EMPLOYMENT TRIBUNALS

Claimant: **Mr T Faller**

Respondent: **Parallax Agency Ltd**

Heard by Cloud Video Platform (CVP) **On: 29 January 2024**

Reserved Judgment 14 February 2024

Before: **Employment Judge Shulman**

Representation

Claimant: **In person**
Respondent: **Ms H Bell (Counsel)**

RESERVED JUDGMENT

1. The Settlement Agreement entered into between the parties on 23 January 2023 is sufficient to prevent the Employment Tribunal from having jurisdiction to deal with the claims of unfair constructive dismissal and those under the Equality Act 2010 and therefore the claimant's application is dismissed.
2. In respect of the remaining claim of breach of contract there shall be a further preliminary hearing by video on **2 May 2024 at 2pm** to consider applications by the parties and make further directions.

REASONS

1. **Claims**

   1.1. Breach of contract.

   1.2. Various claims under the Equality Act 2010.

   1.3. Constructive unfair dismissal.

   Each of the claims are as set out in the Annex in the notes of a preliminary hearing as set out by Employment Judge Cox on 22 September 2023 (the preliminary hearing).

2. **Issue for this hearing**

Whether a Settlement Agreement entered into between the parties on 23 January 2023 (SA) prevents the Tribunal having jurisdiction to deal with the claims of constructive unfair dismissal and those under the Equality Act 2010.

3. **The Law**

The Tribunal has to have regard to the following provisions of the law:

3.1. Section 203 Employment Rights Act 1996 (ERA)

3.1.1. Section 203(1) ERA

"Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports — …

(b) to preclude a person from bringing any proceedings under this Act before an employment tribunal."

3.1.2. Section 203(2) ERA

"Subsection (1) —

….

(f) does not apply to any agreement to refrain from instituting or continuing … any proceedings within the following provisions of section 18(1) of the Employment Tribunals Act 1996 (cases where conciliation available) —

(i) paragraph (b) (proceedings under this Act),

if the conditions regulating settlement agreements under this Act are satisfied in relation to the agreement."

3.1.3. Section 203(3) ERA

"For the purposes of subsection (2)(f) the conditions

regulating settlement agreements under this Act are that-

(a) the agreement must be in writing,

(b) the agreement must relate to the particular proceedings,

(c) the employee or worker must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an employment tribunal,

(d) there must be in force, when the adviser gives the advice, a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the employee or worker in respect of loss arising in consequence of the advice,

(e) the agreement must identify the adviser, and

(f) the agreement must state that the conditions regulating settlement agreements under this Act are satisfied."

3.2. *Sections 144 and 147 Equality Act 2010 (EqA)*

3.2.1. *Section 144(1) EqA*

"A term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act."

3.2.2. *Section 144(4) EqA*

"This section does not apply to a contract which settles a complaint within section 120 if the contract - …

(b) is a qualifying settlement agreement"

3.2.3. *Section 147(1) EqA*

"This section applies for the purposes of this Part"

3.2.4. *Section 147(2) EqA*

"A qualifying settlement agreement is a contract in relation to which each of the conditions in subsection (3) is met"

3.2.5. *Section 147(3) EqA*

"Those conditions are that –

(a) the contract is in writing,

(b) the contract relates to the particular complaint,

(c) the complainant has, before entering into the contract, received advice from an independent advisor about its terms and effect (including, in particular, its effect on the complainant's ability to pursue the complaint before an employment tribunal),

(d) on the date of the giving of the advice, there is in force a contract of insurance, or an indemnity provided for members of a professional or professional body, covering the risk of a claim by the complainant in respect of loss arising from the advice,

(e) the contract identifies the advisor, and

(f) the contract states that the conditions in paragraphs (c) and (d) are met."

3.3. I was referred by counsel to dictum in the case of **Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd** [1962] 2 QB 26 (Kawasaki) where it was questioned - "Does the occurrence of the event deprive the party who has further

undertakings to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as consideration for performing those undertakings?"

4. **Facts**

The Tribunal having carefully reviewed all the evidence (both oral and documentary) before it finds the following facts (proved on the balance of probabilities):

4.1. The claimant was employed by the respondent, most recently, as client services director, commencing employment on 1 January 2011, which terminated on 28 February 2023, the parties having signed the SA, as mentioned above, on 23 January 2023. Importantly there is no dispute between the parties as to the validity and enforceability of the SA.

4.2. In or about 8 December 2022 the Tribunal finds that the claimant asked the respondent to make an offer for the claimant's 2% shareholding in the respondent. We find that this was the start of discussions leading to the end of the claimant's employment. We further find that in or about 12 December 2022 the claimant expressed his desire to the respondent to leave the respondent's employment.

4.3. This culminated in the SA, whereby the respondent agreed to pay the claimant:

- £80,000 for his shares in the respondent.
- £26,000 by way of compensation.
- Pay between 23 January 2023 and 31 January 2023 when the claimant would work.
- Pay on garden leave from 1 February 2023 to termination (28 February 2023).

Further the respondent agreed to provide any contractual benefits up to termination, which apparently included the provision of health benefit with BUPA for the claimant.

The respondent also agreed to pay the claimant holiday pay and the balance of his notice by way of payment in lieu of notice, that latter sum being £9,039.55.

There was also a contribution to legal fees.

The claimant retained his laptop and the respondent agreed to request its telecoms provider to transfer the mobile telephone number hitherto used by the claimant at work to the claimant.

There was also the provision of a reference.

The claimant had the benefit of legal advice which complied with the provisions of section 203 ERA and section 147 EqA.

The payment for the shares in the respondent was the subject of a share buy back agreement, which was necessarily specified in the SA but does not form part of the issues in this case.

4.4. The claimant received and kept, despite his subsequent protest, all sums due under the SA. The principal sums were paid as follows:

- £9,039.55 on 24 February 2023.
- £26,000 on 13 March 2023.
- £80,000 on 3 April 2023.

4.5. Unfortunately the claimant's BUPA benefit was stopped by the respondent from 1 February 2023 to 28 February 2023. The claimant was still employed in that period and the respondent was liable to pay for that benefit in that period.

4.6. The Tribunal finds that the first time the respondent became aware of the non-payment of the BUPA benefit was at a lunch with the claimant, Mr Lawrence Omar Dudley-Bahrani (Mr Dudley), a director of the respondent, who gave evidence before us and also an Adam McNichol a non-executive director of the respondent. This lunch was on 3 April 2023.

4.7. Later that day Mr Dudley emailed the claimant accepting that the respondent had incorrectly cancelled the BUPA benefit on 1 February 2023, but that the respondent would reimburse the claimant for any costs normally covered by BUPA in the relevant period up to £2,000 and Mr Dudley asked the claimant for receipts for the purposes of reimbursement. The claimant having disagreed at first then accepted that the cancellation was an oversight. The claimant told Mr Dudley that he the claimant had managed to make arrangements with BUPA to restart his cover with effect from 23 February 2023, albeit with a different product at a cost of £30 per month.

4.8. Before 3 April 2023 and on 23 March 2023 the claimant indicated to Mr Dudley that the respondent was in breach of the SA but the claimant did not spell out that this related to the BUPA matter or anything else. Indeed the claimant belittled the severity of the matter. (See paragraph 5.11.3 below).

4.9. On 3 April 2023 the claimant indicated that there were healthcare and "additional legal bits" which he would send on in the next two days. Mr Dudley then wrote to the claimant resisting legal fees but confirming that he stood by the offer to reimburse costs normally covered by BUPA in the relevant period.

4.10. In the event no receipts were supplied by the claimant to the respondent in respect of reimbursement and on 9 May 2023 James Hall, a director of the respondent, raised the ceiling figure for reimbursement relating to BUPA cover expenses to £2,500. The Tribunal finds that there was no meaningful reply from the claimant before he presented his claim to the Tribunal. Further there was nothing setting out the amount of a BUPA claim in the claim form, nothing until or at the preliminary hearing, when Employment Judge Cox ordered at paragraph 3:

"*By 6 October 2023 the claimant must send the respondent a statement of the compensation he wants the Tribunal to award for each aspect of his claim. The statement must make clear how he has calculated the sums he is claiming*."

This Order was not complied with.

At this hearing the claimant claimed entitlement to £5,000 in respect of legal fees. I asked the claimant to produce a receipt in respect of the payment of those legal

fees at the end of his case and then again at the end of the hearing. Nothing was or has been produced.

4.11. Nevertheless the claimant makes the claims set out by EJ Cox in the Annex to the preliminary hearing, including under the heading "Breach of Contract" in the first sentence of paragraph 1 "*the Respondent failed to maintain the claimant's contractual benefit of health insurance up until 28 February 2023, in breach of clause 2.4*." There are of course other claims made by the claimant which he says support the breach of contract claim, but the Tribunal finds as a fact that it has seen little or no evidence to substantiate claims additional to the BUPA matter. These include a claim that his mobile phone was not in his possession, an issue relating to access to emails and use of the claimant's personal credit card.

4.12. In order to consider the alleged breach relating to the respondent's failure to maintain the claimant's contractual benefit of health insurance it is necessary to have regard by way of facts to the terms of the SA.

4.13. Background Recitals (B) and (C).

4.13.1. Recital (B). "*The parties have entered into this Agreement to record and implement the terms on which they have agreed to settle any claims that the employee has or may have in connection with his employment or its termination or otherwise against the Company or any Group Company … or its or their officers or employees whether or not those claims are, or could be, in the contemplation of the parties at the time of signing this Agreement and including, in particular, the statutory complaints that the employee raises in this Agreement*."

4.13.2. Recital (C). "*The parties intend this Agreement to be an effective waiver of any such claims and to satisfy the conditions relating to settlement agreements and compromise contracts in the relevant legislation*."

4.14. Clause 6 Waiver of Claims clause 6.1. "*The employee agrees that the terms of his Agreement are offered by the Company without admission of liability on the part of the company and are in full and final settlement of all and any claims or rights of action that the employee has or may have against the eompany or any group company or its or their officers, employees or workers arising out of his employment with the Company or its termination, whether under common law, contract, statute or otherwise, whether such claims are, or could be known to the parties or in their contemplation at the date of this Agreement in any jurisdiction and including but not limited to, the claims specified in Schedule 1 (each of which is waived by this clause)."*

4.15. Clause 6.2. "*The waiver in clause 6.1 shall not apply to the following:*

(a) Any claims by the employee to enforce this Agreement;

(b) Any claims arising from or under to enforce the Share Buyback Agreement";

(c) Claims in respect of personal injury of which the employee is not aware and could not reasonably be expected to be aware at the date of this Agreement other than claims under discrimination legislation;

(d) Any claims in relation to any accrued pension rights."

4.16. Clause 6.5. "*The waiver in clause 6.1 with have effect irrespective of whether or not, at the date of this Agreement, the employee is or could be aware of such claims or have such claims in his express contemplation (including such claims of which the Employee becomes aware after the date of this Agreement in whole or in part as a result of new legislation or the development of common law or equity)*".

4.17. Schedule 1. Claims

….

1.2 "*for unfair dismissal, under Section 111 of the Employment Rights Act 1996; …….*

1.18 for direct or indirect discrimination, harassment or victimisation related to disability, discrimination arising from disability or failure to make adjustments under Section 120 of the Equality Act 2010; ….."

5. **Determination of the Issues**

(After listening to the factual and legal submissions made by and on behalf of the respective parties):

5.1. Since both parties accept the validity of the SA and having set out the relevant parts of Section 203 ERA and Section 144 EqA there is no need to rehearse further their provisions. The question is whether the SA prevents the Tribunal having jurisdiction to deal with the claims of unfair constructive dismissal and the complaints under the EqA.

5.2. The terms of the SA are material to this question, which include not only present but future claims. In the Background to the SA and in particular Recitals (B) and (C), in (B) reference is made to the settling of any claims the claimant has or may have in connection with his employment or its termination or otherwise whether such claims are or could be in contemplation of the parties at the time of signing the SA. In (C) the parties intend the SA to be an effective waiver of any such claims. In the Annex to the preliminary hearing there was at least one claim that post-dated the Termination Date but no argument was put to the Tribunal that such post-dated claim was not covered by the SA.

5.3. By Clause 6.1 of the SA, the SA is expressed to be in full and final settlement of all and any claims in or rights of action that the claimant has or may have whether such claims are or could be known to the parties or in their contemplation at the date of the SA, including but not limited to the claims in Schedule 1 (see below). This Clause 6.1 is in the main body of the SA (as opposed to the Background) and Clause 6.1 effectively provides closure to the parties, save for the enforcement of the SA.

5.4. Clause 6.2 is the waiver clause making it clear that Clause 6.1 does not apply to certain matters. It does not include attempts relating to the alleged breach of the SA so that if the claimant wishes to break the SA it has to be done another way.

5.5. Clause 6.5 of the SA provides that the terms of Clause 6.1 of the SA whether or not at the date of the SA the claimant is or could be aware of claims or have such claims in his express contemplation (see paragraph 5.3 above).

5.6. In Schedule 1 of the SA there is expressly included at paragraph 1.2 unfair dismissal and at paragraph 1.18 direct discrimination, harassment and other discrimination claims. This means that all claims made by the claimant are expressly included for the purposes of compromise in the SA.

5.7. The Tribunal decides therefore that not only is the SA accepted as binding on the parties but its terms bind the parties and bind the claimant in particular as regards the claims he is now making.

5.8. So the Tribunal now decides that the SA is a binding document in itself and all the claimant can do is suggest that the alleged breach relating to the BUPA issue (and any other claims were they to be applicable which the tribunal finds take the claimant no further) are such that the breach is so serious as to collapse the effect of the SA.

5.9. Having regard to **Kawasaki** this effectively asks whether the occurrence of the BUPA issue (the other claims having gone) could deprive the respondent of the benefits as expressed in the SA in its favour. **Kawasaki** is believed to be a shipping case and therefore may not at first sight bear relevance to an employment claim such as this. This however does bear relevance as both **Kawasaki** and this case are effectively cases in the law of contract.

5.10. The real question is what the respondent did; i.e. did it prematurely cancel the claimant's BUPA cover and in so doing did that cancellation by the respondent go to the root of the SA, so as to allow the claimant to discharge himself from the effects of the SA, the effect of which would allow him to pursue his claims for unfair dismissal and disability discrimination.

5.11. Did the respondent's conduct go to the root of the SA?

5.11.1. The Tribunal has found that the cancellation of the BUPA cover was an oversight.

5.11.2. The claimant took at least one month to notify the respondent of the alleged breach, having himself taken matters into his own hands and arranged his own cover, again without telling the respondent.

5.11.3. Prior to the disclosure the claimant belittled the problem saying to Mr Dudley "it's okay it's not bad".

5.11.4. Despite many requests the claimant never gave evidence of his losses and despite the respondent's offer of up to £2,500 by way of reimbursement the claimant never took advantage of this offer which he could only have done by producing receipts.

5.11.5. The claimant took no action to sever the SA and quite happily hung on to the money he had promptly received under the SA. Indeed the £80,000 he put in his pocket on the day he notified the respondent of the BUPA claim.

5.11.6. Then there was the matter this tribunal was involved in asking (twice) for the evidence of the legal fees of £5,000.

5.12. In the circumstances what the respondent did did not go to the root of the contract, being the SA, and therefore the SA is sufficient to prevent the ET from having jurisdiction to deal with the claims of unfair constructive dismissal and the claims under EqA and the claimant's claim is dismissed.

5.13. The question is what happens to the breach of contract claim, which is all that is left. There clearly needs to be a further preliminary hearing to consider applications by the parties and directions for any further hearings. This will take place by video at **2pm on 2 May 2024**.

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Employment Judge Shulman

Date 19 February 2024

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