Neutral Citation Number: [2022] EWCA Civ 1600

Case No: CA-2021-000207

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL
MR MICHAEL FORD Q.C.
SITTING AS A DEPUTY HIGH COURT JUDGE
EA- 2019-000698-RN (formerly UKEAT/0770/19/RN)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 December 2022

Before:

LORD JUSTICE LEWIS
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE WARBY

- -

Between:

ADRIAN ARVUNESCU	**Appellant**
- and -	
QUICK RELEASE (AUTOMOTIVE) LIMITED	**Respondent**

The Appellant appeared in person
JAMIE McCRACKEN (instructed via direct access) for the **Respondent**

Hearing date: 28 November 2022

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JUDGMENT APPROVED SUBJECT TO EDITORIAL CORRECTIONS

This judgment was handed down by the Judge remotely and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 6 December 2022.

Lord Justice Lewis:

INTRODUCTION

1. This appeal concerns the proper interpretation of a settlement agreement. The appellant, Adrian Arvunescu, was formerly employed by the respondent, Quick Release (Automotive) Ltd., between 4 May and 6 June in 2014. On the termination of his employment, the appellant brought proceedings alleging that he had been discriminated against on the grounds of race. On 1 March 2018, the appellant and the respondent entered into an agreement, referred to as a COT3 agreement, settling claims brought by the appellant.

2. In May 2018, the appellant brought a new claim against the respondent alleging victimisation. He alleged that he had applied in January 2018 for a post with a company (called QRG) based in Germany which was a wholly-owned subsidiary of the respondent. He was rejected for that post on 19 February 2018. He alleged that he had been victimised as he was refused the post because he had previously brought a claim of race discrimination against the respondent. He alleged that the respondent, through its close links with its subsidiary, had been responsible for him not being offered the post. This appeal concerns the question of whether, on a proper interpretation of the COT3 agreement, that claim was within the scope of the settlement agreement so had been settled by that agreement.

3. The COT3 agreement was confidential and neither party wished the tribunals below or this Court to see the full terms of the agreement. Both agreed that the material parts of the relevant clauses were adequately set out in the judgments below and this appeal could be dealt with on the basis of those extracts. They provide that:

> "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."
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> "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."

THE PROCEEDINGS BELOW

4. At a preliminary hearing, the employment tribunal, employment judge Wyeth, held that the claim in the present case fell within the scope of the COT3 agreement and had been settled by the parties and so could not be the subject of proceedings. The employment tribunal considered that, on any objective interpretation of its wording, the COT3 agreement was unequivocal and applied in full and final settlement of all or any claim or right of action arising directly or indirectly out of or in connection with the appellant's employment. Further, the employment tribunal struck out the claim of victimisation in relation to the refusal of the post by the German company in 2018 as it considered that the claim had no reasonable prospect of success.

5. On appeal, the Employment Appeal Tribunal ("EAT"), Mr Michael Ford KC, sitting as a deputy judge of the High Court, analysed the claim in the following way. The allegation was that the respondent knowingly helped the German company to do an act of victimisation, by refusing the appellant the post in 2018, because the appellant had earlier brought proceedings against the respondent. That was an allegation of a breach of section 112 of the Equality Act 2010 ("the 2010 Act"). The EAT allowed an appeal against the finding that there was no reasonable prospect of that claim succeeding. The EAT, however, upheld the finding that the claim fell within the scope of the COT3 agreement and so had been settled and could not form the subject matter of proceedings in the employment tribunal.

6. The reasoning of the EAT was as follows. The role of the tribunal was to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge reasonably available to the parties. The central question in the present case was whether the claim, properly analysed as a claim under section 112 of the 2010 Act, was one "arising directly or indirectly out of or in connection with the claimant's employment with the respondent, its termination or otherwise". The EAT summarised the contentions of the parties at paragraph 56. Counsel for the appellant submitted that, while the COT3 agreement might cover direct post-employment victimisation by the former employer (the respondent), it did not cover a claim where the respondent had merely helped a third party victimise the appellant. That claim, it was submitted, did not arise directly or indirectly out of the appellant's employment with the respondent but rather out of prospective employment with a third company. Counsel for the respondent submitted that the agreement was intended to achieve what he described as "a clean break" between the respondent and the appellant settling all potential claims.

7. The EAT observed that the relevant clause in the COT3 agreement was not the best drafted. There were errors in the cross-references to other paragraphs in the agreement. The meaning of the phrase "or otherwise" was opaque and did not fit in as a matter of syntax. The EAT also considered that there might be some doubt about what was meant by a claim "arising … indirectly out of employment". The EAT, however, found that the COT3 agreement did embrace the claim that the respondent had acted contrary to section 112 of the 2010 Act. The core reasoning is in paragraph 63 to 67 which are as follows:

> "63. 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. I do not consider it is very far from Mr Young's example of the failure of an employer to provide a reference to a former employee because of a protected act, even if such a claim would be brought under section 108 rather than section 112. Such a claim would be said to arise "directly or indirectly out of or in connection with" employment for the purpose of the COT3. I consider a similar analysis applies here because, on the claimant's case, the respondent helped QRG to victimise him because of his complaint that he had been discriminated against while employed by the respondent.
>
> 64. I do not consider the fact that QRG is a separate legal person, and no cause of action arose until it refused to offer the claimant employment, is sufficient to detract from the width of the wording of the clause. In my judgment, the actual claim arose indirectly out of and in connection with the claimant's employment because one of the necessary factual ingredients of his succeeding in a claim under section 112 was the protected act based on his treatment while he was employed by the respondent. Such a connection with previous employment may not be a necessary legal ingredient of all claims under section 112; but it was an essential factual element of the particular claim under section 112 advanced here.
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> 65. For completeness, nor do I consider that paragraph 11 of the EAT ruling in *Howard* assists the claimant. The issue in *Howard* was whether a COT3 agreement, signed in 1998 when Mrs Howard's employment was terminated, covered a claim based on victimisation when she asked to work for the respondent in 2000. I do not consider at paragraph 11 the EAT was making any general statement about whether her later claim arose out of her employment. It was addressing a different issue of whether the clause in that case, which applied to claims which the claimant "has or may have against the

> respondent", was apt to embrace claims made after the date of the COT3 form. The EAT held that the wording of that expression only covered existing, and not future, claims (see paragraph 9). Its analysis at paragraph 11 was, in my view, only directed to addressing whether or not the later claim she brought did exist at the date of the agreement, which the EAT concluded it did not because the cause of action was not completed until after the date of the COT3 agreement.
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> 66. In contrast to *Howard*, in this case I consider the better interpretation of the clause in the COT3 is that it did cover the type of claim which was being advanced. I am reinforced in that view by the phrase at the end of the clause, by which the clause was meant to apply even if the claimant was unaware of "the legal basis for such a claim". After all, the essence of the claimant's complaint was that the respondent had engineered his non-engagement with its German subsidiary because of the previous claim he had brought against the respondent about his treatment during his employment by it. If one were to analyse such a complaint without reference to section 112, it would appear to fall within the wording of the COT3: it was connected with or indirectly arose out of his previous employment. That is should have been properly categorised as a claim of helping under section 112 is not, in my judgment, sufficient to displace the width of the clause.
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> 67. Finally, I do not consider that the background to the COT3 helps to resolve the issue. Even assuming the parties knew at the date it was signed that the claimant might be considering bringing another claim, I consider the background does not assist in resolving the issue on this appeal. On the one hand, it might be said that if the respondent wanted to exempt such a claim, they should have said so clearly; but, on the other, if the parties had such knowledge, it would also be a factor suggesting that the clause was intended to wrap up everything once and for all. My conclusion is based on the construction of the clause itself."

THE APPEAL AND THE SUBMISSIONS

8. The appellant was granted permission to appeal on the interpretation of the COT3 agreement. That, in effect, involved two grounds of appeal set out in the appellant's written skeleton argument, namely:

> "(a) The COT3 was ambiguous, and therefore should have been interpreted narrowly based on the background, to exclude employment in Germany.
>
> (b) In the alternative, if unambiguous, Howard 11 was still applicable, as there was no link between the conduct completing the cause of action (out of which the claim is said to

> arise) and the 2014 employment. Coxe also prevented indirectness, as there is no genuine causation, but a mere loose connection, and in any case such an indirect link cannot be drawn to the mere historical context".

9. A third ground of appeal referred to the EAT having erred in law in finding that the claim compromised by the COT3 relied on victimisation prior to 1 March 2018. This ground, having regard to the accompanying skeleton argument, concerned the submission that there had not been a single rejection of a job application in February 2018 (before the settlement agreement was made) but included allegations relating to conduct that post-dated the COT3 agreement (see, paragraphs 35 and following of the appellant's skeleton argument). That argument had been rejected by the employment tribunal and an appeal on that issue dismissed by the EAT. Permission to appeal to this court was refused by the order of Lewison LJ as, on a proper reading of the particulars of claim, the claim related to the single job application refused in February 2018. The fourth ground of appeal alleged a breach of the right to fair trial as the appellant's counsel "was asked by the EAT not to take part in the Hearing". In fact, counsel did take part albeit remotely. He had symptoms of COVID-19, although a PCR test had been negative. He appeared, as was common during the recent pandemic, via a video link. Permission to appeal was not granted on this ground. The only grounds for which the appellant has been granted permission to appeal, therefore, are those which concern the interpretation of the COT3.

10. In his written and oral arguments, the appellant put forward the following key submissions. First, he submitted that the interpretation of the COT3 was a difficult issue and should be interpreted in favour of the weaker party which, in this case, was the appellant. Further, the COT3 agreement was ambiguous and ought to be interpreted narrowly. Secondly, the judge below did not explain what amounted to an "indirect link". Rather, he confined himself to considering that, as the previous employment was a building block in the claim, there was such a link. That was insufficient. Thirdly, the meaning of the COT3 depended on its objective meaning: how a bystander would, objectively, have interpreted the agreement. The judge should not have considered the subjective intentions of the parties. Fourthly, the judge erred in his application of paragraph 11 of the decision in *Royal National Orthopaedic Hospital Trust v Howard* [2002] IRLR 840. That paragraph of the judgment was not concerned with the question of whether the settlement agreement in that case applied to future claims. Rather, it held that the claim in that case was not based on what had occurred during the claimant's employment but was based on conduct arising after the end of that employment when the former employer refused to allow her to act as a technician in subsequent operation. That claim was not barred by the settlement agreement. The appellant submitted that similar reasoning applied in the present case. The claim did not arise directly or indirectly in connection with his employment with the respondent. It arose out of conduct occurring after the end of that employment in connection with a different prospective employer.

11. The appellant further relied on authorities concerning the meaning of causation in the context of cases principally involving contract law and tort. These included the observations of Scrutton J. in *Coxe v Employers' Liability Assurance Corporation Ltd.*[1916 2 KB 629 dealing with a provision in an insurance contract which excluded liability in the event that a death was "indirectly caused by, arising form or traceable

…to war". He further relied on the decisions in *Greater Manchester Police v Bailey* [2017] EWCA Civ 425, *London Borough of Lewisham v Malcolm* [2008] IRLR 700, *AIG Europe Limited v Woodman* [2017] UKSC 18, *Beazley Underwriting & Others v The Travellers Companies Inc.* [2011] EWHC 1520, *Scott v Copenhagen Reinsurance Co. (UK) Ltd.* [2003] EWCA Civ 688 and other cases cited in his written skeleton argument. He submitted that the phrase "arising … directly or indirectly … in connection with" should be understood as meaning "caused by". Here, the appellant submitted, the 2014 employment was historical background to the claim and there was no causation between the employment and the claim relating to alleged victimisation.

12. Mr McCracken submitted that the law in this case was straightforward. On the wording of the COT3 agreement, the parties intended a clean break. The judge below had considered the question of whether there was an indirect connection with the employment as appeared from paragraphs 61 to 63 of his judgment.

DISCUSSION AND CONCLUSION

13. In the present case, the Court is concerned with interpreting the terms of a contract settling claims. The relevant principles were identified by the EAT at paragraph 53 to 54 of its judgment. In general terms, as Lord Hoffmann observed in *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1 WLR 896 at pages 912 to 923, 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."

14. In the context of construing settlement agreements such as the COT3 agreement in this case, Lord Bingham observed in *Bank Credit and Commerce International SA v Ali* [2002] 1 A.C. 251 at paragraph 8 that:

> "….. In construing this provision, as any other contractual provision, 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"

15. Against that background, I consider first the nature of the claim brought by the appellant in this case and then the relevant provisions of the COT3. As the EAT correctly identified, the claim in the present case was a claim by the appellant against the respondent alleging that the respondent had knowingly helped another company, the German company, to victimise the appellant, that is to refuse him a job with the

Germany company, because the appellant had brought a claim for race discrimination against the respondent: see sections 112, 39(3) and 27 of the 2010 Act. The question then is whether that claim falls within the scope of the COT3.

16. Analysing the terms of the relevant clause in the COT3 agreement, the appellant agreed that the payment provided for by the COT3 agreement was accepted by him in full and final settlement of:

(1) All or any claim or right of action of any kind whatsoever;

(2) Which the appellant may have against the respondent

(3) Arising directly or indirectly;

(4) Out of or in connection with;

(5) The appellant's employment with the respondent, its termination or otherwise.

The second part of the relevant clause makes it clear that the claims or rights of action encompassed within the clause include but are not limited to claims under the Equality Act 2010.

17. In the present case, the claim does fall within the wording of the agreement. 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. It arises indirectly in connection with the appellant's employment in 2014 with the respondent. I accept that the claim does not arise directly or indirectly out of the employment. The COT3 agreement is, however, expressed more widely. It includes claims arising "indirectly … in connection with the employment". 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.

18. Further that conclusion is reinforced by consideration of the context in which the settlement agreement came to be made. The purpose underlying the COT3 agreement, as appears from its terms, is to settle claims the appellant may have against the respondent as at the date of the agreement, i.e. 1 March 2018. There had been a relationship of employer and employee between the parties. That relationship had ended after just over a month. That had led to litigation. The context in which the agreement was reached, and the wording of the agreement itself, indicates 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. The claim alleging a contravention of section 112 of the 2010 Act in January or February 2018 is a claim against the respondent which is connected with the appellant's employment with the

respondent and which existed at the date of the settlement. The purpose underlying the settlement agreement was to settle all such existing claims.

19. I turn then to consider the specific points made by the appellant. First, the relevant words of the COT3 agreement – that is "arising … indirectly … in connection with the claimant's employment" - may be difficult to interpret or to apply in particular circumstances. That does not, of itself, mean that the agreement is ambiguous. It is the role of the court to determine the proper interpretation of the contract and to resolve any difficulty. Here, on a proper interpretation of the COT3 agreement the particular claim in issue does fall within the scope of the claims that were settled. There is no ambiguity which might justify giving a different interpretation to the COT3 agreement. Secondly, the tribunals below did apply the correct approach and did consider whether the agreement, construed objectively in accordance with the principles identified above, applied to the claim in question. They did not speculate about the subjective intentions of the parties.

20. The appellant relied on a number of authorities in the field of contract law and tort. He submitted that causation required some act or omission which gave rise to the claim. Matters of historical background did not amount to causation. He submitted that the previous employment with the respondent was historical background. The issue here, however, concerns the proper interpretation and application of the provisions of the COT3 agreement. References to concepts of causation in other contexts do not provide any real assistance. The issue here is whether the agreement was limited to matters to do with the employment with the respondent and so did not include matters to do with the prospective employment of the appellant with another company. That depends upon the meaning of the words used in the COT3 agreement. For the reasons given above, the settlement agreement did apply to claims "arising … indirectly … in connection" with the appellant's employment with the respondent. A claim that the respondent had breached section 112 of the 2010 by helping a third party victimise the appellant because he had previously brought a claim against the respondent alleging that the employment had been terminated on grounds of race is a claim which is indirectly connected to the appellant's employment with the respondent.

21. In that regard, the appellant sought to rely on paragraph 11 of the decision of the EAT in *Howard*. The appellant submitted that EAT had held in that paragraph that, where the conduct which gave rise to the claim occurred after the employment had ended, the claim was not caught by the settlement agreement in that case. He submitted that the situation was analogous to the present case.

22. The decision in *Howard* needs to be read in its entirety. The claimant was employed by a hospital for 18 years and left in 1998. She made allegations of sex discrimination. The parties reached a settlement agreement whereby the respondent paid her a certain sum in settlement of the proceedings and "all claims which the applicant has or may have" against her employer. Two years later, in 2000, the claimant was refused the opportunity to work at the hospital under a particular surgeon because of the earlier complaint. The issue in that case was whether the settlement agreement comprised claims arising after the settlement of the previous claim.

23. At paragraph 9 of its judgment in *Howard*, the EAT observed that a party could enter into an agreement to settle some future cause of action which had not yet arisen at the time of the settlement agreement but that "it would require extremely clear words for such an intention to be found". At paragraph 10, the EAT considered that the words "has or may have" were directed to claims that existed as at the date of the settlement agreement and did not indicate any intention to deal with future claims. At paragraph 11, the EAT applied that conclusion to the particular facts of Mrs Howard's claim, noting that the claim "arose out of the alleged conduct of the hospital after the settlement agreement" in 1998. It was in that context that the EAT said that the conduct in 2000 was actionable, if at all, only by reason of the earlier conduct of Mrs Howard in bringing a claim for sex discrimination. It further said, however, that the claim of victimisation was based on the alleged refusal of the hospital in 2000 to allow her to work there for a particular surgeon. That was a claim which arose after the 1998 settlement agreement and there was nothing to indicate that the settlement agreement was intended to settle future claims.

24. Read as a whole, *Howard* is dealing with the interpretation of a settlement agreement in the context of future claims, that is, claims arising out of conduct occurring after the settlement agreement. *Howard* was not seeking to define what constitutes conduct "arising indirectly … in connection with employment, the words used in the present case. The situation in the present case concerns allegations about conduct which occurred in January and February 2018 and before the settlement agreement on 1 March 2018. The COT3 does include existing claims. The question is whether the claim in question does arise indirectly in connection with the appellant's employment with the respondent. That is to be determined by interpretating the COT3 in the present case. The decision in *Howard* does not assist in resolving that question.

25. The appellant raised two further points that he was concerned may not have been considered by the EAT. First, he pointed out that the respondent was contending that the COT3 represented a clean break between the parties whereas he was seeking employment with the respondent's German subsidiary. That, he submitted, indicated that he could not have been seeking a clean break. It is clear from its judgment that the EAT was well aware that the respondent contended that the settlement agreement represented a clean break (see, e.g. paragraph 57 of the judgment). The EAT knew that in 2018 the appellant was seeking employment with the respondent's subsidiary company in Germany. Furthermore, the words used by the respondent to describe its view of the settlement, and the wish of the appellant to work for a subsidiary company, do not ultimately affect, or answer, the real question in this case which is whether the COT3 agreement, interpreted in accordance with the principles set out above, amounted to a settlement of the claim of a breach by the respondent of section 112 of the 2010 Act.

26. Secondly, the appellant relied on the fact that in the settlement negotiations, he had raised the possibility that the respondent would offer him employment with the Germany company. He said that the ACAS conciliation officer had told him that the respondent had said he was free to apply for any role that became available but he would need to go through the full application process and employment at the German company did not form part of the agreement. The appellant interprets this as meaning that the settlement agreement was not intended to compromise any claims relating to possible employment at the German company. It may be questionable whether matters

forming part of the negotiations leading up to the agreement are admissible for the purposes of interpreting the agreement. In the present case, however, it is clear that the matters relied upon by the appellant do not, in fact, offer any real assistance in interpreting the relevant provision of the COT3 agreement. It may well be that the respondent was not prepared to offer or arrange for any employment at the German company as a term of the settlement. It was in that sense that employment at the German company did not, as the appellant put it, form part of the COT3 agreement. That, however, does not assist in resolving the question of whether the COT3 agreement, properly interpreted, did settle any claim alleging a breach by the respondent of section 112, namely the allegation that it assisted the Germany company to victimise the appellant because he had previously brought a claim against the respondent alleging that his employment with the employer had been terminated on grounds of race.

27. For those reasons, I consider that the claim that the respondent breached section 112 of the 2010 Act did arise indirectly in connection with the appellant's employment with respondent. The claim was, therefore, compromised or settled by the COT3 agreement. The employment tribunal was correct therefore to strike out the claim and the EAT was correct to dismiss the appeal on that issue. I would dismiss this appeal. Any application in relation to any ancillary issue such as costs or permission to appeal should be notified to the court and the other party in writing within 14 days of the date of this judgment being handed down, and that notice should be accompanied by written submissions in support of that application. The other party will have seven days to reply in writing. Any application will thereafter be determined by the court on the basis of the application and the written submissions and reply.

Lady Justice Elisabeth Laing

28. I agree.

Lord Justice Warby

29 I also agree.