EMPLOYMENT TRIBUNALS

Claimant: **Ms M Richards**

Respondent: **Avon and Wiltshire Mental Health Partnership NHS Trust**

Heard at: **Bristol** **On:** **8 February 2017**

Before: **Employment Judge Livesey**

Representation
Claimant: In person
Respondent: Miss Palmer, counsel

JUDGMENT

The Claimant's claim is dismissed under rule 37 (1)(a) of the Employment Tribunals Rules of Procedure.

REASONS

The issues

1. The issues which had to be decided at this Preliminary Hearing were as follows;
   (a) Whether, having regard to the principle of res judicata or issue estoppel, the claimant is estopped from reopening the question determined by Employment Judge Sara on 29 May 2009, namely whether the claimant can restore her 2006 claim for hearing, the claim having been withdrawn after settlement through a COT3 agreement;
   (b) Whether, having regard to the principle of res judicata or cause of action estoppel the claimant is estopped from bringing a claim for the same causes of action that formed the basis of her previous claim in 2006;
   (c) Whether having regard to the applicable time limits the tribunal should exercise its discretion to extend time under s. 111 of the Employment Rights Act 1996 or under s. 123 of the Equality Act 2010 to enable the claims or any of them to proceed;
   (d) Whether the claims should be struck out or subject to a deposit order (not exceeding £1000) if the Tribunal concludes that or any of them have little or no reasonable prospect of success.

The hearing

2. Witness statements had been prepared on behalf of the Claimant and Mr Stancliffe, the Respondent's HR Business Partner, but mainly on the issues relating to jurisdiction and time. That evidence did not need to be heard in light of the fact that the first two issues identified by Employment Judge Mulvaney were addressed first, and on the basis of oral and written submissions only. Nevertheless, the Claimant wished to read portions of her statement, which she duly did. The Employment Judge also read further parts himself which he asked to by her.

3. The following documents were considered;
    - C1; the Claimant's chronology;
    - R1; a bundle of documents, pages of which have been referred to in square brackets where necessary below;
    - R2; the Respondent's counsel's skeleton argument;
    - R3; the Respondent's chronology.

4. As a result of her condition of autism, the Claimant sought various adjustments to facilitate her disability during the course of the hearing. They had been set out in an email of 27 January 2017 and they were considered at the start of the hearing and accommodated when required.

Background

5. The Claimant was employed by the Respondent as a Counsellor up until July 2006. She worked at Victoria Hospital in Swindon.

6. There was medical evidence which existed prior to the end of the Claimant's employment which referred to her history of Asperger's Syndrome (for example, Dr Jerrom's letter of 30 January 2006 [8-9).

7. Following the end of her employment with the Respondent, she issued proceedings in the Employment Tribunal in which she raised complaints of constructive unfair dismissal (No 1402086/2006 [16-25]). She specifically identified herself as being disabled as a result of '*mild Asperger's Syndrome…*and…*episodic depression*' [23]. On 19 March 2007, the Claimant was given leave by Regional Employment Judge Tickle to amend her claim to add complaints of disability discrimination, based upon the disabilities referred to in her Claim Form [37-9]. The matter was then listed for a hearing.

8. Those proceedings were settled on 4 June 2007 under a standard COT3 agreement. The Claimant was then represented by a solicitor, Ms Sahi [71-2]. The sum of £12,000 was paid by the Respondent in accordance with that settlement. It was important to note that the COT3 was specified as covering "*all and any claims which the Claimant has or may have against the Respondent*" and claims under the Employment Rights Act and the Disability Discrimination Act were specifically referred to. The agreement was also stated to have applied to, but was not limited to, those claims which had been brought within the proceedings.

9. At that point, the claim was withdrawn, but not formally dismissed by the Tribunal.

10. Very soon after the COT3 had been signed, the Claimant embarked upona course of correspondence through which she attempted to unpick it [73-

87]. She stated that she believed that she had a mistake when it had been finalised. During the hearing today, she stated that she had been angry with her solicitor initially, but had realised subsequently that it had been her fault.

11. On 29 December 2007, the Claimant wrote to the Tribunal about her problems [92]; she stated that she had been tricked into the agreement and/or that it had been achieved through coercion. After some initial correspondence with the Tribunal, the application was listed for determination at a Preliminary Hearing. No medical evidence was supplied by her in support of her arguments regarding her alleged incapacity at the time, although directions had been given for her to do so since that was one of the arguments which she had put forward. Ultimately, she did not actually attend the hearing and Employment Judge Sara dismissed her application on 28 May 2009 in a reasoned Judgment of that date [113-7]. He found that the Claimant had been advised and represented by a solicitor during the settlement process and that the first offer which had led to that settlement had been put forward by her. The subsequent allegations that the settlement had been achieved by duress and/or fraud and/or misrepresentation and/or whilst she had been under an incapacity were rejected. She did not appeal that decision nor has she ever sought to have it reviewed or reconsidered.

12. This claim was issued on 2 May 2016. In a seven-page document which accompanied the Claim Form, the Claimant alleged that she did not receive adequate redress from the problems that she experienced during her employment and that the COT3 did not represent a fair settlement. Most of the document then explained the nature of the problems that she allegedly experienced during her employment; a number of specific people have been blamed including, but not limited to, Dr Howells, Mrs Barnes, Mrs Stapleton and Mr/Mrs Mott. Towards the end of the document, the Claimant referred to events which occurred after the settlement (paragraph 20 (g)); she stated that she had brought and lost a personal injury claim against the Respondent and that she had fought a long battle which resulted in the loss of her home. She referred to correspondence which the Respondent had sent to her MP four years ago and, more recently, its alleged refusal to discuss the matter further and/or meet with her in January 2016. According to Part 8 of the Form, the claims were of unfair dismissal, discrimination on the grounds of disability, although their precise nature of the was difficult to discern from the particulars.

13. On 15 June 2016, the Respondent's Response was filed. It contained a history of the Claimant's litigation against it and sought an order for the claim to be struck out.

14. The matter then came before Employment Judge Mulvaney on 15 July 2016 at a Case Management Preliminary Hearing. The complaints were confirmed to have been of unfair dismissal and disability discrimination (paragraph 1 of the Summary) and the Judge determined that the four issues set out above should have been addressed at this hearing.

<u>The relevant legal principles</u>

15. Rule 37 permits a Tribunal to strike out all or part of the claim if it is "*scandalous or vexatious or has no reasonable prospect of success*" (rule 37 (1)(a)). If proceedings are considered to be an abuse of the Tribunal's process, they are liable to be struck out under rule 37. It is an abuse of the process to attempt to re-litigate matters which have already been decided by a tribunal or another court of competent jurisdiction. Although that is one example of the application of the principle of estoppel (or *res judicata*), it is not the only one; cause of action estoppel prevents the re-litigation of a claim between the same parties which had already been determined. Issue estoppel generally acts to prevent a party from seeking to pursue a claim which is dependent upon the same facts which had been the subject of earlier litigation between those parties and, thirdly, there is a wider form of issue estoppel (sometimes referred to as the rule in *Henderson-v-Henderson* (1843) 3 Hare 100 as explained in *Johnson-v-Gore Wood* [2002] 2 AC 1), which lays down the general principle that parties must bring forward their whole case, except in special circumstances, and would not ordinarily be permitted to bring fresh proceedings in respect of issues which could and should have been included in an earlier action.

16. The general principle in relation to cause of action estoppel is that a decision on a specific claim is binding on any future litigation between the same parties. It is, however, based upon the need for there to have been a decision in the first action/issue; something which had been the subject of a judgment or decision.

17. In relation to the wider application of the rule in *Henderson*, this is best understood by a reading of Lord Bingham's judgment in the case of *Johnson*: There is an underlying public interest that there should be finality in litigation and that interest is reinforced by the increased emphasis on efficiency and economy within litigation. There was no need to identify a particular aspect of the litigation which might be considered to have been a collateral attack on a previous decision, nor was it necessary for there to have been some dishonesty present; there needs to be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on "*the crucial question whether, in all circumstances, the parties misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before*".

18. Finally, the legal principles relevant to settlement also had to be considered. An agreement reached through a COT3 is a relevant exception to the provisions of s. 203 of the Employment Rights Act and s. 144 of the Equality Act (formerly s. 9 of the Disability Discrimination Act). It is important that any COT3 agreement properly recorded all of the claims which were intended to have been covered by it. The ordinary principles of contractual interpretation apply to such agreements in the event that there is a dispute as to an agreement's meaning. Unlike settlement agreements, a compromise achieved through ACAS conciliation may cover *any* disputes between the parties, including some which may not even have arisen at the time of settlement. In such cases, the tribunal would expect clear words to cover such an intention (*Royal National Orthopaedic Hospital Trust-v-Howard* [2002] IRLR 849).

19. Only in an extreme case may such a settlement be set aside but examples exist where conciliation officers acted in bad faith or adopted unfair methods toward settlement. A departure from best practice would not generally be enough (*Clarke-v-Redcar and Cleveland Borough Council* [2006] IRLR 324).

Conclusions on the issues

20. The first issue was not difficult to determine; since the Claimant had not applied to reopen the previous litigation but had, instead, merely issued fresh proceedings, the question did not arise in the manner that it had been framed within paragraph 7.1 of the Case Management Summary of 15 July 2016.

21. As to the second issue within paragraph 7.2, however, the principle of res judicata or cause of action estoppel could not apply since there had been no 'decision' or judgment on the first claim when it was withdrawn (*Khan-v-Heywood and Middleton Primary Care Trust* [2007] ICR 24). The first claim ended before the creation of the new rule 52 (of the 2013 Tribunal Rules). That did not necessarily allow the Claimant to proceed whilst the COT3 remained in place and paragraph 20 of the Respondent's Skeleton Argument neatly encapsulated the problem (R3);

> "*Therefore, for the Claimant to proceed with the second claim, she would need to persuade the tribunal that that agreement* [the COT3] *is not binding on her. And that question was the subject of a judicial determination in 2009. So an issue estoppel arises, the issue being whether she can set the agreement to settle aside, and the effect is that she cannot reopen the question whether she can set the settlement agreement aside, so she cannot proceed with the second claim any more than she could with the first one.*"

22. Employment Judge Sara's Tribunal determined that the COT3 ought not to have been set aside. That issue cannot be re-opened now. On its face, the COT3 clearly prevents this litigation from being pursued because the complaints which have been brought are also under the Employment Rights Act and the Equality Act (which re-enacted the relevant provisions of the Disability Discrimination Act). That Tribunal had considered all of the potential arguments which might have served to have upset the COT3, but they rejected them. Even now, despite her arguments, the Claimant's medical evidence does not indicate a lack of capacity at the relevant time (see Dr Van Diel's letter of 5 August 2009 [128-130]). The Claimant could and should have appealed that decision or asked for it to have been reviewed or reconsidered, even late. Without her having done so, the COT3 operates as a bar to these proceedings. They cannot therefore be allowed to proceed and must be dismissed.

23. Accordingly, it was not necessary to resolve the issues identified in paragraph 7.3 and 7.4 of the Case Management Summary of 15 July 2016.

Employment Judge Livesey

Date: 8 February 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

9th February 2017

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FOR THE TRIBUNAL OFFICE