OUTER HOUSE, COURT OF SESSION

[2020] CSOH 29

A227/18

OPINION OF LORD MULHOLLAND

In the cause

JENNIFER TROUP

Pursuer

against

WEST LOTHIAN COUNCIL

Defenders

Pursuer: Napier QC and Stuart; Balfour and Manson, Edinburgh
Defenders: Rolfe; Clyde & Co (Scotland) LLP

10 March 2020

Introduction

[1] In an ordinary action for damages the defenders seek dismissal on the basis that the pursuer is by reason of the terms of a compromise agreement, entered into in respect of an employment tribunal claim, personally barred from raising this action.

The facts

[2] The pursuer was employed by the defenders as a primary school teacher between 2004 and 12 May 2017. The defenders, a local authority, were her employer. She has raised

an action for damages for personal injury (the present action). The action is based on the averred fault at common law of the defenders and the averred breach of the implied term of the pursuer's contract of employment that the defenders would not without reasonable and proper cause engage in conduct which destroyed or seriously damaged the confidence and trust between employer and employee. She avers that she suffered a major depressive disorder with anxiety as a result of the defenders' breach of duty. The pursuer avers that the defenders' managers knew or ought to have known that the pursuer was at risk of psychiatric injury by reason of work-related stress and that in the face of that knowledge or imputed knowledge they failed to take reasonable care for her mental health. The defenders dispute the claim.

[3] Prior to raising the action, the pursuer raised a claim at the employment tribunal (4100245/2017). The defenders in the present case were the respondents in the claim. In the claim which was brought under the Equality Act 2010 (the 2010 Act), she averred that she had suffered discrimination by reason of her disability (sections 13 and 15 of the 2010 Act), the defenders had failed to make reasonable adjustments in respect of her disability (sections 20 and 21 of the 2010 Act) and she suffered harassment as a result of her disability (section 26 of the 2010 Act). The claim form is 7/3 of the inventory of productions and the claim is detailed at page 40 *et seq* (my page numbering). Paragraphs 121-125 of the claim set out the legal basis of the claim under the 2010 Act.

[4] The claim was settled in a compromise agreement (7/2 of the inventory of productions). The compromise agreement is also known as a COT3 agreement. I will refer to it as the "compromise agreement". This is an agreement to settle the claim which involved input from the Advisory, Conciliation and Arbitration Service (ACAS). The compromise agreement was signed by the claimant and the respondents (by a solicitor

having the authority to sign on behalf of West Lothian Council) on 15 and 16 May 2017 respectively. The compromise agreement requires the respondents without admission of liability to pay to the claimant a specified sum on money within 21 days. The agreement states (paragraph 1(a)(ii)) that the sum of money was compensation, including loss of employment, in full and final settlement of the employment tribunal claim (4100245/2017) and all and any claims which the claimant has or may have in the future against the respondents whether arising from her employment with the respondents or its termination on 12 May 2017, including but not limited to, claims under contract law, the Equality Act 2010, the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Disability Discrimination Act 1995, the Employment Rights Act 1996, the Working Time Regulations 1998, the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the Information and Consultation of Employees Regulations 2004, the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 or European Communities Law (paragraph 1(a)(ii)). As recognised by the compromise agreement, the claimant's employment with the respondents terminated on 12 May 2017. The compromise agreement also contained an exclusion clause which caveated paragraphs 1(a)(i) and (ii) by excluding:

> "any claim related to accrued pension rights and any claim for damages for personal injury which may be brought within the ordinary civil courts of Scotland arising from circumstances occurring prior to 12 May 2017" (paragraph 1(a)(iii)).

The agreement requires the claimant to withdraw her claim from the employment tribunal (first paragraph 4), the respondents to provide her with a reference (paragraph 7) and both the claimant and the respondents to refrain from making false or misleading statements about each other (second paragraph 4). There is also a confidentiality clause (paragraph 5)

which contains limitations on disclosure. I was advised that both parties to the agreement were legally represented when the agreement was drafted.

The defenders' challenge

[5] The defenders seek dismissal of the present action on the basis that the pursuer is personally barred by the compromise agreement (first plea in law for the defenders and answer 56 in the pleadings). The defenders aver that the pursuer founds upon the same factual events in both proceedings. She sought compensation in her claim before the employment tribunal in respect of loss, injury and damage in respect of a psychiatric injury. Both the claim and the present action relate to the same conduct of the same employees over the same time frame. The fact that the present action includes more heads of loss is neither here nor there. The defenders submit that the pursuer has settled her claim for damages in respect of psychiatric injury and as a result she is personally barred from suing the defenders in respect of the same injury arising from the same circumstances. The defenders submit that the exclusion clause is ambiguous and as a result it should be narrowly construed such that it should not be interpreted as preserving a right of action based on the same events and resulting in the same harm. It should be construed *contra proferentum* against excluding grounds of action from the compromise agreement. If the exclusion clause does not operate in the way contended by the defenders, it is difficult to see what substantive claim in respect of personal injury was settled by the compromise agreement. The exclusion should only apply to claims not settled by the compromise agreement, namely damages in respect of any injury sustained in her employment, apart from psychiatric injury. This could include a fall from height, an assault by a co-worker and slips and trips.

There is nothing within the compromise agreement which preserves the pursuer's right to maintain this action.

The pursuer's response

[6] The pursuer submitted that employment tribunals have the power to award financial compensation for breaches of the Equality Act 2010 which cause personal injury (physical or psychiatric). This includes harassment related to disability, discrimination by reason of disability and failure to make reasonable adjustments in respect of disability. The pursuer's employment tribunal claim was settled by means of the compromise agreement. ACAS was involved. If the compromise agreement excludes the present action, the issue of personal bar does not arise. The compromise agreement should be construed in accordance with the ordinary principles of construction of a contract. It is not for the court to re-write the compromise agreement that the parties have made. The wording of the exclusion clause is clear and unambiguous. There is no scope for implied terms. The compromise agreement excludes any claim for damages for personal injury which may be brought within the ordinary civil courts of Scotland arising from the circumstances occurring prior to 12 May 2017. Had the defenders wished to achieve the result now sought, it should not have accepted the exclusion clause in the terms agreed. The compromise agreement was not intended to settle each and every aspect of the pursuer's claim. If that was the case the compromise agreement would have been in different terms. There is nothing in the amended closed record to support such an averment. With regard to personal bar, the cases cited in support of the defenders' plea are distinguishable on the facts and the applicable law in Scotland. There is nothing in the amended closed record to support the plea of personal bar and there are no averments and no plea in law to support a submission of *res*

judicata which in any event is not pled. There are no inconsistencies between the compromise agreement and the present action. It is not inconsistent with agreeing to settle a claim and then subsequently acting in a way that has been expressly identified as permissible under the terms of the compromise agreement. There is no unfairness in the present action. The question of whether the sum of money specified in the compromise agreement should be deducted, in whole or in part, from the award of damages is a question that will be addressed in due course, if and when the liability of the defenders is established. At that stage it will be relevant to look at the background to the settlement agreement and the factors taken into account in agreeing the payment. The compromise agreement had value to both the parties to it. The payment of compensation in settlement of the employment tribunal claim ended the claim of disability discrimination. This ended the risk of the tribunal making a finding against the defenders that it had discriminated and harassed the claimant and failed to make reasonable adjustments to accommodate her disability. This would be a matter of importance for the defenders, a local authority, avoiding any reputational damage and the risk of an award of compensation which is higher than the sum agreed. The compromise agreement also ends the risk of a successful claim for unfair dismissal following the termination of her employment. The agreement would also be of benefit to the claimant in avoiding the uncertainty of a hearing and providing her with compensation for the discrimination and harassment allegedly suffered by her. It also brings closure of the claim which avoids any prolonged stress and anxiety that a hearing would bring.

Decision

[7] It is well established that settlement agreements entered into by parties to extra-judicially settle litigation are binding contracts (*Margaret Hamilton of Rockhall* v *Lord Lyon King of Arms* [2019] CSOH 85 per Lady Wolffe at paragraph 60 citing *Evenoon Ltd* v *Jackel & Co Ltd* 1982 SLT 83 per Lord Cameron at 88). The compromise agreement which settled the employment tribunal claim is therefore a binding contract. This was accepted by both counsel in their respective submissions. The rights and obligations of the pursuer and respondents are therefore to be determined by the terms of the compromise agreement. In interpreting the terms of the compromise agreement, the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The court must construe the provisions of the contractual agreement in context and in accordance with the purposes that the contract is intended to achieve. This involves the court identifying the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood the language in the compromise agreement to mean. The court will look for the natural and ordinary meaning of the language used in the compromise agreement, including the exclusion clause. With regard to background knowledge, it would be known that the compromise agreement settled an employment tribunal claim brought under the 2010 Act averring discrimination and harassment at work by reason of the pursuer's disability. The employment tribunal has jurisdiction to deal with such claims (under part V of the 2010 Act) which is the appropriate place to make such claims (the Sheriff court does not have jurisdiction to hear such claims *per* section 114 of the 2010 Act). The tribunal has the power to order the respondents *inter alia* to pay compensation to the claimant (section 124(2)(b) of the 2010 Act). The compromise agreement settled the claim

without admission of liability which would be of benefit to the defenders in avoiding a potential finding of discrimination and harassment of an employee with all the negative connotations that could bring, including reputational damage. This is recognised by the inclusion of a confidentiality provision. The agreement would also be of benefit to the claimant in avoiding the uncertainty of a hearing and providing her with financial recompense for the discrimination and harassment allegedly suffered by her. It also brings closure of the claim which avoids any prolonged stress and anxiety that a hearing would bring. There are therefore clear benefits in settling the claim.

[8] As noted above, both parties had legal input in the drafting of the compromise agreement. The agreement was negotiated and the parties to it would not have agreed to it unless they were content to sign it bringing it into force. The agreement will have been in the interests of both parties to it or else it wouldn't have been signed. So, is the present action covered by the terms of the compromise agreement? The agreement specifies the payment of compensation, including the claimant's loss of employment, in full and final settlement of the claim and all and any claims which the claimant has or may have in the future against the respondents whether arising from her employment with the respondents or its termination on 12 May 2017. Paragraph 1(a)(ii) then specifies that this includes, but is not limited to, claims under contract law, European Communities law and a series of statutes which are detailed in paragraph 4 above. If the exclusion clause (1(a)(iii)) did not exist the compromise agreement would clearly cover the present action. However, the agreement includes an exclusion clause. Does the exclusion clause prohibit the present action? In determining this issue, the wording of the clause is of paramount importance. The clause excludes "any claim for damages for personal injury which may be brought within the ordinary civil courts of Scotland from circumstances occurring prior to 12 May

2017." The ordinary and natural meaning of this wording is that it does exclude a claim for damages for personal injury brought within the civil courts from circumstances which occurred prior to 12 May 2017. In my view this provision could not be clearer. It contains no ambiguity and there is no room for doubt as to what it means. The present action is a claim in a civil court in Scotland. It claims for damages for personal injury and arises from circumstances which occurred prior to 12 May 2017 (the date of the termination of the pursuer's employment with the defenders). Applying the wording of the exclusion clause to the present action, it is clearly excluded from the terms of the compromise agreement. The defenders argue that it does not exclude the present case and the wording of the exclusion clause would apply only to actions brought in respect of slips and trips, falls from height and assaults by fellow workers. If it was meant to be so restrictive then it would surely have been drafted accordingly. That is not what the exclusion clause says and applying the clear and unambiguous wording of the exclusion clause, it covers the present action such that it is not contractually prohibited by the compromise agreement.

[9] The defenders argue that to interpret the exclusion in the manner contended by the pursuer would render the compromise agreement meaningless. I disagree. The compromise agreement clearly has a purpose and is advantageous to both the pursuer and defenders. I have summarised these advantages in paragraph 7 above. The defenders also argue that the employment tribunal claim and the present action are both based on the same set of circumstances within the same timeframe. It was submitted that these are the same actions. However, this argument fails to recognise that the claim was based on allegations of disability discrimination and harassment under the 2010 Act for which the employment tribunal is the appropriate place to make such a claim. These are statutory wrongs. The present action is not based on averments of disability discrimination and harassment and

the pleadings for the present action contains heads of claim which were not contained within the employment tribunal claim. The claim and the present action are rooted differently. The present action avers negligence, fault and breach of contract the legal basis of which is the common law. With regard to the payment of compensation, the 2010 Act expressly gives the tribunal the power to award compensation. However, if compensation is awarded by the tribunal it will be for a statutory breach of the 2010 Act for discrimination and harassment. If the pursuer succeeds in her present action she will be entitled to reparation for the fault, injury and damage through the fault and negligence of the defenders. These actions are clearly different in nature. The different nature of the actions is recognised in the jurisdictional provision in the 2010 Act. Section 114 of the Act gives the employment tribunal jurisdiction to hear complaints of contraventions of Part V of the Act. Part V is concerned with discrimination and harassment at work. In contrast, the Sheriff court does not have jurisdiction to hear part V claims which is an implicit recognition by Parliament that there may be separate actions and claims in these different forums arising from the same facts and within the same time frame. In summary, applying the ordinary and natural meaning of the wording of the exclusion clause, I have no doubt that it excludes the present action from the compromise agreement. There is in my opinion no ambiguity in the wording and as a result there is no scope for the application of the *contra proferentum* rule (McBryde, *The Law of Contract in Scotland*, 3rd edition at paragraph 8-38 *et seq*).

[10] With regard to personal bar, the requirements are set out in Gloag and Henderson, *The Law of Scotland*, 14th edition at paragraph 3.05 *et seq*, which was cited to me by counsel as an authoritative definition. I note that personal bar is distinct from *res judicata* or *lis alibi pendens* or bar due to the application of the rules preventing claims arising out of the one obligation being pursued in separate actions (E Reid and J Blackie, *Personal Bar* (Scottish

Universities Law Institute, 2006) at paragraph 19.10), none of which was pled before me and there are no averments or pleas in law in the amended closed record to found such pleas. I note from paragraph 3.05 of Gloag and Henderson that inconsistency on the part of the person barred, and unfairness, are the fundamentals of the doctrine of personal bar. I agree with the submission of the pursuer's counsel that there is no inconsistency between the terms of the compromise agreement and the present action. It is not inconsistent with agreeing to settle the claim and then subsequently acting in a way that has been clearly and unambiguously identified as permissible by the terms of the agreement. Nor is there unfairness. It is not unfair to the defenders for the pursuer to behave in a way in which the defenders contractually agreed. The defenders aver in their submissions (note of argument at paragraph 12.3) that if the defenders' view of the exclusion clause does not operate as the defenders say it should, it is difficult to see what substantive claim in respect of personal injury was settled by the compromise agreement. I reject this submission. As I have already observed the compromise agreement settled the claim of discrimination and harassment allegedly suffered by the pursuer, extinguished the possibility of a claim for unfair dismissal and claims for breaches of the statutes listed in the compromise agreement at paragraph 1(a)(ii) (detailed in paragraph 4 above). There are also derivative benefits which I have listed in paragraph 7 above. The defenders submitted that unfairness results from the payment of compensation for personal injury. However, this payment was compensation for disability discrimination and harassment allegedly suffered by the pursuer. It is possible that if, in the present action, liability is established and damages are being assessed, the compensation paid in settlement of the employment tribunal claim will be taken into account. However, that is not a matter for me to determine. I merely observe at this stage that this is a possibility.

[11] Two cases were cited to me by the defenders' counsel in support of the plea of personal bar. I did not find them helpful and both are distinguished on the facts. The first case is *Sheriff* v *Klyne Tugs (Lowestoft) Ltd* 1999 ICR 1170, CA which was decided on the terms of the settlement agreement in that case. The settlement agreement in that case is different in terms than the compromise agreement which settled the employment tribunal claim brought by the pursuer. The court held in *Sheriff* that the county court claim for damages for personal injury was clearly covered by the compromise agreement which settled the employment tribunal claim (paragraph 22 of the judgement of Stuart-Smith LJ). The case also applied a rule of English law set out in *Henderson* v *Henderson* (1843) 3 Hare 100, per Wigram V-C at pages 114-115. The rule, based on public policy, is that a defendant should not be oppressed by successive suits when one would do. However, this rule is not part of Scots law and does not form part of the doctrine of personal bar (E Reid and J Blackie, *Personal Bar* (Scottish Universities Law Institute, 2006) at paragraph 19.10).

[12] The second case cited to me by the defenders' counsel in support of the plea of personal bar is *Sivanandan* v *London Borough of Enfield* [2005] EWCA Civ 10. This case is also different on the facts. In this case Ms Sivanandan issued proceedings in the High Court against the London Borough of Enfield (Enfield) for damages for breach of contract. The contract was a contract of employment between Ms Sivanandan and Enfield under which Enfield employed Ms Sivanandan as a racial equality officer. This claim had been previously raised in the Stratford Employment Tribunal in proceedings brought by Ms Sivanandan against Enfield in which she had claimed race discrimination and victimisation under the Race Relations Act 1976, unfair dismissal, breach of contract, and sex discrimination under the Sex Discrimination Act 1975. This claim was struck out by the Employment Tribunal. Ms Sivanandan argued that her claim for breach of contract was

withdrawn before the Employment Tribunal struck out her claim (the claim was struck out on the ground that her conduct of the proceedings had been frivolous, vexatious and scandalous). She submitted that her claim for breach of contract was therefore unaffected by the dismissal of her Employment Tribunal proceedings. However, the Court of Appeal on a detailed examination of the evidence held that the breach of contract claim had not been withdrawn before proceedings were dismissed (paragraph 110 of the judgment of Lord Justice Wall) and her county court action was dismissed as *res judicata*. These cases did not assist me in determining the issues before me.

[13] For the foregoing reasons, I repel the plea of personal bar.

Disposal

[14] I repel the defenders' first plea in law and order that the defenders' averments in support of personal bar are excluded from probation. The action should now be put on the by order (adjustment) roll for discussion of further procedure. I shall reserve meantime the question of expenses.