EMPLOYMENT TRIBUNALS

LONDON CENTRAL EMPLOYMENT TRIBUNAL

BETWEEN

Paul Cuthbert Claimant

V

Taylor Wimpey Ltd Respondent

Preliminary Public Hearing

HELD AT: London Central (Zoom video call) ON: 6 October 2020

BEFORE: Employment Judge Russell (sitting alone)

REPRESENTATION:
Claimant: No Appearance
Respondent: Mr Davidson, Counsel

JUDGEMENT ON OPH

The Claimant's complaints to include those of unfair dismissal , sex discrimination, harassment , breach of contract , wages act/unauthorised deduction from wages , other contractual payments and under the working time directive are all dismissed through strike out under Rule 37(1)(a) of the ETs (Constitution & Rules of Procedure) Regulations 2013 Sch1 .

Reasons

Background

1. On 3 September 2020 the Respondent made a strike-out application, on 3 grounds:

- The existence of a settlement agreement between the parties;
- Limitation; and
- Lack of employee/worker status.

Findings - factual and legal

2. I make these findings at this Open Preliminary Hearing today on the pleadings and by reference to the short preliminary hearing Bundle of documents available to me today, on the sworn evidence given by Amna Khan who oversaw the settlement on behalf of the Respondent. and the emails from the Claimant including his recent ones to the Tribunal. I interweave the factual and legal findings as they are closely connected and reflect the presentation of the case by both parties.

3. The Claimant's claim is confused , his complaints include many matters not within the ET jurisdiction (e.g. relating to alleged defamation) and his sought remedy well in excess of £2 million is wholly unreasonable .

4. The Claimant's claims are out of time .His engagement came to an end on 3 December 2019. There are no acts complained of which post-date this. All of the causes of action raised in the Claim have a time-limit of three months .It follows that the Claimant should have approached Acas by 2 March 2020 to be in time. In fact, Acas did not receive his early conciliation notification until 8 March 2020. By this stage, every aspect of the Claim was already out of time. Acas then issued a certificate dated 3 April 2020. The Claim was not received until 13 May 2020. Even if the notification had been made within the 3-month limitation period, the conciliation would have expired one month after the date of the certificate, i.e. 3 May 2020 and so the Claimant is out of time under s 111 (2)(a) ERA 19996 and would have been out of time even if he had been able to rely on s 207 ERA 1996. The Claimant has given no substantive explanation or excuse for this.

5. In the absence of the Claimant I have not been able to consider whether time could have been extended under S111(2)(b) ERA and although I expect it was "reasonably practicable" for the complaint to have been filed in time I have made no finding on this and so reserve the finding as to whether the Tribunal has any jurisdiction to hear the claims due to time limitation .

6. The principal finding in this case is that the Claimant voluntarily entered into a settlement agreement on 7 February 2020 lawfully compromising all claims arising out of this loss of employment (to the extent that he was an employee of the Respondent as his employment status is in dispute and again cannot be determined today in the absence of the Claimant) including all those claims now made to the Employment Tribunal.

7. The compromise fulfilled all of the relevant statutory criteria under section 203 of the Employment Rights Act 1996 and the Equality Act 2010.
    a. It was in writing.
    b. It related to all particular complaints.
    c. The Claimant received legal advice from a qualified solicitor as to the terms and effect of the agreement
    d. The solicitor was covered by a contract of insurance.
    e. The solicitor was identified.
    f. The contract said that the statutory conditions regulating settlement

agreements were satisfied.

8. Schedule 2 of the Settlement Agreement listed some 38 types of claim. The list included all the Claimant's claims and later provided that they were compromised as part of a full and final settlement .

9. On 14 February 2020, in performance of the payment requirements of the settlement agreement, the Respondent transferred £16,100 to the Claimant and there is no suggestion that they did not fulfil all their obligations under the Settlement Agreement. Nor has the Claimant made any effort to repay the money paid to him under the contract, nor stated any intention to do so.

10. To the extent the Claimant was employed by the Respondent at all (as opposed to being an agency worker employed by Pinnacle Recruitment Limited as claimed by the Respondent but I make no finding on that) I do find that it was only for a very short period of time and therefore the Employment Tribunal would have no jurisdiction to deal with any normal claim of unfair dismissal in any event. As with the limitation point however I reserve the finding as to whether the Tribunal has any jurisdiction to hear the unfair dismissal claims for this reason.

11. The Respondent claims all of the Claimant's claims are without substance and they would have made an application to strike out the claim on other grounds if this had been necessary. However they seek a strike out of the complaint today , in the Claimant's absence , based only upon the fact that the completion of the settlement agreement means the Employment Tribunal has no jurisdiction to hear the Claimant's case. A matter I can decide on the pleadings and written submissions received. And so I have focused on this issue .

12. Whilst I observe that the Claimant continues to argue that he signed this settlement agreement under mental and economic duress and did indicate at various times (though the emails are conflicting) that he may not sign up to an agreement I am satisfied that , when he did so , he did so voluntarily. On February 10 2020 for instance the Respondent wrote to the Claimant saying

    "It is important that you understand that you are under no duress to accept the terms of the settlement agreement and that you are of sound mind to accept and understand the terms that have been offered to you. Therefore may I please have confirmation of this today from Chris Hadrill. I will then proceed to sign the settlement agreement on behalf of Taylor Wimpey and send back and organise for the payment to be made as soon as possible and within the terms of the agreement"

13. to which the Claimant replied on 15 February saying , inter alia, saying

    " I confirm that I am not under duress in writing this email. I can confirm that I am accepting your offer as full and final settlement".

14. And later said on 18 February when pressed

" I am of sound mind"

and even threatened at that point to sue the Respondent for defamation for suggesting that he might not be (which I find they did out of concern and in response to the Claimant and not by way of accusation) .

15. On his own case I observe that the Claimant says his mental health has only deteriorated "*since signing the settlement agreement*". But even if he was more ill at the time of signing the agreement than the Respondent knew or realised I find that they could not reasonably have been expected to do more than they did to ensure the Claimant acted voluntarily and with the capacity to do so . In all of the communications with the Respondent, the Claimant and his solicitor gave every appearance of the Claimant understanding the relevant information , considering it and making a choice.

16. The Claimant argues in his letter to the Employment Tribunal of the 24 September that he had then only recently been notified of the Respondent's application to strike out his claims. However this is not the case. The Respondent's application of 3 September was copied to the Claimant who responded immediately with his objections . The Claimant also indicated on 24 September , in addition to summarising some of his reasons for wishing to go behind the signed settlement agreement, that he "was looking forward to the Employment Tribunal hearing 6 October" and would prepare an agenda for it. He has not made an appearance, has not prepared an agenda and although he sent a long email last night to the Employment Tribunal this was confused in content and to a large part fails to address the issues of today's hearing.

17. Moreover the Claimant's correspondence including his two recent emails to the Tribunal make inappropriate and unreasonable comment as to the conduct of the Respondent. In contrast his own conduct, including his failure to attend the tribunal today , without prior notification of that fact , and conduct of this case has been unreasonable. The Claimant is not stating he is unwell and if his reason for non-attendance, of this important hearing where he knew consideration was to be given to a strikeout of his claims , is financial this is not a substantive or persuasive reason .Bearing in mind that the hearing was through cloud video platform and therefore online with no material cost involved to the Claimant on the assumption that he would remain a litigant in person.

18. Where the Claimant does refer to the settlement agreement however and suggests that he was coerced into the agreement I have considered the statements he makes and the authorities that he refers to in this respect .In particular the case the cases of Glasgow City Council v Dahhan [2016] (confirming that a settlement agreement may be set aside on the grounds that a party to it did not have sufficient mental capacity) and Hennessy v Craigmyle and Co Ltd [1986] , also referred to by the respondent's representative, where a similar finding was confirmed in respect of settlement agreement signed despite economic duress.

19. However whilst the Claimant was (like many employees who suddenly become unemployed) keen to accept the terms of the offered settlement agreement I find those terms were generous and were not forced upon the Claimant . As I have found earlier there is no evidence that the Claimant's mental health was such that it would have been inappropriate to enter into the settlement agreement.

20. As far as the economic duress argument is concerned I cannot find there was " economic " duress in the Claimant's absence and given his short tenure at the Respondent he had less to lose than many other employees and was more likely to welcome what were quite generous severance terms as opposed t pursuing his complaints and refusing the compromise . And certainly there was no duress imposed by the Respondent. It was the Claimant's choice as to whether or not to sign up as was confirmed throughout by the Respondent . And would no doubt have been explained fully to him by his own solicitor before he signed .I accept the Respondent's submissions and evidence on this and I find the Claimant's arguments to the contrary might suit him now but are self-serving.

21. These are some of the Respondent's written submissions on both Economic and Mental Duress.

Economic duress

The test for economic duress is that one party's decision to enter into the contract is not voluntary, but arises as a result of "a combination of pressure and the absence of practical choice" Here, neither applies.

a. *There was no pressure at all, let alone the type of pressure which goes beyond the ordinary conduct of legal disputation so as to become illegitimate.*
b. *Nor was there an absence of practical choice: the Claimant was well aware of the "availability of a cheap and quick procedure" (i.e. the Employment Tribunal), and indeed it was he who was threatening to "progress" down that route .*

The Court of Appeal has said that "in real life it must be very rare to encounter economic duress of an order which renders actions involuntary. It follows that if the applicant's situation was not uncommon, it is highly unlikely that he was subject to the necessary degree of economic duress." It upheld the EAT, which had opined that "the circumstances in which [economic duress] is likely to be successfully alleged will arise in employment law only in the most exceptional circumstances."

Capacity

A defendant who seeks to avoid a contract on the ground of his mental incapacity must plead and prove, not merely his incapacity, but also the other party's knowledge of that fact, and unless he proves these two things he cannot succeed.

Under section 1(2) of the Mental Health Act 2005, "A person must be assumed to have capacity unless it is established that he lacks capacity." Section 2 goes on to provide:

For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

It does not matter whether the impairment or disturbance is permanent or temporary.

A lack of capacity cannot be established merely by reference to–

c. a person's age or appearance, or

d. a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

Section 3 provides:

For the purposes of section 2, a person is unable to make a decision for himself if he is unable–

e. to understand the information relevant to the decision,

f. to retain that information,

g. to use or weigh that information as part of the process of making the decision, or

h. to communicate his decision (whether by talking, using sign language or any other means

It is for the Claimant to prove on the balance of probabilities that he lacked capacity. Ordinarily, this would require a full and proper mental capacity assessment. Certainly the mere fact that he was prescribed medicine does not rebut this presumption. The evidence, in the form of the contemporaneous documents and the testimony of Ms Khan, shows clearly that the Claimant did not come within any of the section 3(1) limbs. If it is the case that the Claimant was then and still is on the same medication, then that suggests that the medicine does not have the effect of depriving him of capacity."

22. I repeat them in full because I find they state the legal position accurately and cause me further confirm my findings. I have found on the balance of probabilities that the Claimant had capacity to sign the settlement agreement and was not pressurised to do so in a way that gives hm or even could give him an argument as to economic duress.

23. The Claimant did highlight that the employment tribunal should consider the matter very carefully before striking out his claims given the potentially drastic nature of this to the Claimant. I agree but I have done so. It is quite clear that the Claimant 's claims have no reasonable prospect of success . There may be other grounds for making this same judgement but the only ground I rely upon (particularly in the absence of the Claimant to e.g. defend the late filing of his claims as explained above) is that all of them were/have been settled under the terms of a settlement agreement .Which I have again found was entered into voluntarily on legal advice and without duress.

24. Despite having validly compromised his possible claims, and accepted payment for doing so, the Claimant now seeks to do precisely what he promised not to do and make claims fully compromised by the signed settlement agreement. This is unreasonable and has caused considerable time and expense to be incurred unnecessarily by the Respondent .The Claimant through unwarranted allegation and the way he has conducted these proceedings has acted in a

wholly unacceptable manner. The claims certainly have no reasonable prospect of success and this is the basis on which the Claimant's claims are dismissed

Case No: 2200293/2020

Employment Judge Russell

Date: 12/102020

JUDGMENT SENT TO THE PARTIES ON
13/10/2020

FOR THE TRIBUNAL OFFICE