



EMPLOYMENT TRIBUNALS

Claimant: Miss R Wadkin

Respondent: Cheshire & Wirral Partnership NHS Foundation Trust

Heard at: Manchester (by CVP)

On: 19 April 2024

Before: Regional Employment Judge Franey (sitting alone)

Representatives

For the claimant: In person

For the respondent: Mr A Gibson, Solicitor

JUDGMENT

The respondent's application to strike out the claim under rule 37(1)(a) is dismissed.

REASONS

Introduction

1. This was a public preliminary hearing conducted by video using the HMCTS Cloud Video Platform. Its purpose was to determine an application made by the respondent to strike out the claim under rule 37(1)(a) on the basis that it was an abuse of process and/or had no reasonable prospect of success.
2. I had a bundle of documents running to 124 pages, and any reference in these Reasons to page numbers is a reference to that bundle.
3. Understandably, neither side had envisaged that any witness evidence would be called, but during discussion with Mr Gibson at the start of the hearing it became apparent that he did intend to challenge some of the facts put forward by the claimant in the bundle of documents and in her response to the application. The claimant agreed that she would give evidence and did so pursuant to an affirmation. Mr Gibson asked her questions about the relevant facts.

4. After I heard her evidence I had an oral submission from each party before giving an oral judgment with brief oral reasons. The claimant asked for written reasons to help her process the decision and the reasons for it.

Background

5. The claimant was employed as a Business Development Manager for the respondent. By the start of November 2022 she had presented three Employment Tribunal complaints alleging different forms of disability discrimination and victimisation.

6. In November 2022 the respondent indicated that it was commencing an investigation to establish facts relating to the suggestion that there had been an irretrievable breakdown in the working relationship by reason of the claimant's refusal and/or inability to have contact with a range of senior employees.

7. Because of her concerns about this investigation and how it was being set up, the claimant opened discussions about the possibility of resigning on agreed terms. By early December it had been agreed in principle that she could resign, subject to a settlement agreement.

8. That agreement was signed by the claimant on 22 December 2022 and by the respondent on 23 December 2022. It covered the three claims and a fourth claim which had been presented at the end of November but not yet served on the respondent.

9. At the end of January 2023 the respondent made payment pursuant to the terms of the agreement, but in February 2023 the claimant presented this claim.

10. In its response form the respondent asserted that it was an abuse of process because there was a binding settlement in relation to the events which had given rise to this claim. Following a preliminary hearing before Employment Judge Benson on 16 November 2023, this hearing was listed to determine an application to strike out the claim on that basis.

11. The application itself was made by the respondent in an email of 30 November (pages 101-103), and the claimant's response objecting to the application was made by email of 7 December 2023 (pages 104-106).

Relevant Legal Framework

12. The power to strike out a claim appears under rule 37(1) of the Employment Tribunals Rules of Procedure 2013 as follows:

“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...”

13. If a claim has been validly compromised by means of a settlement agreement, it will amount to an abuse of process and will have no reasonable prospect (or, indeed, any prospect) of success.

14. The complaint in this case was a complaint of unfair constructive dismissal under Part X Employment Rights Act 1996 (“the Act”).

15. Parliament has legislated to prevent employees signing away their rights to pursue a claim under the Act unless the agreement is one of a number of specified types of agreement, including a “settlement agreement”.

16. The relevant provision was section 203, of which the material parts were as follows:

- “(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports –**
 - (a) to exclude or limit the operation of any provision of this Act, or**
 - (b) to preclude a person from bringing any proceedings under this Act before an Employment Tribunal.**

- (2) Subsection (1) –**
 - (a) ...**
 - (f) does not apply to any agreement to refrain from instituting or continuing any proceedings ...if the conditions regulating settlement agreements under this Act are satisfied in relation to the agreement.**

- (3) For the purposes of subsection (2)(f) the conditions regulating settlement agreements under this Act are that:**
 - (a) The agreement must be in writing;**
 - (b) The agreement must relate to the particular proceedings;**
 - (c) The employee or worker must have received advice from a relevant independent adviser as to the terms and effects of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an Employment Tribunal;**
 - (d) There must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the employee or worker in respect of loss arising in consequence of the advice;**
 - (e) The agreement must identify the adviser; and**
 - (f) The agreement must state that the conditions regulating settlement agreements under this Act are satisfied.”**

Findings of Fact

17. Having heard evidence from the claimant, and having considered the documents, I made the following findings of fact to enable me to decide the application.

18. Following discussions in November 2022, on 1 December 2022 (page 35) the respondent wrote to the claimant asking whether she still wished to consider a resignation on agreed terms. The claimant replied a few minutes later by saying that

she had already indicated that to be so, and in response the Trust wrote on 2 December accepting the resignation and confirming that its terms would include an agreed reference and the abandonment of the Trust investigation.

19. It was suggested that the resignation would be effective from 19 December and that there would be a payment in lieu of the 12 weeks' contractual notice period. The termination date was later agreed to be 31 December 2022.

20. A draft settlement agreement was emailed to the claimant on 7 December, with an offer to contribute up to £400 plus VAT towards the cost of independent legal advice (page 41). The claimant replied asking for £660 plus VAT as a minimum and mentioned her four outstanding Employment Tribunal claims.

21. There was further correspondence in the days that followed about the fourth claim, which the respondent had not yet received, and about the figure for legal fees.

22. In an email of 14 December 2022 (page 45) the claimant confirmed that she understood that subject to the agreement, she would not be lodging any further claims against the Trust. She said in that email she was attempting again to source independent legal advice. Her attempts to do so through the Bar direct access scheme earlier in December had not been successful.

23. On 15 December 2022 the Trust emailed the claimant (page 48) to confirm that the contribution to legal costs would now be £500 plus VAT, and that agreement had to be completed by the end of 21 December failing which the investigation would continue. The claimant responded about 30 minutes later (page 48) saying that she had now procured a solicitor and was awaiting advice which should follow within 48 hours.

24. That solicitor was Karen Murray at Slater and Gordon. Ms Murray emailed the claimant on the morning of 16 December recording that they had been unable to contact each other by telephone. They spoke later that morning and at just after noon Ms Murray emailed again (page 112) setting out the anticipated fees and confirming that negotiating the terms of the agreement would be outside the employer's contribution for providing advice on its terms and effect. She said that the charge for the required advice would depend on the complexity of the agreement.

25. Wednesday 21 December 2022 was the date set as the last day for reaching agreement. At 2.15pm that day the claimant emailed Ms Murray saying that she had successfully negotiated the terms of the settlement agreement herself and it only required signing off. She asked if that could be done within the budget of £500 plus VAT.

26. The claimant did not get a reply from Ms Murray and was unable to contact her by telephone during the day. She sent an email to the respondent at just after 5.00pm saying she had had "limited success" in contacting her solicitor, but providing the email address of Ms Murray so that it could be inserted in the agreement.

27. The claimant signed the signature page of the settlement agreement (page 89) on Thursday 22 December 2022. It was signed on behalf of the respondent the following day.

28. The agreement contained her warranties in clause 7. They included confirmation in clause 7.5 that the adviser (identified in clause 1.2 as Ms Murray) had provided advice on the terms and effect of the agreement. That was not true because the claimant had not received any such advice from Ms Murray.

29. The agreement also said that the adviser would provide a letter in the form attached at schedule 1, which was a certificate on the adviser's headed notepaper confirming that the advice had been given as required by section 203. Clause 10.2 required the adviser to provide the certificate within seven days of the date of the agreement. That certificate was never completed by Ms Murray as she had not provided the advice.

30. By email of 23 December at 12:03 (page 66) the respondent confirmed that termination would be processed and payment made once schedule 1 was received from the adviser. The claimant replied (page 67) confirming she would resign on 31 December for completeness.

31. The claimant's resignation on 31 December appeared at page 68. She said that she was being paid in lieu of notice, and that she understood the payment together with a payment for outstanding annual leave would be made on 27 January 2023.

32. On 3 January 2023 (page 69) the respondent chased up the schedule 1 certificate and said that payment would be processed when it was received.

33. That same day at 6.14pm (page 70) the claimant sent an email in the following terms:

"...There won't be any signed schedule 1 as I couldn't actually obtain any legal advice in the end due to the pressure I was put under to sign by the firm deadline of 22 December; I was also advised that from the moment I instructed a solicitor I would be liable for the legal fees regardless, even if the agreement was subsequently withdrawn due to my inability to obtain an appointment [and] advice [on] 22 December or the advice was that signing it would be detrimental to me, and therefore I couldn't take the risk of being held to ransom for fees that I have physically no way whatsoever of paying, so there we go."

34. On 4 January the respondent replied by a letter at page 72 in which it said that without the signed schedule from the adviser, the agreement would not comply with the regulations and the provisions included within it would be of no effect, including the agreed reference and agreed monies.

35. The claimant responded on 5 January 2023 (page 73). In its entirety her email read as follows:

"I have sought advice and my solicitor's direction is that the wording within clause 9 is factually incorrect as the terms of the agreement are not accepted in full and final settlement of all and any claims as it states, and that this wording must therefore be amended for the avoidance of any doubt to expressly exclude the four existing claims already issued and ongoing at the Employment Tribunal, comprising claim numbers

2401996, 2405847, 2406580 and 2409564/2022. She further advises that attempting to withhold payment in lieu of the organisation permitting me to serve my contractual notice period and attempting to withhold payment for all of my outstanding untaken annual leave would of course give grounds for further claims for breach of contract and unlawful deductions from wages, if the agreement is to be considered to have no effect. I have been psychologically abused by this organisation for long enough; I don't even work for it anymore and yet the threats and harassment and attempts at intimidation continue."

36. The email was understood by the respondent to be referring to Ms Murray. In fact, the claimant had gone onto an employment law forum on the internet and made contact with a Ms Thethi. They had subsequently spoken on the telephone and Ms Thethi had told the claimant that the agreement needed amendment. The claimant thought that Ms Thethi was a solicitor but was unsure. This advice was entirely informal.

37. The respondent replied on 9 January (page 75). The letter concluded as follows:

"It is clear you have now had advice – please ask your solicitor to provide the schedule as requested. The agreement we consider is binding, so of course you will receive the monies due to you as set out in it."

38. That was confirmed in a further letter of 26 January at page 77.

39. Notice pay and holiday pay were paid to the claimant on 27 January 2023.

40. The claimant presented her claim form on 13 February 2023.

Submissions

Respondent

41. For the respondent Mr Gibson elaborated on the written application at pages 101-103. He emphasised that the claimant plainly understood the terms of the agreement, as was evident from the emails, and that she had given the impression that she had received the requisite advice both in signing the agreement and in her email of 5 January. The primary contention, therefore, was that once the claimant received the legal advice to which her email of 5 January 2023 referred, the agreement became binding at that point because the requirements of section 203 had been satisfied.

42. If I was against him on that point, he submitted that the claimant should still be held to the agreement as a matter of policy. There was a need for certainty about the effect of settlement agreements and where the claimant had misled the respondent it would be inequitable for her to be able to avoid the effect of the agreement which she willingly signed. The claimant had not been deprived of the opportunity of pursuing the four claims which had subsequently been heard in early 2024.

Claimant

43. In response to the application the claimant emphasised that she had not received any formal advice on the terms and effect of the agreement from Ms

Murray, and nor did the information received from Ms Thethi amount to that kind of advice. She had been doing her best to get legal advice before signing the agreement but had been unable to do so because of the deadline imposed by the respondent.

44. She was worried that not signing the agreement would mean that the respondent would not pay her what was due when her employment ended.

45. The claimant accepted she had given the impression that she had received some legal advice when that was not the case.

Discussion and Conclusions

46. As summarised above, I found as a fact that the claimant had not received legal advice on the terms and effect of the agreement.

47. She had no advice on the agreement at all from Ms Murray, who had not even seen it.

48. The informal discussion with Ms Thethi, who had seen the agreement, fell short of being the advice on the terms and effect required by section 203.

49. Even if the discussion with Ms Thethi had amounted to that advice, Ms Thethi was not the adviser named in the agreement and nor was there any evidence as to whether she had a policy of insurance as section 203 also requires.

50. I was satisfied that the informal discussion with Ms Thethi in January could not validate the agreement signed on 22/23 December 2022.

51. Whatever its status at common law, therefore, the agreement itself did not satisfy the conditions required in order for it to be effective as a means of settling the unfair dismissal complaint.

52. I considered the secondary argument raised by Mr Gibson that it would still be inequitable, or contrary to policy, to allow the claim to proceed. But there was no authority in support of the proposition that an agreement not satisfying the conditions in section 203 could still act as a compromise of the statutory claim. If that were possible it would undermine the purpose of section 203, and arguably make matters less certain. The certainty which is desirable in these agreements is achieved by the respondent satisfying itself that all the ingredients of section 203 are present, which is the purpose of the adviser's certificate even though it is not a requirement of section 203. That is a sensible precaution for respondents to take to make sure that the claimant has indeed had the required legal advice.

53. I did take into account that the claimant had signed this agreement knowing that in doing so she was making a false representation to the respondent, and that she had deliberately worded her email of 5 January 2023 in such a way as to give the impression that she had received further advice from Ms Murray, the named adviser. However, the issue in this case was one of law rather than one of equity or morality. The plain fact was that the agreement did not satisfy the requirements of section 203 because the claimant had not received independent legal advice on its terms and effect.

54. For those reasons I declined to strike out the claim as having no reasonable prospect of success: the argument that it had been the subject of a valid settlement agreement failed.

Regional Employment Judge Franey
22 April 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
29 April 2024

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