EAT confirms claim of victimisation compromised by COT3

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***Arvunescu v Quick Release (Automotive) Limited* [2022] EAT 26**

Introduction

1. Mr Arvunescu was employed by Quick Release from 6 May 2014 to 6 June 2014. The Claimant describes himself as a Romanian national. He worked as an engineering release co-ordinator at a site of a contractor of his employer. Following his dismissal, he brought claims against his previous employer for race discrimination. By way of a COT3 settlement agreement entered into on 1 March 2018, those proceedings came to an end.

The Employment Tribunal

2. On 10 April 2018 the Claimant contacted the ACAS Early Conciliation team and obtained a certificate on 10 May 2018. He presented a fresh ET1 on the same date.

3. Within those particulars, the Claimant made allegations of, amongst other things, victimisation. He contended that, in January 2018 (i.e., prior to signing the COT3 agreement) he had applied for the same or very similar role that he had held in 2014. He said the job was with a company based in Germany who was a wholly owned subsidiary of his previous employer. The Claimant alleged that when he contacted a member of his previous employer's HR department she had "declined to volunteer a reference" and had directed him to a member of the HR team of the German company. He alleged he was not offered the role due to "animosity owning to his earlier tribunal case"[1]. On 23 January 2018, a member of the Quick Release said to the Claimant, by email, "Hi Adrian- Unfortunately I have no influence over the recruitment process"[2].

[1] Para 8, EAT judgment
[2] Para 38, ET judgment

4. The Claimant said that without a reference from his previous employer, he was essentially prohibited from progressing his application with the German company.

5. He contended that his previous employer was responsible for the victimisation because it was, as he set out at paragraph 2 of his Particulars of Claim, "obvious that [the Respondent], by means of their German subsidiary/joint venture decided not to consider [his] application for any of their roles in Köln or elsewhere".[3]

6. The Claimant's case was that there was a close connection between the Respondent and the German company which had rejected him, and that the Respondent was responsible for him not getting the role.

7. At a preliminary hearing in December 2018, a further Preliminary Hearing was set down and a list of issues complied, including that the failure to advance the Claimant's application for a post in Köln was an act of victimisation. Seven preliminary issues were set down to be advanced at the hearing listed for July 2019, including whether the Employment Tribunal lack jurisdiction to hear the present claim on the basis that the issues which are raised in it were compromised by the COT3 Agreement between the claimant and the first respondent in case number 2700985/2014.

8. At the Preliminary Hearing in July 2019, the Employment Judge struck out the Claimant's claims in their entirety. On the issue of the COT3, the Judge considered the following to be of significance:

> *"42. The second bullet of clause two of that agreement states that:*
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> *"The claimant agrees that the payment set out in paragraph 1 [for these purposes I accept that this was referring to the first bullet paragraph in clause 2] 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. <u>This paragraph applies to a claim even though the claimant may be unaware at the date of this agreement</u>*

[3] Para 9, EAT judgment

of the circumstances which might give rise to it or the legal basis for such a claim [my emphasis].

The last sentence is of some potential significance.

43. The third bullet states:

"For the avoidance of doubt, the settlement in paragraph 2 [which I accept is referring to the second bullet paragraph] 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."* "[4]

9. The Judge went on to set out the law in respect of COT3 agreements under s144 of the Equality Act 2010. He stressed "unlike with settlement agreements, COT3 agreements do not need to relate to a particular proceeding"[5].

10. The Judge made the following observations:

- The COT3 did compromise the claims that the Claimant sought to pursue
- On any objective reading of the COT3 the wording was unequivocal
- That the Claimant was a highly intelligent individual who had given a "tremendous amount of thought to his claim and [had] prepared lengthy submissions that contain references to particular cases and law that only with real effort and diligence could an unqualified and untrained individual find and identify to be relevant"[6]
- That the Judge was satisfied that the Claimant "knew before he signed this agreement of the potential claims, he [was] now seeking to bring"[7]

[4] Paragraph 42 and 43, ET judgment
[5] Paragraph 48, ET judgment
[6] Paragraph 67, ET judgment
[7] Paragraph 68, ET judgment

- That it could not be said that the Claimant was unaware of the that fact he was not going to be given a reference given the email of 23 January 2018
- That, taking the Claimant's case at its highest, he must have known that that was the position given he knew of the rejection from the German company on 19 February 2018
- The Claimant did not inform the ACAS conciliation officer that he wanted an exception applied to the terms of the agreement
- Nothing changed between the email of 23 January, the rejection on 19 February and his entering into the ACAS COT3 in March 2018

11. The Judge concluded therefore that the Claimant's claims were compromised as part of the settlement and were therefore not matters which could be adjudicated on.

The EAT

12. The Claimant appealed to the EAT and was given permission to pursue two grounds of appeal following a Rule 3(10) hearing before HHJ Auerbach on 17 February 2021. The grounds were as follows:

> *i) "The Employment Tribunal erred in striking out the victimisation claim as having no reasonable prospect of success because (a) it erred in not identifying that the pleaded claim was, in substance, that the Respondent had instructed, caused or induced the decision of the German company; and/or (b) it erred in concluding that such a claim was wholly fanciful.*
>
> *ii) The Employment Tribunal erred in concluding that the form COT3 precluded the victimisation claim from being pursued, because (a) it erred in concluding that it could embrace a claim about rejection of an application for employment with a different company; and/or (b) it erred in concluding that the victimisation complaint was confined to conduct which had already taken place by the time the COT3 was concluded*."[8]

13. This article will deal principally with the second ground of appeal. The EAT hearing was held before Michael Ford QC, Deputy Judge of the High Court.

[8] Paragraph 2, EAT judgment

14. On the issue of the COT3, the Judge held that the Claimant was not saying he had suffered continuing victimisation by not being considered for other specified posts, but rather had suffered a one-off act of victimisation in relation to the role with the German company.

15. The following was discerned by the Judge:

> *"I consider the correct reading of the claim brought before the tribunal is that the claimant was claiming victimisation in relation to Engineering Release roles for which he applied on 23 January. It follows, on the Tribunal's finding that he received the e-mail of rejection on 19 February (paragraph 39), that any act of victimisation by the German company, and any help given by the respondent for the purpose of section 112 EqA, took place before the COT3 was signed."*[9]

> *"In my judgment, as a matter of fact the claimant's specific claim under section 112 did involve an indirect link or connection with the claimant's employment. The claim he brought was connected with his previous complaint of race discrimination, which was about his treatment while an employee of the respondent, and which gave rise to the protected act necessary for such a claim to be brought at all."*[10]

16. The EAT therefore concluded as follows:

> "*The COT3 agreement was worded in very wide terms and applied to any claims arising directly or indirectly out of or in connection with the claimant's employment with the respondent. Although a claim under section 112 of the Equality Act did not necessarily require a link with employment, on the alleged facts here the complaint had a sufficient link with the claimant's past employment with the respondent to fall within the terms of the COT3.*"[11]

17. The EAT allowed the appeal in respect of Ground (i) but dismissed it in respect of Ground (ii). Therefore, the Claimant's claims were compromised and could not proceed

[9] Paragraph 52, EAT judgment
[10] Paragraph 63, EAT judgment
[11] EAT Summary

Conclusion

18. This case is a useful reminder for Respondents and those advising them in terms of ensuring wordings on COT3 are carefully drafted. The decision is based on facts which are not unique and might be a useful authority to have in one's arsenal in defending claims at any early stage where there has previously been a COT3 drawn up and executed.

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