EMPLOYMENT TRIBUNALS

Claimant: Ms M Abimbola

Respondent: Global Banking School Limited

Heard at: Leeds **On:** 3 October 2023

Before: Employment Judge Jones

REPRESENTATION:

Claimant: In person
Respondent: Mr Delaney, Solicitor

JUDGMENT having been sent to the parties on 10 October 2023 and written reasons having been requested by the claimant, the Tribunal provides the following:

REASONS

1. By claim number 1803356/2022, the claimant brought a claim against her employer, the current respondent in this claim, for race discrimination and harassment related to race. That claim came before the Tribunal for a case management hearing on 30 September 2022. Employment Judge Tegerdine identified the legal claims as direct discrimination and harassment (the protected characteristic being race) and she identified the events to which they related as starting in September 2021 and running until 26 July 2022. In fact, the claim form included events which ran up to June 2022 but it appears, by some process of amendment, the claims were to include July 2022 as well, which the respondent says is significant. It may not be the case as the claimant says to me that the claim with which I am concerned only relates to events in March and April 2023 and her reference to events in 2022 was background material only. That was the first claim which the claimant presented, and it was to be heard initially in March 2023 but subsequently the hearing was put back to July 2023.

2. The claim was settled and an agreement was reached between the parties under the auspices of ACAS. A conciliation officer assisted the parties who reduced their agreement to writing and it was submitted in a document known as a COT3. That document was signed on 5 May 2023. It was signed by the claimant and by Dr

Rana on behalf of the respondent. It included a number of provisions which provided for the payment of sums of money, the resignation of the claimant as of 5 May 2022 and the claimant agreed to withdraw her claim. The claim was withdrawn, and the Tribunal dismissed that claim on 15 May 2023, pursuant to rule 52.

3. The claimant issued a second claim (the one with which I am dealing – 1802563/2023) on 3 May 2023. That claim concerns harassment related to race and victimisation. It includes a timeline of events from 13 March 2023 to 28 April 2023. It refers to events in July 2022. In summary, they are about the response of the respondent to Occupational Health advice and, in respect of the period the claim relates to (as relied on by the claimant), for not accepting the recommendation of the claimant's GP and the respondent's Occupational Health specialists, that she was fit to return to work with adjustments from 13 March 2023. The claimant says the respondent refused to acknowledge that and treated her as continuing to be sick. That had consequences not only for her ability to discharge her duties but also in respect of remuneration.

4. The respondent says that this second claim is one which should be struck out. It argues that it has no reasonable prospects of success or is vexatious. The reason it makes these suggestions is because it says these matters are caught by paragraph 7(d) of the Settlement Agreement of 5 May 2023. Section 7 of the Agreement provides:

> "The settlement sum, the notice pay and the pension payments in the terms of this Agreement are in full and final settlement of:
>
> (a) the Tribunal claim for direct race discrimination and harassment; and
>
> (b) any claim for unfair dismissal, breach of the employment contract dated 17 September 2021 and zero hours contract dated 15 September 2021, all of her grievances made during the period of employment, any claim for flexible working, unpaid wages, salary or other pay, accrued holiday pay or any claim for monies contained within the claimant's Schedule of Loss in the sum of £69,163.51 filed as part of the Tribunal claim; and
>
> (c) any claim for depression, anxiety or other personal injury arising from any act of race discrimination as particularised in the Tribunal claim and Case Management Orders made on 30 September 2022 in the Tribunal claim; and
>
> (d) all and any claims of whatever nature which the claimant has or may have in the future against the respondent or any of its officers or employees anywhere in the world, whether arising from her employment within the respondent or its termination on 5 May 2023 and including, but not limited to, any claims arising under European Law, Common Law or Contract Law or arising under statute, including but not limited to claims under the Trade Union and Labour Relations (Consolidation) Act 1992, the Employment Rights Act 1996, the Working Time Regulations 1998, the National Minimum Wage Act 1998, the Transfer of Undertakings (Protection of Employment)

> Regulations 2006, the Transnational Information and Consultant 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 Equality Act 2010 or the Enterprise and Regulatory Reform Act 2013."

5. In this case the respondent submits through its solicitor, Mr Delaney, that the terms of clause 7 are clear – that the claimant had not disclosed to them or Mr Delaney that there was any further claim pending by the time the Agreement was signed on 5 May 2023 and it came as a complete surprise that the claimant had issued a claim on 3 May 2023, information which only came to light after the Agreement had been signed and filed with ACAS. He says that the terms of clause 7(d) are crystal clear. They exclude any claims which the claimant has or may have in the future under the Equality Act 2010. He says these claims under the second claim are both claims which fall within the Equality Act 2010, and the claimant therefore has entered into a contract with the respondent not to pursue these claims.

6. The claimant says that the timeline in her second claim was very clear and ended in the summer of 2022 and that the new claims concern 2023. In an email she sent in response to this application, on 1 June 2023, she clarifies that and says that the reference to the 2022 matters in respect of Occupational Health advice and the respondent's failure to comply with it was background material. The claimant says that the 2023 events were not covered by the Agreement and that clause 7 must be read as a whole. One should not separate out clause 7(d) and consider it in isolation.

7. Section 144 of the Equality Act 2010 provides that a term of a contract is unenforceable by a person in whose favour it would operate insofar as it purports to exclude or limit a provision of or made under this Act. That statutory provision is designed to prevent people from entering into contracts which preclude them from enforcing their rights under the Equality Act 2010. It reflects Parliament's intention that rights (such as the right not to be discriminated against) are important and not lightly to be signed away.

8. There are however exceptions to section 144(1), contained within section 144(4). It provides the section does not apply to a contract which settles a complaint within section 120 if the contract is made with the assistance of a conciliation officer or is a qualifying Settlement Agreement. This case concerns an agreement made with the assistance of a conciliation officer, and that is governed by the Trade Union and Labour Relations (Consolidation) Act 1992 – what we call a COT3 agreement.

9. So, the issue which I have to decide this morning is whether the claim should be struck out because the claimant has contracted not to bring these claims in the second claim form by reason of paragraph 7 of the Settlement Agreement dated 5 May 2023. If she had contracted not to bring any such claims that would then constitute an abuse of process. That, for the purpose of the Tribunal Rules under rule 37, would mean that the claim is vexatious or it stood no reasonable prospects of success. That is because of the underlying principle that parties are entitled to enter into agreements between themselves and be bound by the terms of those

agreements. If they then seek to renege on the agreement and bring legal proceedings in contravention of its terms it would be regarded as an abuse of process.

10. The issue can be reduced to the question: has the claimant, by reason of the Settlement Agreement of 5 May 2023, agreed not to present claims, the type of which are set out in the claim form 1802563/2023?

11. The approach which I must take has been considered by the Court of Appeal recently in the case of **Arvunescu v Quick Release (Automotive) Limited [2023] ICR 271**. Essentially, it comes down to deciding what the agreement means. The claimant says to me it did not extend to excluding claims which arose form events which happened in 2023 and were nothing to do with the first claim back in 2022. The claimant says that is more than clear from the timeline. The claimant says she did read the Agreement and sign it and she even went to see a solicitor, but it does not exclude her right to bring these second claims. The respondent says that clause 7(d) is clear.

12. The Court of Appeal identified the approach as follows: the relevant principles in interpreting contracts involves ascertaining the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract – a citation taken from a House of Lords case called **Investors Compensation Scheme v West Bromwich Building Society**. Furthermore, Lord Bingham said in **Bank of Credit and Commercial International v Ali**:

> "*In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction as far as known to the parties. To ascertain the parties' intention the court does not of course enquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified*."

13. The claimant is correct to say that I must read the whole of the Settlement Agreement and the whole of paragraph 7. The words of paragraph 7(a), (b), (c) and (d) are cumulative. In other words, each paragraph adds something to the former paragraph, so paragraph 7(a) settles fully and finally the first claim for direct discrimination and harassment. If paragraph 7 stopped there, there could be no question but that the claimant was entitled to bring this second claim. It does not stop there. It adds a further category of claim and that is claims for unfair dismissal and breach of contract in paragraph 7(b). They are then further elaborated. In paragraph 7(c), a prohibition is added for personal injury claims arising from the first claim. Finally, it adds a very broad and extensive category of claims in paragraph 7(d) which cannot be brought against the respondent "all or any claims of whatever nature". It covers the whole world. It provides a non-inclusive list of different statutes and claims under the common law. It is not unlimited, in that the claims

which cannot be brought are those "*arising from her employment within the respondent or its termination*". In contrast to that restriction, it is very broad in that it covers all such claims which have arisen or may arise in the future.

14. The question is: what did the parties intend by these words? As Lord Bingham indicated, I do not identify subjectively what the parties intended. It is clear from what they told me today that they did not agree what they intended. I have to consider what a reasonable person would consider the words of the contract would be regarded as meaning.

15. The claimant says that if she went back to work for the respondent now and it behaved in an egregious way the terms of that Agreement would preclude her from bringing a claim, if the respondent's argument is correct. That is an interesting proposition and a troubling one if it is correct. But I am not required to consider a hypothetical situation of that type because in this case the facts upon which the second claim is brought had arisen by the time, that is before, the Agreement was signed on 5 May 2023. That is similar to the circumstances in the Court of Appeal case to which I have referred of **Arvunescu**. The court upheld an agreement similar to the one which I am dealing with which precluded the claimant from bringing a further claim.

16. I have to bear in mind that the object of this Agreement was to reach finality between the parties in respect of litigation and not simply the litigation of the first claim, because it would not have extended to paragraph 7(d). Paragraph 7(d) would not have been necessary because paragraphs 7(a), (b) and (c) would have covered the first claim. Paragraph 7(d) must have added something. I am satisfied it included and added events which were known to the parties by 5 May 2023: – the words "*any claims of whatever nature which the claimant **has***" clearly connotes events which are known to the parties at that time. The clause specifically refers to the Equality Act 2010.

17. I can see that where the clause talks about what claims may arise in the future that there is an argument that that is so vague and uncertain that future events would not be captured by the broad language in this Agreement. For reasons I have indicated, I am not dealing with that situation here. I am dealing with a situation that, as of 5 May 2023, the claimant knew that she had potentially a claim for harassment and victimisation against the respondent for ignoring or not complying with the advice of her Occupational Health adviser and her GP, and she knew that when she entered into the Agreement on 5 May 2023 because she had already issued the claim on 3 May 2023, unbeknown to the respondent.

18. I agree with the submission of Mr Delaney that those circumstances are clearly caught by paragraph 7(d). For the claimant to agree to accept a sum of money and in consideration of that to accept that in full and final settlement of any claims which she has under the Equality Act 2010, as of 5 May 2023 covers the events set out in the timeline in the second claim form.

19. Therefore I find that the bringing of the second claim is an abuse of process and vexatious and I therefore strike it out.

Employment Judge D N Jones

Date: 15 November 2023