



EMPLOYMENT TRIBUNALS

Claimant: Ms M Abimbola

Respondent: Global Banking School Limited

Heard at: Leeds

On: 15 April 2024

Before: Employment Judge D N Jones

REPRESENTATION:

Claimant: In person

Respondent: Mr M Delaney, Solicitor

JUDGMENT

The application of the respondent to strike out the claim on the grounds it is vexatious and has no reasonable prospect of success is dismissed.

REASONS

Introduction

1. This is the third set of proceedings brought by the claimant against the respondent. The first claim (case number 1803356/2022) was issued on 11 July 2022 and concerned direct discrimination and harassment related to race. It was settled pursuant to a Compromise Agreement by a COT3 dated 5 May 2023. The second claim (case number 1802563/2023) was issued on 3 May 2023. It was struck out by this Tribunal on 3 October 2023 on the grounds that it had no reasonable prospect of success and its pursuit was an abuse of process and vexatious. That was because the written agreement which compromised the first set of proceedings dated 5 May 2023 extended to final settlement of the type of claims in the second set of proceedings.

2. This is the third claim which was issued on 14 July 2023. It concerns the withdrawal of £60,000 from a National Employment Savings Trust (NEST) pension in favour of the claimant by the respondent on 1 June 2023. The claimant alleges that is an act of victimisation because she did a protected act, namely issued the second set of proceedings on 3 May 2023. The respondent contacted NEST to withdraw the

funds it had paid pursuant to the settlement because it claims that by issuing the second set of proceedings, the claimant breached the terms of the COT3. The claimant also brings a claim that this was harassment related to race.

3. At a preliminary hearing on 31 January 2024 the Tribunal identified the issues which would need to be determined in respect of the application to strike out these proceedings. They were:

- (1) Did the claimant breach paragraph 7, paragraph 13 or any other provision of the COT3 by bringing proceedings in case number 1802563/2023?
- (2) If so, did that entitle the respondent to repayment of all monies paid under the agreement including the pension payment, by paragraph 12, or because they were discharged from their terms under the agreement by the claimant's breach?
- (3) Did the respondent breach paragraph 5 of the agreement by recouping the monies paid in respect of pension on 1 June 2023? If so, did that discharge the claimant from the terms of the agreement, in particular paragraph 7, such that she has the right to bring claims defined within it against the respondent?
- (4) Did the claimant breach any other terms of the agreement to be included in an application for amendment, if allowed, and what consequence did that have with regard to the issues above?

4. Because the parties had not then foreseen the number of issues which would have to be addressed, the case was postponed for them to consider the relevant authorities.

The Law

5. By rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

“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 and has no reasonable prospect of success.”

6. In **Arvunescu v Quick Release (Automotive) Limited [2023] ICR 271** the Court of Appeal upheld the principle that a claim could be struck out under rule 37 on the grounds it had no reasonable prospect of success when it had been precluded by the words of a COT3 because the parties had settled their claims. The Tribunal considered this authority and the principles of construing contracts, which includes settlement agreements, in the decision to strike out the second set of proceedings. It also identified the restrictions on compromising claims under the Equality Act 2010, but this agreement was made by way of the involvement of ACAS and therefore was not subject to the general limitation on settlements. It should be read in conjunction with these reasons.

7. The respondent drew the Tribunal's attention to two authorities of the EAT, **Royal National Orthopaedic Hospital Trust v Howard [2002] EAT/861/01** and

McLean v TLC Marketing PLC & Others [2008] UKEAT/0429/08/LA in which claims were held to have been covered by the terms of a Compromise Agreement and therefore could not be pursued. The Tribunal drew the parties' attention to the recent authority of **Bathgate v Technip Singapore PTE Limited [2023] CSIH XA18/23**. The Inner Court of Session approved the approach of the EAT in **Hilton UK Hotels Limited v McNaughton [2005] UKEAT/0059/04** and cited the Court of Appeal authority of **University of East London v Hinton [2005] ICR 1260**. A blanket agreement signing away all employees' Tribunal rights would not be sufficient to exclude the bringing of a further claim: "*The actual or potential claim must at least be identified by a generic description or a reference to the section of the statute giving rise to the claim*". If the wording is plain and unequivocal, a future claim of which an employee can have no knowledge can be compromised. The Court held that the claimant was precluded from bringing an age discrimination claim which related to an additional redundancy payment. He had accepted redundancy and entered into a settlement agreement which included a long list of compromised claims including direct or indirect discrimination on the grounds of age. Three months afterwards the respondent had decided that the additional part of the redundancy payment would not apply to those over 60. The claimant, who was 61, therefore brought the second claim.

8. The claimant drew attention to the cases of **Lloyds Bank v Bundy [1975] 1 QB 326** and **Alec Lobb (Garages) Limited v Turtle Oil (Great Britain) Limited [1983] 1 WR 87**. The former case concerned a challenge to the validity of a contract. Lord Denning MR said:

"English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or oppressive for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."

Facts/background

9. The relevant terms of the Compromise Agreement which apply in this case are:

Paragraph 2: By no later than 12 noon on 5 May 2023, the claimant will email the Employment Tribunal in the terms of the letter at Appendix 1 withdrawing the claimant's Employment Tribunal claim against the respondent under case number 1803356/2022 (the "Tribunal Claim")...The claimant and the respondent acknowledge that the proceedings covered by this settlement will be dismissed following the withdrawal of the claim with no order as to costs in favour of either party.

Paragraph 5: The respondent will, subject to the terms of this Agreement, also make a further payment without admission of liability of £60,000 into the Claimant's pension provided by the company with NEST subject to the compliance with the rules of such pension scheme and such payment not exceeding the Claimant's annual allowance. The sum of £60,000 represents a special contribution to provide the Claimant with additional deferred benefits (The Pension Payment). Payment will be

made within 28 days and subject to compliance as set out at paragraph 2 above.

Paragraph 7: The Settlement Sum, the Notice Pay and the Pension Payments and 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 her 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;*
- (c) Any claim for depression, anxiety or other personal injury arising from any act of race discrimination as particularised in the Tribunal Claim and the case management orders made on 30 September 2022 in the Tribunal Claim;*
- (d) All and any claims of whatsoever 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 with 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 Consultation 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 Format 2013.*

Paragraph 8: This Agreement excludes any claims relating to the right to enforce the terms of this Agreement or for personal injury of which the claimant is unaware, provided that the claimant warrants that, at the date of the Agreement, there are no circumstances known to her or which ought reasonably to be known to her which would give rise to such a claim for personal injury.

Paragraph 12: The claimant accepts and agrees that if she breaches any of the provisions of the terms of this Agreement all monies paid to her under this Agreement will be repayable to the respondent as a debt and upon demand.

Paragraph 13: The claimant agrees that except for the payments and benefits provided under this Agreement she shall not be eligible for any further payments from the respondent, its directors or employees relating to her employment and its termination.

10. The relevant chronology in respect of the signing of the COT3 agreement and the events leading to the withdrawal of the pension payment and issue of this claim is as follows.

- 10.1 The claimant contacted ACAS in March 2023 in respect of concerns she was not receiving her contractual pay but only sick pay, notwithstanding she was fit to work. She was advised by ACAS to contact her employer, which she duly did. The claimant contacted ACAS for the purposes of early conciliation on 28 April 2023 in respect of these matters and an ACAS certificate for early conciliation was issued on 2 May 2023. The claimant had indicated to ACAS that she did not wish to attempt to engage in early conciliation with the respondent;
- 10.2 On 3 May 2023 the claimant issued the second set of proceedings for victimisation and harassment with respect to the non-payment of her contractual pay;
- 10.3 The respondent's representative sent the claimant the draft COT3 for the first set of proceedings. On 5 May 2023 the parties agreed settlement on its terms. Pursuant to the paragraph 2 the claimant emailed the Tribunal withdrawing her first claim. They were dismissed upon withdrawal as requested, on 15 May 2023.
- 10.4 On 5 May 2023 the respondent and its representative were unaware that the claimant had issued the second claim on 3 May 2023. She had instructed ACAS not to attempt early conciliation with them and they had not been served with the claim form.
- 10.5 By letter dated 16 May 2023 the respondent was sent the second claim form by the Tribunal and a Notice of Preliminary Hearing for Case Management to be heard on 16 July 2023.
- 10.6 On 16 May 2023 the respondent paid £60,000 into the NEST account in favour of the claimant as a special contribution with additional deferred benefits in accordance with paragraph 5 of the agreement.
- 10.7 On 31 May 2023 the representative of the respondent wrote to the claimant to inform her that its client would apply to strike out the recent claims (the second claim of victimisation and harassment) as they were the basis of the ACAS Settlement Agreement she had entered on 5 May 2023. The letter was stated also to be a pre-action protocol notification under the Civil Procedure Rules. The claimant was informed that by issuing proceedings she had breached the terms of the COT3 agreement and was thereby liable to repay the monies she had received in settlement of her claims, which was £55,000 less taxes (being £47,000) and the £60,000 paid in respect of pension to NEST. It required the claimant, within 14 days of the letter, to repay the sum of £55,000 less

taxes and the NEST pension payment and to withdraw the second set of proceedings and pay the respondent's legal costs on an indemnity basis.

10.8 On 1 June 2023 the respondent contacted NEST to withdraw the sum of £60,000 which it had invested on 19 May 2023 in favour of the claimant. In a letter sent to the claimant dated 6 March 2024, NEST stated that they had been informed by the respondent that she had been in their employment up until 19 June 2023. In that letter they said that as the claimant had been working up until that date, the correction was permissible under the rules of the scheme. They also referred to a 22-day period of allowance after the end of the relevant earnings period for a payment to be made.

Discussion and Conclusions

1. Did the claimant breach paragraph 7, paragraph 13 or any other provision of the Agreement by bringing proceedings in case number 1802563/2023 (the second claim)?

11. For the reasons set out in respect of the strike out of the second claim, the Tribunal was satisfied that pursuit of that claim would be vexatious and that it would have no reasonable prospect of success because the subject matter had been subject to compromise under paragraph 7(d) of the COT3.

12. Mr Delaney suggests that because the claimant accepted and agreed, by paragraph 13, that except for the payments and benefits provided under the Agreement she would not be eligible for any further payment from the respondent, by issuing proceedings and pursuing them when she was not entitled to because of paragraph 7(d), she committed a breach of the Agreement. He argues that the respondent was entitled to recoup any monies paid under the Agreement pursuant to paragraph 12 because of the claimant's breach.

13. Issuing the second claim did not breach the terms of the COT3. It predated it by 2 days. I have found that continuing the proceedings in that way had no reasonable prospect of success, because the claimant had agreed by 7 of the agreement to compromise such a claim. It followed that to continue to pursue it became an abuse of process and therefore vexatious; but that does not equate to a breach of the agreement.

14. Paragraph 12 enables repayment of sums paid on demand if there is a breach by the claimant of any of the provisions of the terms of the agreement. By paragraph 13, the claimant expressly agreed that she would not be eligible to any further payment from the respondent, its directors or employees relating to her employment except for the payments and benefits payable under the agreement. Neither term states that the claimant may not institute proceedings against the respondent and nor is that implicit from the wording. In his submissions Mr Delaney asked rhetorically how the respondent could otherwise protect itself from further claims from the same party. The protection is that the agreement will provide a complete defence to the respondent if a new claim is already compromised by its terms. It will be struck out at an early stage and an order for costs will often follow. Ultimately an order prohibiting further complaints without permission of the High Court or Employment Appeal Tribunal may be obtained.

15. Excluding a party from bringing proceedings to enforce his or her civil rights is a draconian step. The claimant points out that she has human rights. Article 6 of the European Convention on Human Rights and Fundamental Freedoms enshrines this. The extent to which settlement agreements of this type exclude other claims, past or future, are fraught with difficulty as is apparent from the authorities cited in this case. In none of them was it suggested that the bringing of the second claim had the effect of breaching the settlement terms of the first.

16. Although it covered a different type of claim, the dicta of Lord Denning in the case of **Lloyds Bank v Bundy** illustrates that it is ultimately for the courts to interpret agreements and declare what is or is not legally enforceable. To exclude a party from asking a court such a question would be an unusual and extreme position to take. The respondent invites the Tribunal to construe the agreement, or imply a term into it, to the effect. That is to say the claimant had agreed not to take court or tribunal proceedings against them. That is a very different situation to arguing that a claim which has been brought is bound to fail and so is an abuse and vexatious because a settlement has compromised it. The respondent has wrongly allied the two.

17. In summary, the provisions of the COT3 provided the respondent with a complete defence to the claims pursued in the second set of proceedings but bringing the second claim was not a breach of the agreement.

2. If so, did that entitle the respondent to repayment of all monies paid under the Agreement including the pension payment, by paragraph 12, or because they were discharged from their terms under the Agreement by the claimant's breach?

18. This issue is conditional upon the finding that the claimant was in breach of the agreement by bringing the second set of proceedings. The finding is that she was not.

3. Did the respondent breach paragraph 5 of the Agreement by recouping the monies paid in respect of pension on 1 June 2023? If so, did that discharge the claimant from the terms of the Agreement, in particular paragraph 7, such that she has the right to bring claims defined within it against the respondent?

19. The bringing of the second set of proceedings by the claimant did not discharge the respondent from its obligations under the COT3 because, for the reasons explained, there was no breach of the agreement by the claimant. Because there was no breach, the terms of paragraph 12 did not arise.

20. The action of withdrawing the pension payment on 1 June 2023, in the absence of any breach by the claimant, was a breach of paragraph 5 of the COT3 by the respondent. It was one of the two payments to be made in favour of the claimant and the larger of the two. It was the consideration for the claimant entering into the agreement.

21. The claimant argues that the respondent had a premeditated plan to withdraw these sums and misled NEST in respect of the dates of her employment in order to do so. It is not necessary for the Tribunal to determine these issues. There is an ongoing complaint from the claimant with NEST and the Pensions Ombudsman with respect to that. It is sufficient for the purpose of this decision that I find that by

withdrawing the pension payment on 1 June 2023 the respondent placed itself in breach of a fundamental term of the agreement.

22. When one party commits a fundamental breach of its obligations under the contract the innocent party will then be discharged from complying with its own obligations under the contract, see **Holmes v Tellemachus Ltd [2022] EAT 71**. It would be peculiar and unfair were that not the case. Authorities which deal with restrictive covenants in restraint of trade not uncommonly raise this issue.

23. The fundamental breach of the respondent in withdrawing the pension payment to NEST on 1 June 2023 discharged the claimant from her obligations thereafter. The respondent can no longer rely upon the effect of paragraph 7, in respect to a claim which was issued on 14 July 2023, because the claimant was by then discharged from the obligations it imposed. It follows that the pursuit of these proceedings is not vexatious nor without reasonable prospects of success.

24. Given that, it is not necessary for me to determine whether the terms of paragraph 7(d) would have been drafted sufficiently broadly to encompass the subject matter of the third set of proceedings.

Employment Judge Jones

Date: 22 April 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>