforce this agreement, any personal injury claims which have not arisen as at the date of this agreement, and any claims in relation to the Employees accrued pension entitlements.

11. The claimant brought an Employment Tribunal claim on 17 February 2022 in respect of her non-appointment to a job at Westbourne Early Years Centre. This is a claim of detriment on the grounds of having made a protected disclosure, under s47 Employment Rights Act 1996.

My decisions

The removal of the second respondent

12. By email dated 22 May 2022 The claimant accepted that Westbourne Children's Centre should be relabelled Westbourne Early Years Centre. Mr Willis contended that in accordance with the application of 24 May 2022 Westbourne Early Years Centre is not a legal entity so therefore it is not properly capable of being a respondent in its own right. When challenged Mr Willis said that the Islington Council's solicitor completed a Response in the name of Westbourne Early Years Centre because the Tribunal had accepted a claim against this named respondent and she did not want to ignore proceedings against this respondent so as to lead to a potential default judgment. He said that the respondent raised this matter immediately and that any potential liability would be affixed to the London Borough of Islington.

13. The claimant accepted that the Westbourne Early Years Centre was directly run and managed by Islington Council. The claimant accepted or, at least, did not dispute that the Westbourne Early Years Centre was not an unincorporated association, a company limited by guarantee nor any other legal entity. Under the circumstances I removed the former second respondent from proceedings herein.

The COT3 Settlement Agreement

14. In essence, the claimant contended that the COT3 Settlement Agreement was limited to her previous employment at Hargrave Park School. This complaint related to a new set of facts – namely the recruitment process at Westbourne Childrens Centre and against Islington Council in a different capacity as a potential employer. The claimant referred to the case of *BCCL v Ali 2001 ICR 337* in which emphasised the importance of not construing COT3 agreements too broadly.

15. The claimant was pushing at an open door if she meant that I should limit any settlement to what the parties expressly said they were prepared to compromise on. However, it is perfectly possible for the terms of an ACAS conciliated agreement to purport to bar not only pre-existing claims but also future claims.

16. The wording of any settlement or compromise agreement must be considered carefully to ascertain what the parties are reasonably to be taken as having intended. The precise wording of the agreement is paramount. In *Royal National Orthopaedic Hospital Trust v Howard 2002 IRLR 849* the Employment Appeal Tribunal said the parties must use language which is "absolutely clear and leaves no room for doubt as to what it is they are contracting for".

17. First, the respondent was a party to the Settlement Agreement. It was identified as the "Employer" and a representative committed the respondent to the Settlement Agreement and sighed on the respondent's behalf on 22 September 2021. So the London Borough of Islington was a party to the COT3 Settlement Agreement and may take the benefit from this.

18. The agreement specifically provided that the consideration was in "full and final settlement of… any claims which the Employee… may have in the future against… the Employer… from events occurring after this agreement has been entered". So, the agreement is not limited to compromising events that had occurred in the past. Former and current claims were specifically mentioned as was future claims.

19. The agreement was wide: "all and any claim… including, but not limited to, claims under… the Employment Rights Act 1996". I think the circumstances of the agreement make it quite clear that the respondent sought to preclude further claims made by the claimant (of any kind); however, even if that construction is too wide (which I do not think it is), then the reference to the specific legislation of the Employment Rights Act 1996 denotes an intention to specifically provide for a claim under this statutory provision and therefore will preclude a future claim of whistleblowing.

20. By way of validation the respondent referred to the case of *Arvunescu v Quick Release (Automotive) Ltd 2022 EAT 26* which held that a widely worded prohibition could have wide reach if that was what the parties are taken to have intended.

21. The language used is clear. If the claimant did not understand this, then she sought no clarification at the time. She did not seek to narrow the provision of the terms of settlement in the COT3 Agreement, and such wide provisions are not essential to any compromise. They are usually negotiable, although the claimant did

not seek to challenge these terms prior to accepting them. I accept that the claimant now feels that she has been badly treated in subsequent event. However, she committed to an agreement that precluded future claims against this respondent and specifically claims of whistleblowing under the Employment Rights Act. Unfortunately, with the wisdom of hindsight, a bad deal is still a deal (or a binding settlement).

22. I am not persuaded by the claimant's contention that the agreement would prevent the claimant binging a possible challenge to a parking ticket or in respect of the provision of council services, as those complaints are not before me and different circumstances might apply.

23. Even if I were to give the COT3 Settlement Agreement the narrow or restrictive interpretation the claimant contends, the agreement would also exclude claims arising from the claimant's employment. Therefore, as the alleged protected disclosures arose within the claimant's employment they would be specifically excluded. Consequently, the claimant would not be able to rely upon them and therefore any complaint of a whistleblowing detriment arising in respect of her non-appointment out Westbourne Early Years Centre would be bound to fail.

24. Given that the claimant had entered into a COT3 Settlement Agreement that preclude this claim, the Employment Tribunal has no jurisdiction to hear the claimant's complaint and it is dismissed under rule 27 of the Employment Tribunal Rules of Procedure.

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Employment Judge Tobin

Date: 3 September 2023

Sent to the parties on:
4 September 2032

For the Tribunal: