EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000108/2023

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Held via Cloud Video Platform (CVP) in Glasgow on 19 October 2023

Employment Judge D O'Dempsey

Ms J Wilson	**Claimant** **In Person**
Chief Constable of the Police Service of Scotland	**Respondent** **Represented by:** **Ms H Carmichael - Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's claims are struck out under rule 37 as having no reasonable prospect of success.

REASONS

1. This was an open preliminary hearing to hear the respondent's application to strike out the claims brought by the claimant. The respondent says that they are an abuse of process because they are compromised by the terms of a COT3 relating to case 4107737/2019 and so should be struck out because they have not reasonable prospect of success.

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2. I was not provided with a list of issues in the case. The case was listed for submissions based on the terms of the pleadings in both cases and the settlement agreement. The respondent says that the claimant is claiming the same thing in the current proceedings as she was claiming in the proceedings that were compromised.

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3. She sets out events going back to 2018. She mentions that the Employment Tribunal relating to the 2019 case was concluded at mediation on 31 January 2022. The COT 3 is dated 8 February 2022 by the respondent but ACAS had plainly conciliated an agreement on 7th February 2022.

4. All the detriments before that date are plainly compromised and any claim brought on the basis of those detriments would be abusive and I strike these out as having no reasonable prospect of success because the claimant is prevented from relitigating matters she has already litigated and compromised.

5. By the date of the COT3, according to her narrative, she had received two letters from Superintendent Duncan, the officer who was investigating her complaints which form the subject of the earlier complaints. She then says that in May 2022 she received a third letter of response, and in October 2022 she received a further letter which was unsatisfactory. She had been making requests that certain things she had asked previously to be done, now be done. I am conscious of the guidance that I should first identify the issues in a discrimination case before moving to deal with the strike out application. I took the view, in the absence of a properly set out list of issues, that there was sufficient clarity in the claimant's pleadings to say what the relevant issues were and to determine whether they fell under the scope of the compromise that had been reached by agreement between the parties.

6. The subject matter of the 2019 proceedings included expressly all of the matters relating to sex discrimination and whistleblowing and were capable of including all matters up to the date of the COT3 agreement. It is only those matters after the date of the compromise agreement that might fall outside of the COT3 agreement. Whether they do or not depends on the construction of the agreement and understanding the deemed intentions of the parties to the agreement.

The law

7. The starting point must be that section 147 of the Equality Act 2010 (and equivalent provision of the Employment Rights Act 1996) prevents settlement

of claims before their existence was known (**Bathgate v Technip UK Limited** [2022] EAT 155). Settlement is permitted in relation to 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.

8. An agreement that identifies an actual or potential claim by a generic description or a reference to the section of the statute giving rise to the claim may be lawful all other things being equal. Whilst parties may agree that a compromise agreement is to cover future claims of which an employee does not and could not have knowledge, to do so effectively, the terms of their agreement must be absolutely plain and unequivocal. This is because it is an extravagant result to release claims of which the parties have and can have no knowledge, whether they have come into existence or not. If that is what they intend (and their intention must be scrutinised) they must do so in language which is absolutely clear and leaves no room for doubt as to what it is that they are contracting for.

9. Where a public body subject to the requirements of the Human Rights Act 1998 and those of section 149 of the Equality Act 2010 is party to a transaction, those Acts will set some limits on the permissible range of lawful intentions of that party.

10. Thus such a public body could not have the intention that claims for acts which undermined the fundamental rights of the individual under the ECHR would be compromised prior to their occurrence; similarly a public body could not have an intention which demonstrated that it had no regard to the need to eliminate unlawful discrimination by entering into an agreement which would permit it to act unlawfully in the future against the individual without the individual having a right of redress .

11. In the absence of clear language the courts are reluctant to infer that a party has intended to surrender rights and claims of which they were unaware; only clear wording could defeat the assumption that an employee did not intend to surrender rights and claims of which they were unaware and could not have been aware.

12. Where the waiver is stated to cover claims that are unidentified at the date of the agreement, the extent to which it will be effective will be determined by construction of the agreement according to ordinary contractual principles:

    (1) I must seek to identify (objectively) the intention of the parties at the time that the waiver was agreed.

    (2) I will construe the scope of the waiver narrowly. Therefore, if a party intended to cover any particular claims, they should be specified.

    (3) I will not regard the waiver as covering actual or possible claims that the employer (but not the employee) knows about. They ought to be raised with the employee if they are to be covered.

    (**Bank of Credit and Commerce International SA v Ali** [2001] IRLR 292.)

13. In relation to whether a COT3 can prohibit a claim arising from a later act of the employer, see **Royal National Orthopaedic Hospital Trust v Howard** [2002] IRLR 849 which contains the principle: "If the parties seek to achieve such an extravagant result that they release claims of which they have and can have no knowledge, whether those claims have already come in existence or not, they must do so in language which is absolutely clear and leaves no room for doubt as to what it is they are contracting for. We can see no reason why as a matter of public policy a party should not contract out of some future cause of action. But we take the view that it would require extremely clear words for such an intention to be found." (At paragraph 9.)

14. There the words "has or may have" could not cover possible future claims.

15. An employee can waive a statutory claim which exists at the time a COT3 is signed, even if the claim is not discovered until afterwards, as long as the wording of the waiver is sufficient to include the relevant claim (see **Arvunescu v Quick Release (Automotive) Ltd** [2022] EWCA Civ 1600). This is a matter of the wording of the agreement, and whether the drafting captures such claims.

16. A claim only comes into existence however when it is fully constituted, including the first damage or detriment that arises from the act or omission about which complaint is made.

The claims made in the current claim after the COT3 agreement (issues)

5 17. In summary the complaints about Superintendent Duncan's matters:

1. 20 December 2021 the first letter of response from Superintendent Duncan: failed to list any of the claimant's evidence; only listed information provided by those under enquiry. Refused to investigate two heads of complaint concerning information provided to
10 ET. Upheld some non- criminal complaints but not others.

2. Second letter of response of 18 January 2022: Duncan found 4 complaints upheld, 2 not investigated due to the Employment Tribunal still inprogress, and 4 not upheld .

The Employment Tribunal case was concluded before the next events.
15 The claimant requested Superintendent Duncan investigate the two heads of complaint that he could not investigate until the ET had concluded.

3. 26 May 2022: third letter of response. Duncan found 5 complaints upheld and 5 not upheld. Claimant complains that Superintendent Duncan had failed to interview David Lyall, Chief
20 Inspector Armstrong and Linda Quinn in relation to the allegations made against them. It seems to me that this complaint was entirely foreseeable at the time of the COT3 agreement: it was entirely foreseeable that the claimant might want to make a complaint to the tribunal that Superintendent Duncan's investigation was (as she
25 had previously complained to him) faulty or incomplete without certain evidence being examined. The claimant notes an explanation that was put forward for the respondent not interviewing these witnesses.

4. 5 October 2022: fourth letter of response. Supt Duncan had interviewed David Lyall and gleaned further information so that, 7

complaints were upheld and 3 were not upheld. Linda Quinn had not been spoken to regarding the complaints.

5. 23 January 2023: fifth letter of response; 7 complaints upheld 3 not. In that letter Supt Duncan had spoken to Linda Quinn (25 November 2022). There had been a private discussion with Chief Inspector Armstrong regarding the retention of two men who did not go through any process and were not discussed at the meeting with David Lyall. The claimant argues that this information would have been very relevant to the criminal investigation of corrupt practice as the claimant understands it had not been mentioned previously.

18. The claimant makes the point that Supt Duncan repeatedly tried to provide reasons why officers may have acted the way they did in order to mitigate the complaint. It seems to me that this idea must have been present to the claimant by the date of the COT3 because of the first two letters that the claimant had already received. During an undated last conversation, the complainant had with Supt Duncan, he stated he had to protect the position of the organisation.

19. The detriment identified by the claimant is that the respondent failed to carry out an investigation into criminal and non-criminal complaints in line with their own Standard Operating procedures.

20. She argues that the disclosure made on 25 November 2022 could have had a significant impact on criminal investigation. It is not clear what precisely that disclosure is but it is not being suggested that the claimant made a disclosure. It appears that this relates to a disclosure that Linda Quinn made. However, it appears to relate to something which had been the subject of the original proceedings and which the claimant had agreed not to pursue. The fact that it might have been important evidence which might (I do not say that it would) have made a difference to whether the claimant would have signed the COT3 is not relevant.

21. The claimant also complains of the time it has taken to conclude the investigation (3 years and 1 month). However, the fact of delay, but not the extent of it was known at the time of the compromise agreement; the fact that she might wish to bring a complaint about the delay in investigating was plainly something in the contemplation of the parties when they signed the agreement. Finally, the claimant complains about the emotional suffering which she has experienced over a considerable period of time due to the respondent's actions. Again, that state of affairs was plainly within the contemplation of the parties at the time of the agreement.

The wording of the agreement (as relevant)

22. The COT3 was not supplied to me in full. I received page 1 of 5 and page 3 of 5. The paragraph numbering jumped from 4 to 9. However, the relevant parts of the document (with emphasis added) were as follows:

"1 The Claimant will withdraw her Employment Tribunal claim (case number 4107737/19) (the "Proceedings") in full as set out below, by sending the withdrawal notice set out at Schedule 1 to this Agreement by email to the Glasgow Employment Tribunal (glasgowet@hmcts.gsi.gov.uk). The Claimant agrees that she will copy this withdrawal notice to the Respondent's representative ….

2 The Claimant confirms that she does not wish to reserve the right to bring a further claim under rule 52(a) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "Regulations") and accordingly the parties, in accordance with rule 52 of Schedule 1 to the Regulations, confirm their understanding that the Proceedings will, following withdrawal of the claims by the Claimant, be dismissed by the Employment Tribunal. Neither the Claimant nor the Respondent shall make any application for costs, preparation time or wasted costs in connection with that claim.

3 The Claimant undertakes and agrees that she will not re-activate the Proceedings or issue any further and/or new claim or claims of any nature (excluding any claim for latent personal injury) against the

Respondent or any of the Respondent's current or former officers, police officers, employees, workers or consultants in relation to or in connection with the subject matter of the Proceedings or in connection with either her agency assignment with the Respondent, or termination thereof or otherwise.

4 The Claimant acknowledges the Respondent's right to bring this Agreement to the attention of the courts or tribunals. …

9 The Claimant agrees that she will not make, publish or otherwise issue any detrimental or derogatory statements concerning the Respondent, or any of its current or former officers, Police Officers, employees, workers or consultants and the Respondent shall use reasonable endeavours to ensure that its officers, Police Officers, employees, workers or consultants should not make, publish or otherwise issue any detrimental or derogatory statements concerning the Claimant. …

11 The Claimant accepts that the Respondent is entering into this Agreement in reliance on the warranties given by the Claimant in this Agreement and if the Claimant commits a material breach of any term of this Agreement which shall, for the avoidance of doubt include, but not be limited to any breach of the making of derogatory statements set out in Clause 9, or any breach of the confidentiality obligation and warranty regarding personal injury set out in Clause 10, then the Claimant shall immediately repay to the Respondent the Settlement Payment, without prejudice to the Respondent's right to recover any further sums by way of damages or compensation."

The construction of the COT3

23. It seems to me that the language of general release in this document would not be sufficient to compromise claims of which the claimant was not aware at the time of signing, which did not then exist, and which could not reasonably have been contemplated. Such a construction would be inconsistent with the limitations on a public body entering into such agreement and with the principle of narrow construction of such ouster clauses.

24. Even if clear language was used, the tribunal's role is objectively to ascertain the intentions of the parties, and it could not be the intention of a public authority to enter into an agreement which would permit what would otherwise be unlawful discrimination to go without a remedy no matter how egregious that treatment might be.

25. Granted that, it is impossible to put ascertainable limits on what behaviour the public authority might intend to leave without remedy in the case of future acts of discrimination against an individual.

26. What I can do is to make a judgment on whether a responsible public authority having regard to its duties as such could have intended to exclude the types of act which the claimant now seeks to make a claim upon without breaching its duties. Plainly it would be able to have due regard to the need to eliminate unlawful discrimination (for example) whilst legitimately protecting itself from further claims in respect of matters which were or ought to have been foreseen between the parties.

27. There might be acts which are so egregious in their consequences that the parties might be deemed not have contemplated compromising claims where the effects ran well beyond what would be foreseeable, but this case does not raise that type of issue. All the acts and the consequences that are now claimed arising from them (financial loss and injury to feelings) were entirely foreseeable given the factual background to the claims that the parties were settling. The use of the language to settle all future claims was unexceptionable.

Conclusion

28. The claimant is seeking to claim damages for events which happen before the compromise agreement; plainly she cannot do that in these fresh proceedings. Any acts which caused the claims for loss in relation to events before the compromise agreement are, in my view compromised in the ordinary way.

29. The current proceedings deal with the issues arising after the COT3 but all of those issues would in my view have been within the actual or deemed contemplation of the parties. The respondent and claimant were seeking to reach an agreement which compromised the disputes between them. They agreed to language which on its face was apt to compromise future claims. I have decided that this is what they were intending to do and did.

30. The effect of that decision is that the claimant's claims are all compromised and her claim must be struck out as an abuse of the tribunal's procedures.

Employment Judge: **D O'Dempsey**
Date of Judgment: **13 November 2023**
Entered in register: **15 November 2023**
and copied to parties