COT3 terms and new claims: settlement of claims involving a subsidiary company

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Arvunescu v Quick Release (Automotive) Limited [2022] EWCA Civ 1600

Summary

1. In *Arvunescu* (6 December 2022), the Court of Appeal (CoA) considered whether the terms of a COT3 had settled a claim relating to the Claimant's rejection for a job by the Respondent's subsidiary company. The CoA's analysis of the terms will be useful to all Employment Law practitioners to ensure that their own template settlement terms cover the claims intended.

2. The CoA found that the terms were broad enough to cover the settlement of the new claim and therefore the Claimant was unable to continue.

3. Readers may be interested to note that in doing so, the CoA upheld the reasoning of one of 3PB's fee-paid Judges, EJ Stephen Wyeth.

4. References within this article in square brackets are to paragraphs of the CoA judgment.

Summary of Facts

5. The Claimant was employed by the Respondent as an engineering release coordinator until the termination of employment in 2014. He brought proceedings for race discrimination and those claims were settled by a COT3 in March 2018.

6. The COT3 terms included the following (emphasis added):

> "The claimant agrees that the payment set out in paragraph 1 is accepted in full and final settlement of all or any costs, claims, expenses or rights of action of any kind whatsoever, wheresoever and howsoever arising under common law, statute or otherwise (whether or not within the jurisdiction of the employment tribunal) which the claimant has or may have against the respondent or against any employee, agent or

officer of the respondent **arising directly or indirectly out of or in connection with the claimant's employment with the respondent, its termination or otherwise**. This paragraph applies to a claim even though the claimant may be unaware at the date of this agreement of the circumstances which might give rise to it or the legal basis for such a claim."

"For the avoidance of doubt, the settlement in paragraph 2 includes but is not limited to:

• the claimant's claim presently before the employment tribunal case number 2700958/2014;

• any other statutory claims whether under the Employment Rights Act 1996, the Working Time Regulations 1999, the Equality Act 2010, the Employment Relations Act 1999 , the Employment Relations Act 1999 [*sic*] or otherwise;

• any claims arising under any EU directive or any other legislation (whether originating in the UK, EU or elsewhere) applicable in the UK; and

• any claim for any payment in lieu of notice, expenses, holiday pay or any other employee benefits or remuneration accrued during the period of the claimant's employment by the respondent."

7. By May 2018, the Claimant had instigated new proceedings against the Respondent for victimisation pursuant to s.27 EA 2010. This new claim arose because in February 2018 he had been rejected for a job by QRG, a wholly-owned subsidiary of the Respondent, and he claimed that the Respondent had been responsible for the rejection because of its close links with its subsidiary.

8. At first instance, EJ Wyeth held that the new claim was captured within the terms of the COT3, therefore had been settled and could not now be pursued. The EAT agreed with EJ Wyeth on this aspect and the CoA further considered the question of how the COT3 terms should be interpreted.

The CoA's reasoning

9. The first and fundamental step for the CoA was to identify what were the new claims [15]. This had been a point successfully appealed in the EAT but not further pursued in the CoA. The CoA agreed that the claim had been one made using s.112, i.e. the knowing

assistance of another to contravene the Equality Act. As a reminder, s.112 states, "(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) (a basic contravention)". For the purpose of enforcement, a contravention is "to be treated as relating to the provisions of this Act to which the basic contravention relates" – here Part 5.

10. The CoA thereafter broke down each material part of the COT3 terms to consider their scope [16] and whether the new claim was covered. Some aspects of the new claim were simple to identify as something included within the COT3 terms, for example that, "It is a claim or right of action brought under the Equality Act 2010. It is a claim which the appellant may have against the respondent "[17].

11. However, the most difficult aspect to consider and the one of which practitioners will want to take note was the COT3's reference to claims "arising directly or indirectly out of or in connection with the claimant's employment with the respondent, its termination or otherwise" (emboldened above).

12. In considering whether the new claim against the subsidiary was included within this term, the CoA concluded that the claim did not arise directly or even indirectly out of the Claimant's previous employment [17], despite the connection that the contravention of s.112 was alleged against the Respondent because of the previous employment and race discrimination claim subsequently brought.

13. Importantly though, this COT3 settled claims arising **"indirectly … in connection with the employment"** and these extra handful of words provided a broader net to capture claims and the claim against the subsidiary was held to come within this term. The CoA stated [17]:

> "Here, the claim does arise indirectly in connection with the employment. It is said to arise because the respondent was responsible for the German company victimising the appellant, that is subjecting him to a detriment (refusing to appoint him to a post) because he had done a "protected act", namely, that he had brought a claim against the respondent for race discrimination on the termination of his employment. A necessary part of the claim would involve considering whether the reason for the refusal of the post was because the appellant had brought proceedings against his former employer on the termination of his employment. The current claim is, therefore, indirectly connected to or linked with the appellant's previous employment."

14. In addition, this conclusion was "reinforced" by a consideration of the context in which the settlement agreement arose [18]. The purpose underlying the COT3 agreement was held by the CoA to be "claims the appellant may have against the respondent as at the date of the agreement, i.e. 1 March 2018…an intention to settle claims connected with the appellant's employment which existed as at 1 March 2018 whether or not they were known about at that date".

15. Here, the 'new' claim of a contravention of s.112 EA 2010 related to alleged victimisation in January or February 2018 and therefore although it was issued after the COT3 was signed, it related to events that had already occurred. Therefore, the new claim did exist at the date of the settlement was within the claims of which the COT3 intended to settle.

16. A question therefore arises as to what would have been the effect if the events relevant to the claim had not arisen by the time the COT3 was signed. On such facts, on the one hand *Arvunescu* could be distinguished because of the different factual background, but conversely the aspect relating to when the new claim arose was only a secondary part of the CoA's reasoning; only 'reinforcing' the interpretation of the COT3's terms.

17. My interpretation is that if the same COT3 term were used but a tribunal/court were considering a claim for which the facts arose after the COT3 was signed, the ability to distinguish the facts of Arvunescu would not *of itself* be a bar to the same interpretation of the contractual terms applying because:

    a. Ultimately, the basic contractual interpretation of the words written in the COT3 was the CoA's primary point of reasoning, rather than the broader context; and

    b. The CoA also looked at an argument relating to a "future cause of action which had not yet arisen at the time of the settlement agreement" in the context of *Royal National Orthopaedic Hospital Trust v Howard* [2002] IRLR 849. In their analysis, the CoA mark out a clear distinction between the two different issues of 'future claims' as opposed to the interpretation of "'arising indirectly … in connection with employment', the words used in the present case" [20-24]. The CoA highlight that the two issues are separate and conclude of the latter question concerning contractual interpretation, "the decision in *Howard* does not assist in resolving that question".

18. However, the ability of a COT3 or settlement agreement to cover future claims may nevertheless be hampered. As a starting point, the rest of the terms need to be drafted sufficiently clearly and broadly to cover future claims. Moreover, the EAT in the recent case of *Bathgate v Technip UK Ltd et al.* [2022] EAT 155 (analysed here by 3PB's Sarah

Clarke) expressed a strong view that a settlement agreement cannot settle a discrimination claim that has not yet arisen.

19. Settlement of other claims, for example, those not relying on the Equality Act, may still be possible and in such a case the wording used in *Arvunescu* is likely to provide the best prospects of success.

Conclusion

20. *Arvunescu* is an important case for practitioners to consider because of the prevalence of claims that settle. It provides a useful analysis of specific wording that would be useful to include in settlement terms when the intention is to settle as many claims as possible, as is the norm. The phrase "'arising indirectly … in connection with employment'" is the key phrase to ensure inclusion within one's template terms.

21. Settlement of future discrimination claims may nevertheless be thwarted by the statutory controls, as highlighted by *Bathgate*, as well as similar statutory limitations imposed on other claims.

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