



EMPLOYMENT TRIBUNALS

Claimant: TC
Respondent: ER
Heard at: Bury St Edmunds (via CVP)
On: 16 January 2024
Before: Employment Judge Graham

Representation

Claimant: In person
Respondent: Mr Hazelwood, Solicitor

JUDGMENT having been sent to the parties on 12 February 2024 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:

REASONS

Introduction

1. The background of this claim involves allegations of sexual offences. Those alleged offences are not the subject matter of this claim. The alleged perpetrator of those offences is not a party to this claim, and the specific complaints are not about things that he has done.
2. At the start of the hearing, I raised the issue of an anonymisation order with the parties as neither had raised it earlier. Having heard submissions from both parties, and having taken into account the principle of open justice as well as having considered both Articles 6 and 10 ECHR, I directed that the names of the Claimant, the Respondent, and the alleged perpetrator be anonymised as follows:
 - i. The Claimant will be anonymised as TC.
 - ii. The Respondent will be anonymised as ER.
 - iii. The alleged perpetrator will be anonymised as YZ.

Background

3. The Respondent is an NHS Ambulance Trust. The Claimant commenced employment with the Respondent in 2014, and was previously employed as a paramedic but was demoted in 2018, and is now an emergency care assistant.
4. The Claimant has brought previous tribunal claims against the Respondent for disability discrimination and also a wages claim. The discrimination claim was previously dismissed by the Tribunal, and the wages claim was settled via a COT3 Agreement via ACAS on 27 January 2023. The terms of that settlement include:

Settlement and Terms

The Claimant and the Respondent hereby agree to accept the terms set out below without any admission as to liability in full and final settlement of:

1. *the Claimant's claims under case numbers [redacted] and [redacted] ("the Claims"); and*
2. *subject to clause 3 below, all and any other claims howsoever arising which the Claimant may have against the Respondent or its officers, agents and employees arising from or in connection with the Claimant's employment up to and including the date of this Agreement, and including the termination of the Claimant's employment on 7 December 2018 and the re-engagement/reinstatement of the Claimant by the Respondent on or around 25 September 2019. For the avoidance of doubt but without prejudice to the generality of the foregoing this includes claims for and under... the Equality Act 2010.*
3. *This settlement does not affect any rights the Claimant may have:*
 - 3.1 *in relation to accrued pension rights;*
 - 3.2 *for personal injury of which the Claimant is unaware and could not reasonably be aware as at the date of this Agreement;*
 - 3.3 *to enforce this Agreement.*

(together "the Excluded Claims")
5. On 3 June 2023 the Claimant brought these proceedings. In her ET1 she made reference to harassment related to sex, sex discrimination, and breach of duty of care. It is important to note that the Claimant does not seek to complain of sexual harassment.
6. In her ET1 the Claimant says that she informed the Respondent in January 2022 that her colleague YZ had been arrested for rape, common assault and false imprisonment of her, and that various police forces were investigating. YZ was then suspended.

7. The Claimant said that in November 2022 the Police force that had been investigating had finished their investigation and determined that there was no further action to be taken. The Claimant says that she was told on 11 January 2023 that YZ would be returning to work but that he would be moved to a different team. The Claimant says that she asked the Respondent to move either YZ or her to another station, but this was declined on 17 January 2023.
8. The Claimant says that 19 January she made this request again, but this was rejected again on 23 January, following which the Claimant went off sick. The Claimant sent a third request on 26 January but only to move YZ and on 6 March 2023 the Respondent responded repeating the contents of an earlier decision.
9. The harassment was alleged to be the Respondent's requirement for her to share a workplace with YZ. The duty of care complaint is not a specific cause of action which a Tribunal has jurisdiction to consider but I note that the Claimant was seeking to complain that she did not feel safe at work and that there was a duty to investigate all allegations, and a duty to prevent the Claimant from coming into contact with YZ. The Claimant's complaint of sex discrimination alleged that the Respondent had not taken the Claimant's complaints seriously and that there was indirect discrimination arising out of an alleged PCP of not investigating allegations of sexual assault and not separating employees in such circumstances. The Claimant said she had been subject to an unspecified disciplinary process.
10. The Respondent filed an ET3 Response in which it denied the complaints and contended that all the facts and omissions asserted as sex discrimination took place before 27 January 2023, and that all the claims asserted were settled and cannot be pursued further and it applied for a strike out of the claim on the basis of the COT3 agreement.
11. The Response also makes reference to the claim having been brought out of time, and it also notes that the Claimant and YZ had been in a personal relationship for some time, the alleged offences occurred outside of the workplace, and that the Claimant and YZ continued to contact each other during the Police investigation even when asked not to do so, and that they may also have gone on holiday abroad together. The Respondent made reference to only one police force having arrested YZ and then ultimately determining that there was no further action, and that the other police force or forces did not arrest him.
12. The Respondent says that it conducted a safeguarding review before the return of YZ in January 2023, and that it put in place measures to minimise their potential contact. The Respondent says that it directed both the Claimant and YZ not to attempt to contact each other given what had occurred during the Police investigation, but this was not a disciplinary sanction but that it could have led to disciplinary proceedings had it been breached. At this time the Claimant had been issued with a grievance outcome which did not uphold her complaints and that the process was ongoing. The Respondent denied all of the complaints and denied the PCP(s) relied upon.

13. Today's hearing was listed to deal with the Respondent's strike out application, however on 11 January 2024 the Claimant sought permission to amend her claim. The Claimant said her claim now related solely to the Respondent's conduct between 8 February and 11 November 2023 specifically rejecting her third request of 26 February 2023 for the Respondent to move YZ to a different node which is essentially a different geographic area of work (equivalent to a county), as opposed to a different team or station. I note that the Respondent had already moved YZ to a different team within the same node. It is common ground that the refusal was communicated on 17 January and repeated on 23 January following a second request by the Claimant. The Claimant repeated the request again on 26 February and she was sent an email from the Respondent on 6 March 2023 simply repeating why the decision had been made on 17 January 2023.
14. I also understood that by the time of this hearing the Claimant had volunteered to move to a neighbouring node, and this has been actioned by the Respondent.
15. Before I considered the Respondent's application for a strike out, I reminded myself that a Tribunal cannot consider a strike out of a claim until such time as it knows what the complaint is. I therefore spent some time clarifying the issues with the parties at the start of this hearing. I therefore understood these to be as follows:

Harassment related to sex

1. An email dated 6 March 2023 from the Respondent to the Claimant repeating earlier decisions of 17 January and 23 January 2023 why it would not move YZ to a different node.
2. The decision not to move the Claimant to another node which was communicated to her on 17 and 23 January 2023.

Indirect sex discrimination

1. A Provision Criterion or Practice ("PCP") of not actively investigating complaints of sexual misconduct raised by staff.
 2. A PCP of not moving parties where one party accuses another of sexual misconduct.
 3. A PCP whereby complainants of sexual misconduct are directed to have no further contact with the alleged perpetrator, and then dealing with them under the informal disciplinary process where they are allegations that they have done so.
16. The Respondent confirmed that it had no objections to the amendment but that it still took the position that all of the claims should be struck out as the only acts or omissions asserted against the Respondent between February and November 2023 appeared to be the 6 March 2023 email repeating the earlier decision of 17 January (repeated on 23 January 2023), there were no new acts on the part of the Respondent.

17. The Respondent's position remained that any acts taken before 27 January 2020 were covered by the settlement and that it would be an abuse of process for claims to be brought based on those settled acts, even if they are re-stated later.
18. I therefore granted the Claimant's application to amend her claim as this was not opposed, however I struck out the claim of breach of duty of care, as this not something for which the Tribunal has jurisdiction.

Issue to be decided

19. The issue for me to determine today was whether the Claimant's claim should be struck out as an abuse of process, having already been settled by way of the COT3 agreement dated 27 January 2023.
20. Having then clarified the issues I went on to hear submissions from either side, starting with the Respondent.

Law

21. In ***Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896**, it was held that the process of interpreting contracts involves:

"...the ascertainment of 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." [at 912]

22. In ***Bank of Credit and Commerce International SA v Ali and Others* [2002] 1 AC 251**, it was held:

"...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 so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified." [per Lord Hoffmann at paragraph 8]

23. The case of ***Arvunescu v Quick Release (Automotive) Limited* [2023] ICR 271** is authority for the proposition that a settlement can include heads of claim which are different to those which are being settled, and further that a settlement may even include future actions even though a claimant may not know of the new claim at the date of signing the agreement.

24. Rule 2 of the Employment Tribunal Rules of Procedure provides:

Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

25. Rule 37 provides:

Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

- (a) that it is scandalous or vexatious or has no reasonable prospect of success;*
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
- (c) for non-compliance with any of these Rules or with an order of the Tribunal;*
- (d) that it has not been actively pursued;*
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

Submissions

26. The Respondent refers me to the terms of the COT3 Agreement and places reliance on clause 2 which settles all claims against the Respondent and its officers which the Claimant may have in connection with the Claimant's employment, including claims under the Equality Act 2010.
27. The Respondent is clear that the agreement does not seek to bar future claims, its argument is that the facts giving rise to this claim are captured in the agreement of 27 January 2023. The Respondent says that all of the discrimination claims being asserted in this claim pre-date the COT3 and that the decisions taken to end YZ's suspension without further investigation, the requirement for the Claimant to return to work in the same region as YZ, and in relation to an alleged informal disciplinary warning given to the Claimant on 17 January 2023 (for TC and YZ to cease having contact), all of which were decided and communicated to the Claimant no later than 17 January 2023.
28. The Respondent says that the email of 6 March 2023 was not a new act on the part of the Respondent, it was a response to a request from a communication from the Claimant whereby it repeated why it had rejected the request to move YZ. I should point out that this email did not deal with the Claimant's request for her to be moved, the last request she made for that was 19 January and that was rejected on 23 January 2023, thus before the date of the COT3 agreement. The Respondent says that any other related acts were by the Police or the Claimant herself and not those of the Respondent.
29. The Respondent tells me that this claim is much more straight forward than many of the other authorities relating to the terms of COT3 agreements as they generally deal with future claims, whereas claim refers to matters known to the Claimant at the time of the COT3 and matters which she had been actively involved in correspondence with the Respondent since the time of the alleged sexual offence a year earlier in January 2022.
30. The Respondent refers me to the case of *Ali* and encourages me to read the COT3 agreement as a whole, and taking into account the parties' relationship and all the relevant facts in ascertaining the intention of the parties.
31. To that end the Respondent says that there is no ambiguity in the COT3 wording on any ordinary or natural reading. Clause 2 states clearly and unambiguously that all claims arising from the Claimant's employment up to the date of the agreement (27 January 2023) are settled. Looking at that wording from the perspective of a reasonable person taking into account the relevant facts, the Respondent says that there is no reason to question the natural meaning of the words.
32. Whereas the current claim is a different head of claim to that which the Claimant settled in January 2023, the Respondent refers me to the case of *Arvunescu* referred to above which is authority for the proposition 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. In that case the Claimant did not know of the facts giving rise to the claim which had

been waived, whereas in this case the Claimant was fully aware in advance of her signing the COT3.

33. The Claimant for her part argues that she did not believe at the time of signing the COT3 agreement was settling all claims although she conceded that in hindsight having read it, that is what it says. The Claimant said that at the time she was not in a good place, and all of this was in its infancy, however she confirmed that she had access to an ACAS conciliator and that the alleged sexual offence occurred 12 months before. The Claimant said that the new information was that she told the Respondent that the police had begun a new investigation, however she did not make me aware of any new act the Respondent had carried out.

Decision

34. I will now issue my decision. Having considered all of the material before me, and having listened to the submissions from both parties, and also having read the authorities to which I have been referred, it is clear to me that words were used within the COT3 agreement were sufficiently clear and unambiguous and would cause a reasonable person to understand that all claims, including those under the Equality Act 2010 up to, and including 27 January 2023, were intended to be settled by way of that agreement, and there was no suggestion that future acts would be excluded.
35. This is a case where the employment relationship continued after the agreement. Had the COT3 agreement sought to exclude future claims in an ongoing employment relationship, then I would have given particular consideration to whether that would have been contrary to public policy given the background to this claim. I note that this is not a claim for sexual harassment, but the claim arises out of allegations of that nature. However, this is not a case where the COT3 seeks to exclude future claims in an ongoing employment relationship, the agreement is backward looking.
36. I of course note that the subject matter of this claim is different to the claim being settled. However, following the decision in **Arvunescu**, it is permissible for the COT3 agreement to settle claims which are a different head of claim to that which had been brought in the proceedings.
37. I do not find that there were any new acts on the part of the Respondent. I am of the view that the Respondent's email of 6 March 2023, was simply repeating information passed to the Claimant on 17 and 23 January 2023, both of which occurred before the COT3 agreement was signed.
38. I have of course taken into consideration that the Claimant appears to suggest that there was new information, that is she says that she told the Respondent that another police force was allegedly investigating YZ, however I note that this did not relate to any new alleged act on the part of YZ. I reiterate that I have found no new acts by the Respondent.
39. It is my finding that the claim had already been settled under the COT3 agreement to which I have referred. It is therefore my decision that the claim should therefore be struck out as an abuse of process. The claim is dismissed in full.

Employment Judge **Graham**

Date 19 February 2024

REASONS SENT TO THE PARTIES ON

28 February 2024

FOR THE TRIBUNAL OFFICE