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EMPLOYMENT TRIBUNALS

Heard at:	London South (via CVP) **On:** 31 October 2023
Claimant:	Miss. E. Pratley-Jones
Respondent:	(1) Concord lifting Equipment Limited
	(2) Christopher Kerrison
	(3) Scott Mynott
Before:	Employment Judge Sudra (sitting alone)
Representation:	
Claimant	Ms. Sarah Forsyth (employment law caseworker)
Respondents	Mr. Peter Hale (consultant)

JUDGMENT ON A PRELIMINARY ISSUE

1. The Tribunal does not have jurisdiction to hear the Claimant's allegations which pre-date the settlement agreement, dated 17th November 2021, between the Claimant and First Respondent.

2. The Claimant's remaining (post settlement agreement) claims, were submitted in time[1] and continue.

[1] The Tribunal at a Final Hearing will determine the issue of a continuing act and if discrete allegations of discrimination are out of time.

REASONS

Introduction

1. This Preliminary Hearing was to decide:

   (A) Whether the Tribunal has the Jurisdiction to hear the Claimant's Claim on the basis that:

   (i) The Claimant signed a settlement agreement with the Respondent.

   (ii) The Claim was submitted out of time.

   (B) The Claimant's application to amend as set out in the email on 3rd March 2023

Procedure and evidence

2. The Tribunal was provided with:

   (i) A PH bundle consisting of 78 pages;

   (ii) a witness statement from the Claimant; and

   (iii) written submissions from the Claimant.

3. The parties confirmed that they had the above documents. confirmed that he had received the documents at paragraph 2(i)-(v) (supra.).

4. The Tribunal heard oral evidence from the Claimant and the Second Respondent, Mr. Chris Kerrison.

Relevant Findings of Fact

5. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.

6. The First Respondent is a lifting equipment rental and hire business with its

registered office in South West London. The Claimant is a workshop technician and has two periods of employment with the Respondent. The Second Respondent is the Managing Director of the First Respondent and the Third Respondent is employed as the First Respondent's Depot Manager in Wandsworth. It is unknown to the Tribunal when the Claimant first began employment with the First Respondent but it is agreed by the parties that that employment terminated on 30th November 2021 via a settlement agreement ('SA') signed on 17th November 2021.

7. On 3rd January 2022 the Claimant was again employed by the First Respondent as a workshop technician. Due to the break in service, the effective date of the Claimant's start of employment is 3rd January 2022.

8. The Claimant shared an office with the Second Respondent (whom she has known since childhood) and her brother. However, the Claimant's brother was away from the office at times which resulted in only the Claimant and Second Respondent being in situ.

9. On 24th May 2021 the Claimant suffered an accident at work causing her to tear the ligaments in her left hand. On 21st June 2021 the Claimant handed in her notice to the Second Respondent and said that she felt that she was being blamed for the injury she had suffered. The Claimant also mentioned to the Second Respondent that the Third Respondent had been making offensive comments in respect of her sexual orientation.

10. The Claimant was persuaded, by the Second Respondent, not to resign and therefore, she continued in her employment. In or around August 2021 the Claimant attended the home of the Second Respondent's father ('Mr. B. Kerrison') and spoke with him about the alleged harassing behaviour by the Third Respondent. Mr. B. Kerrison told the Claimant that her complaints would be addressed and enquired if she would be suing the First Respondent for the injury she had sustained. He further assured the Claimant that she did not have to pursue a legal personal injury claim as it would be better, and more economical, to amicably resolve the matter without resorting to litigation.

11. Between August and November 2021 the Claimant spoke to Mr. B. Kerrison on multiple occasions regarding her allegations of harassment and in respect of her

injured hand.

12. On 24th September 2021 the Claimant approached the Second Respondent with a financial proposal in respect of a payout for her injury and the complaints she had raised and for an increased salary. The Second Respondent said that the best course would be to agree settlement via a SA but not being a legal expert, he would have to take advice.

13. The Second Respondent obtained a template settlement agreement and amended it to suit the claims being settled. He discussed with the Claimant what claims were being settled and specifically, the sustained injury and harassment claims. It was agreed that they would then have a clean slate and the Claimant can begin new employment with the First Respondent.

14. The Second Respondent put the Claimant in touch with a solicitor he had previously used so that she could be advised about the SA and who could also provide an advisors certificate. The Second Respondent did not forbid the Claimant from mentioning any particular matters to the solicitor.

15. A SA was signed by the Claimant and First Respondent on 17th November 2021 and the Claimant's employment terminated on 30th November 2021.

16. On 3rd January 2022, the Claimant began new employment with the First Respondent.

The Law

17. S.147 of the Equality Act 2010 provides that (so far as material),

> **147 Meaning of "qualifying [F1settlement agreement]"**
>
> *(1)This section applies for the purposes of this Part.*
>
> *(2)A qualifying [F2settlement agreement] is a contract in relation to which each of the conditions in subsection (3) is met.*
>
> *(3)Those conditions are that—*
>
> *(a)the contract is in writing,*
>
> *(b)the contract relates to the particular complaint,*
>
> *(c)the complainant has, before entering into the contract, received advice from an independent adviser about its terms and effect (including, in particular, its effect on the complainant's ability to pursue the complaint before an employment tribunal),*
>
> *(d)on the date of the giving of the advice, there is in force a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the complainant in respect of loss arising from the advice,*
>
> *(e)the contract identifies the adviser, and*
>
> *(f)the contract states that the conditions in paragraphs (c) and (d) are met.*

….

18. The leading authority in this area is the judgment of Mummery LJ in, *University of East London v Hinton* [2005] EWCA Civ 532 para 33,

> *"However, in my judgment, the purpose of section 203 is clear. It is to protect claimants from the danger of signing away their rights without a proper understanding of what they are doing. In order to achieve that purpose, I consider that section 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. In my view, Mr Hare went too far when he conceded that it might be sufficient to identify the proceedings only by reference to the statute under which they arise. In my judgment, it is not sufficient. Many employment rights arise, for example, under the Employment Rights Act 1996 and, to comply with section 203(3)(b), the particular proceedings to which the agreement relates must be more clearly identified. In my judgment, in order to comply with section 203 the particular claims or potential claims to be covered by the agreement must be identified, as Mr Hare suggested, either by a generic description such as unfair dismissal or by reference to the section of the statute giving rise to the claim.*
>
> *34 That is all that can be required for compliance with section 203(3)(b). …."*

19. In *McWilliam & Ors v Glasgow City Council* UKEATS/0036/10/BI para 33 Lady Smith stated,

> *'I do not see that it matters if the 'particular complaint' is one that has been identified by the employer as opposed to one that has been identified by the employee. What matters is that both parties know to which particular complaint the compromise agreement relates – they know which particular complaint cannot be litigated in the future. That, to my mind, is the purpose of the requirement. It does not matter whether or not there has been a history of communication or dialogue about the complaint…'*

Conclusion

20. It is apparent from the Claimant's oral evidence that she raised her allegations of harassment related to sexual orientation on several occasions with the Second Respondent and Mr. B. Kerrison. The Claimant also approached the Second Respondent with a proposal for a financial payout in respect of her personal injury and for enhanced wages.

21. It would be very odd if an employer were to settle one aspect of a potential claim in an agreement ant and not another. The Claimant's harassment allegations were not made after the SA was signed but were communicated as early as June 2021. When the Claimant agreed to the terms of the SA she knew what claims were being settled and on the that basis, signed the SA and agreed a date to begin new employment with the same employer, at the same location, and with the same work colleagues.

22. Following signing of the SA the Claimant did not communicate with the First Respondent to agree specific resolution to her harassment allegations prior to her return to work for the First Respondent. If she genuinely believed that the SA was only in respect of her hand injury then it would have been usual for the Claimant to address an issue, as serious as harassment, that she felt was outstanding.

23. Therefore, on a balance of probabilities it is the Tribunal's judgment that the SA was in respect of both the Calamint's hand injury *and* her allegations of harassment by the Third Respondent and that both parties were aware of this. The Claimant was a valued member of staff and that is why her timely return to the First Respondent was arranged and executed.

24. The Tribunal's decision does not deprive the Claimant of a claim and her post SA allegations will proceed to a Full Hearing.

Application to Amend

25. The Claimant made an application to amend her claim and asserted that the nature of the amendment was purely to re-label allegations already pleaded in her particulars of claim.

26. The Claimant applied to put her allegations at paragraphs 43, 44, 45, and 65

under the label of 'indirect discrimination' rather than as detriments following a protected act.

27. The Respondents objected to the Claimant's application to amend.

The Law

28. The EAT held in *Selkent Bus Company Ltd v Moore* [1996] ICR 836 EAT: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J (as he then was) explained that relevant factors would include:

    (i) The nature of the proposed amendment;
    (ii) the applicability of time limits to the new claim or cause of action; and
    (iii) the timing and manner of the application to amend.

    These factors are not exhaustive and there may be additional factors to consider, (for example, the merits of the claim).

29. In respect of the balance of prejudice: per HHJ Tayler in *Vaughan v Modality Partnership* UKEAT/0147/20/BA(V): [21] "… *Representatives have a duty to advance arguments about prejudice on the basis of instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice … [26] a balancing exercise always requires express consideration of both sides of the ledger, both quantitatively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice. [27] Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it. [28] An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional costs; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant*

considerations, the key factor remains the balance of justice."

30. The Tribunal found that the Claimant's application to amend was the re-labelling of allegations already pleaded and known to the Respondents. The Respondents would not be unduly prejudiced by the amendment and the balance of hardship fell in favour of the Claimant.

31. Therefore, the Claimant's amendment application is allowed.

Case Management Directions

32. By no later than **26th September 2023**, the Claimant is to send the Respondents a draft List of Issues.

33. By no later than, **3rd October 2023** the Respondents are to respond to the Claimant with any comments in respect of the draft List of Issues.

34. The parties are to agree and finalise a List of Issues for use at the full Hearing by no later than, **10th October 2023** and send a copy to the Tribunal

35. By no later than, **10th October 2023** the parties must write to the Tribunal and:

    (a) Provide a time estimate for the Final Hearing (which will be for both liability and remedy);
    (b) provide dates to avoid for all concerned parties; and
    (c) confirm whether or not the parties are interested in Judicial Mediation.

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Employment Judge Sudra

Date: 19th September 2023