Case No: 2409303/2020

EMPLOYMENT TRIBUNALS

Claimant: Ms H Parry

Respondent: New Look Retailers Ltd

Heard at: Manchester Employment Tribunal (by CVP) **On:** 16 April 2021

Before: Employment Judge Dunlop (sitting alone)

Representation

Claimant: In person
Respondent: Ms R Owusu-Agyei

RESERVED JUDGMENT

1. The respondent's name is amended to "New Look Retailers Ltd".

2. The respondent's application for the claim to be dismissed, or alternatively for it to be struck out, is rejected.

REASONS

Introduction and Summary of Conclusions

(1) This was an application by the respondent that the claimant's claims should be dismissed, or alternatively struck out as having no reasonable prospect of success, due to the existence of a company voluntary arrangement ("CVA") under Part I of the Insolvency Act 1986 ("the IA").

(2) I have rejected that application for the reasons set out in detail below.

(3) This is a long and complicated judgment. I have set out here some summary conclusions to explain the key points of the judgment for the benefit of Ms Parry:

2.1 The claim is able to proceed. There will be a preliminary hearing listed for one hour to discuss the claim and the arrangements for a final hearing. There will be a final hearing listed for three days (although this may change following discussions at the preliminary hearing). The parties will be sent the dates for these hearings in a separate letter.

2.2 Although I have decided that the claim can proceed for now, the existence of the CVA might prevent Ms Parry from recovering some or all of her money from New Look if she is successful. If New Look do not pay her, then she would have to ask the courts to enforce the judgment and they may decide that the existence of the CVA means that the judgment cannot be enforced. She may be able to recover part of the money from the government, but that would only relate to a small part of the claim.

2.3 If Mrs Parry chooses to make a claim to the supervisors of the CVA (which is what New Look says she should do) then New Look will be able to apply again for this claim to be dismissed. Such an application would only result in the recovery of a small portion (up to 2%) of the value of the claim.

2.4 It is a decision for Ms Parry whether to continue with her claim, make a claim under the CVA, or do neither. The Tribunal cannot provide advice, but will proceed on the basis that this claim will continue unless and until it is notified otherwise.

The Hearing

(4) The application was previously considered at a Preliminary Hearing for case management before Employment Judge Sharkett on 26 January 2021. EJ Sharkett declined to determine the application on that occasion for several reasons, including the fact that the respondent had provided a 389-page bundle and a complex skeleton argument to the unrepresented claimant on the evening before the hearing. The matter was re-listed for today's date, with arrangements made for the Judge to have time to read into the case in advance of the hearing itself.

(5) I had regard to:

3.1 the respondent's bundle of documents (now 415 pages and including copies of various statutory provisions and a report of the case of **Re Britannia Heat Transfer Ltd (In administration and in company voluntary arrangement) [2007] BPIR 1038**).

3.2 the respondent's skeleton argument

3.3 two skeleton arguments from claimant

3.4 a small number of additional emails forwarded by the claimant for the Tribunal's attention.

(6) I did not hear any evidence. I considered it might have been necessary to hear evidence from Ms Parry as to whether or not she had received notice of the creditor's meeting at which the CVA was approved. In the event, the respondent conceded that she had not.

(7) Ms Owusu-Agyei's skeleton argument was clear and helpful. Unfortunately, however, it made no mention of the fact that the CVA was the subject of a challenge in the High Court by some of the respondent's landlords, which had been argued over six days in March. Judgment was awaited at the time of this hearing, and was subsequently handed down on 10 May 2021. I am disappointed that this potentially salient matter was not referred to by the respondent at the hearing. The Tribunal expects professional advocates to draw the Tribunal's attention to relevant matters which may have a significant bearing their case, all the more so where the claimant is a litigant in person and all the more so where they are pursuing an application based on an area of law outside the Tribunal's usual scope of expertise. In the event, however, the challenge was unsuccessful (**Lazari Properties 2 Ltd & Ors v New Look Retailers Ltd & Ors [2021] EWHC 1209 (Ch) Zacaroli J**).

(8) I drew both parties' attention to a decision of Employment Judge Allen sitting at Watford, promulgated on 31 March 2021. That case was a claim by a Kim Burrows against this respondent. It appears that, faced with a similar application to this one and on similar facts, Employment Judge Allen determined that Ms Burrows' claim in the tribunal could proceed. That decision is not binding on this Tribunal, but if it had been under appeal then I would have considered staying this matter pending the determination of that appeal. I also wanted to hear Ms Owusu-Agyei's submissions on the effect of a particular section of the IA which was referred to by EJ Allen in his decision.

(9) Ms Owusu-Agyei supplemented her skeleton argument with oral submissions, including responding to a number of questions from me.

(10) Ms Parry was unable to make any effective submissions about the effect of the CVA on the litigation. I say that without any disrespect. This was an extremely difficult and technical application, which had nothing to do with the merits of the underlying claims. Ms Parry understood this to be the case and explained that, like many Tribunal litigants, she did not have the means nor resources to secure legal advice or representation. She did not seek to postpone the hearing to do so.

(11) It would have been of great assistance to me if Ms Parry had been in a position to secure professional representation from a specialist employment and/or insolvency lawyer. It appears that this is a point which has had limited judicial consideration, and may affect increasing numbers of Employment Tribunal claimants in the current economic climate. If my decision is to be appealed, it might be the sort of case which an organisation providing *pro bono* representation might consider taking on. That would mean that Ms Parry would not have to pay legal fees. However, the Tribunal cannot provide, nor compel anyone else to provide, legal representation for a claimant.

Background Facts

(12) I made no findings of fact. The facts as set out below (for the purposes of this application only) were either agreed, or were apparent on the face of the documents.

(13) The respondent is a high street fashion chain. In common with many 'bricks and mortar' retailers, it has faced difficult trading conditions in recent years, exacerbated by the Covid-19 lockdowns of 2020 and 2021.

(14) Ms Parry started work in May 2006. She commenced a long-term sickness absence in June 2019. She was dismissed, purportedly on capability grounds, with effect from a date in July 2020 (there is a dispute about the exact date which does not matter for today's hearing).

(15) On 27 July 2020 Ms Parry presented an ET1 claim form to the Tribunal. In it, she brings various claims arising from that dismissal, including claims of unfair dismissal and disability discrimination. She claims that she was not paid correctly on termination of her employment and may be owed holiday pay and/or notice. The claim is well-drafted and Ms Parry may have had some assistance with it from someone with experience of these matters (I did not ask her). Despite this, none of the claims are quantified.

(16) On around 31 August 2020 the respondent presented an ET3 response to the claim. No jurisdictional point of any type was taken. The response robustly defends the claims on their merits. The case was listed for a preliminary hearing for case management., to take place on 26 January 2021.

(17) At a virtual meeting which took place on 15 September 2020 a CVA was approved by the respondent's creditors. A report by Daniel Francis Butters, a licensed Insolvency Practitioner with Deloitte LLP, dated 21 September 2020 confirms that the CVA was approved with the consent of the requisite proportion of creditors in line with the requirements of the IA. I will return below to the terms of the CVA proposal document (which I understand sets out the terms approved by the creditors) in more detail below.

(18) On 1 October 2020 the respondent's solicitors sent an email to the Tribunal, copying the claimant, drawing attention to the CVA and contending that its effect was that the claimant's claim was compromised by operation of the CVA. It also drew attention to various obligations said to be on the claimant, including to discontinue her claim. It appears that a similar letter was sent directly to Ms Parry on or around the same date. Neither enclosed copies of the CVA proposal document, which runs to some 300 pages. The letter did not ask for the claim to be dismissed or struck out, but invited the Tribunal to "*make any such case management order(s) in relation to the Claim as it may consider to be appropriate*."

(19) By letter dated 5 November 2020 the Tribunal confirmed that the preliminary hearing would go ahead, and that if the respondent was contending that the CVA deprived the Tribunal of jurisdiction to consider the claim, or extinguished any of the claimant's rights that were subject to the claim, it must be prepared to explain the legal basis for that suggestion clearly at the preliminary hearing. As stated above, the preliminary hearing on 26 January 2021 was ineffective, but the respondent addressed me fully on the point at today's preliminary hearing.

The CVA proposal document

(20) The CVA proposal document is, as I have said, some 300 pages long. It appears that the first time Ms Parry had sight of it was when it was included in the bundle for the 26 January preliminary hearing, and disclosed to her a short time in advance of that hearing. She certainly did not see it before it was approved having had, as the respondent now accepts, no notice of the meeting at which it was put to the creditors for approval.

(21) The proposal document is an extremely dense and complex legal document. Its predominant focus is on the relationship between the respondent and its landlords and, in particular, on substantially reducing the rent obligations on many, if not all, of its store properties. I have no doubt that the document would be entirely impenetrable to Ms Parry and, again, I say that without any criticism or disrespect towards her or her capabilities.

(22) The proposal document states that if the CVA was not approved, then New Look would be likely to enter into administration or liquidation. It contends that Unsecured CVA Creditors will receive a greater return on the amounts owed to them under the CVA than if it were not approved (i.e. if the business were allowed to go into administration or liquidation).

(23) The CVA excludes from its scope creditors who are not expressly included within it. This includes current employees, customers and any other Unsecured Creditors not listed in the CVA or caught by its generic terms. The CVA Creditors are defined within the document in 12 separate categories (A-L) and Schedules set out the creditors identified as belonging to each category alongside their addresses and amounts owed. Categories A-E deal with various types of leases. Category F deals with creditors with non-critical liabilities, Category G deals with Intra-Group liabilities, Category H deals with contingent liabilities, Category I deals with rates liability, Category J deals with historic dilapidations liability, Category K deals with SSN holders and Category L – the last category – deals with Former Employees.

(24) Schedule 1 defines a large number of terms in the Proposal. This confirms that a "Former "Employee" is someone not employed as at the date of the creditor's meeting, so would include Ms Parry. "Category L CVA Creditor" is defined as "*any Former Employee to whom New Look owes a Liability, including those Former Employees listed in Part 4 of the Schedule 19*".

(25) Part 4 of Schedule 19 sets out a list of approximately 70 Former Employee creditors. In each case, the name and address is listed as 'Withheld' and a quantified claim amount is given. Those sums range from under £1,000 to, in one case, a sum in excess of £40,000.00. I enquired with Ms Owusu-Agyei as to which of the entries related to Ms Parry. Her instructions are that none of these entries related to Ms Parry as the same 'administrative error' which had meant that she was not sent notice of the CVA meeting had also resulted in her not being listed in the documentation.

(26) Returning to the definitions section, "Liability" is very widely defined as follows:

> "Liability" means any obligation of a person, whether it is present, future or contingent, whether or not its amount is fixed or liquidated, whether or not it is disputed, whether or not it involves the payment
> of money, whether it is secured or unsecured and whether it arises at common law, in equity, by contract, or by statute in England or in any other jurisdiction, or by any order, judgment, decree or any other act of any court (including without limitation to the foregoing generality, the Court) or in any other manner whatsoever, and "Liabilities" shall be construed accordingly."

(27) The broad term "Compromised CVA Creditor" includes Category L CVA Creditors, as well as those from other categories.

(28) The definitions section also includes the following definitions:

"Compromised CVA Creditor Claim" means the claim by a Compromised CVA Creditor as set out in this Proposal.

"Compromised CVA Creditor Contract" means any contract that relates to the Compromised CVA Creditor Claim as set out in this Proposal.

"Compromised Former Employee Liabilities" means any and all Liabilities owed by New Look to a Former Employee other than the Redundancy Payments.

(29) Clause 4 of the Proposal provides, materially, as follows:

> 4. Waiver and Moratorium
>
> 4.1 Waiver
>
> With effect from the Effective Date:
> (a) each Compromised CVA Creditor and each Category A Landlord waives and releases New Look from any breaches or potential or actual defaults of any terms of a Lease, Agreement for Lease or Compromised CVA Creditor Contract that may have arisen and are continuing as at the Effective Date or that may arise thereafter in either case as a result of:
>
> (i) New Look not paying any amount due under any Lease, Agreement for Lease or Compromised CVA Creditor Contract before the Effective Date; or
> (ii) a CVA Related Event or the compromises under, or any other provision of, the Proposal; and
>
> (b) subject to Clause 4.2 (Landlord proprietary rights) below, no Compromised CVA Creditor or Category A Landlord shall be entitled as a result of any of the events referred to in Clause 4.1(a) (Waiver) above, by way of a Legal Process or otherwise:
> (i)-(ii)…
> (iii) to enforce any other contractual or other right that they may have in their capacity as Landlords or Compromised CVA Creditors in respect of Leases, Agreements for Lease or Compromised CVA Creditor Contracts (as the case may be);
> (iv)-(vi)…
>
> and any Compromised CVA Creditor or Category A Landlord that has commenced or completed any Legal Process or other action which falls within Clause 4.1(b)(i)-(vi) (Waiver) above, agrees and acknowledges that it will discontinue such Legal Process or other action, and (if applicable) consent to any application by New Look and/or any Group Company for relief against any such process of action.

(30) Although clause 4 is headed “Waiver and Moratorium” there is nothing within the clause which refers to a moratorium on claims, and the respondent has not suggested that any such moratorium has been granted by any Court.

(31) The respondent submits, and this would appear to me to be correct, that the effect of clause 4.1(a) is that the claimant waives and released the respondent from any breach or potential or actual default of her contract of employment that may have arisen and is continuing as at 15 September 2020 as a result of the Respondent not paying any amount due under any contract of employment before 15 September 2020. That might be an effective waiver of claims for outstanding pay or notice pay, for example, but it seems clear to me that it would not encompass any compensation ultimate found to be due as a result of a successful unfair dismissal or discrimination claim (and the respondent does not appear to argue otherwise).

(32) Instead, the respondent relies on 4.1(b) and, in particular, 4.1(b)(iii) which refers to “any other right” the claimant may have in her capacity as a Compromised CVA Creditor. This, the respondent says, is wide enough to encompass the statutory rights not to be unfairly dismissed and the not to be discriminated against. I have some concern with the notion that such rights could be removed without a very clear indication that that was the case. However, ultimately, I do not consider it is necessary to reach a determination on that basis. Clause 4.1(b) is subservient to clause 4.1(a); it removes the entitlement to enforce contractual or other rights where that right arises as a result of the events in clause 4.1(a) i.e. as a result of New Look defaulting under the contract or entering into the CVA.

(33) I do not consider that pre-existing claims of unfair dismissal and/or discrimination are caught within clause 4 at all. There is therefore no obligation to discontinue them under that clause.

(34) Clause 6 of the Proposal provides that the CVA shall not affect the rights of any Employee (as opposed to Former Employee) or liabilities owed to them in their capacity as Employees.

(35) I have not set out the definition of Redundancy Payments contained in the document, but pause to note that Ms Parry does not claim to be entitled to a redundancy payment as part of her claim before the Tribunal, nor would she be entitled to one under the definition in the CVA.

(36) Clause 22 of the Proposal, which deals specifically with Category L CVA Creditors, reads as follows:

> The Effect of the CVA on Category L CVA Creditors – Former Employees
>
> 22.1 Redundancy Payments
>
> ...
>
> 22.2 Compromise of Compromised Former Employee Liabilities

To the extent that a Category L CVA Creditor's CVA Claim in respect of Compromised Former Employee Liabilities becomes an Allowed CVA Claim in accordance with Clause 30 (Notice and Acceptance of Claim), the CVA will release and compromise the claim for Compromised Former Employee Liabilities held by such Category L CVA Creditor to 2% of the amounts assessed by the Supervisor as outstanding at the Effective Date.

22.3 Payment

The amount calculated in accordance with Clause 22.2 (Compromise of Compromised Former Employee Liabilities) shall be paid to Category L CVA Creditors by New Look following the Interim CCF Claim Date, provided that no payment shall be made if a Challenge Application has been made to the Court in respect of the CVA on or before the end of the Challenge Period, unless such Challenge Application has been withdrawn, settled or decided judicially in favour of New Look.

22.4 Full release and discharge

From the Effective Date, each Category L CVA Creditor irrevocably and unconditionally, fully, finally and absolutely releases and discharges New Look from any Compromised Former Employee Liability and from any further actions, proceedings, costs, claims, demands and expenses with respect to any Contingent Liabilities, and accepts such amount to be paid under Clause 22.3 (Payment) in full and final settlement of such Compromised Former Employee Liabilities.

(37) Clause 27 of the Proposal reads, materially, as follows:

Full and Final Settlement and Bar Date

27.1 Full and Final Settlement
(a) … the provisions of the CVA shall constitute a compromise of all Compromised CVA Creditor Claims which have been modified under the terms of this Proposal. Accordingly, the payments made pursuant to the CVA… to any Compromised CVA Creditor shall be in full and final settlement of any such claims.

(b) Without prejudice to the generality of Clause 27.1(a) (Full and Final Settlement) above, New Look's obligation to make the payments referred to in… Clause 22 (The Effect of the CVA on Category L CVA Creditors – Former Employees)… save as expressly stated in those Clauses, will be accepted in full and final satisfaction of any Liability to a Compromised CVA Creditor.

(c) …

(d) …

(e) For the avoidance of doubt, Clause 4 (Waiver and Moratorium) provides that Category A Landlords and Compromised CVA Creditors may enforce their rights under the CVA, including under the Leases as modified and varied by the CVA and/or for any non-payment of any amount when due under the CVA.

(38) Clause 30 provides that, in order to benefit from payments under the CVA, creditors in Ms Parry's position must submit a Notice of Claim to the CVA Supervisors before the Bar Date (as I understand it, 31 December 2023, although the respondent's skeleton argument suggests 14 December 2021). An Allowed CVA claim is one which is admitted by the supervisors. Assuming Ms Parry were to submit a Notice of Claim to the supervisors, it may be that it would be admitted. However, given New Look's initial defence of these proceedings, and given the fact that the claim is unquantified, it is possible, if not probable, that the claim would not be admitted by the supervisors. It would then, under the scheme of the CVA, become a disputed claim.

(39) If the claim was allowed, clause 30.3(b) provides for its value to be calculated by the Supervisors, with the assistance of an independent expert to be agreed between New Look and Ms Parry. The costs of expert are to be borne equally.

(40) If the claim was disputed, a more complex dispute determination process applies (clause 33), requiring Ms Parry to file a Disputed Claim Notice and ultimately providing for adjudication by a Chartered Accountant with experience of resolving similar disputes. The fees of the accountant are, again, to be borne equally unless the accountant determines otherwise.

(41) If a claim by Ms Parry was ultimately admitted within the CVA, she would be paid at 2% of the admitted value of the claim (potentially less, if the agreed funding proved to be insufficient).

(42) The effect of clause 22 would therefore appear to be substantially broader than the 'Waiver' set out at clause 22. It appears to impose a compromise of any liability, including an as-yet undetermined liability such as those in this claim upon a former employee such as Mrs Parry. Due to the very broad definition of "Liability" set out in the definition section (quoted above) this would appear, on the face of the document, to extend to liabilities arising from statutes (in this case the Employment Rights Act 1996 and the Equality Act 2010).

Requirement to give notice

(43) As noted above, New Look now accepts that Mrs Parry was not given notice of meeting at which the CVA was approved. It contends that this does not prevent her being bound by the terms of the CVA. The Watford ET in the Burrows judgment found that there was an obligation to give notice, but in doing so it referred to sections of the Insolvency Act 1986 which govern individual insolvencies rather than CVAs. Ms Owusu-Agyei told me that there was no requirement for notice to be served in respect of a CVA and pointed to s.5 Insolvency Act 1986 in support of this. Having regard to her duties to the Tribunal, I trust this to be correct, although I have some difficulty in reconciling it with submissions seemingly made in by New Look in the High Court that the law requires all creditors to be given notice of the meeting and permitted to vote (see paragraph 119 of that Judgment).

The effect of the CVA on Ms Parry

(44) The respondent contends that the effect of clauses 4 and 22 of the CVA are that the claimant is deemed to have waived and released the respondent from this claim and from any breach or potential breach of her employment contract. Further, that she is not entitled to enforce any contractual or other right she might have as a former employee, including the right to make a claim in respect of alleged unfair dismissal and discriminatory acts. Finally, that she is deemed to have agreed to discontinue this claim. The only right that remains is to pursue a claim within the terms of the CVA, under the process outlined above.

(45) Save, potentially in respect of a notice pay claim, I disagree with that interpretation as regards clause 4 (which also includes the express obligation to discontinue proceedings). I accept, however, that clause 22 would appear, on the face of it, to impose a compromise of these claims upon Ms Parry.

(46) The question is whether, given Mrs Parry has declined to pursue the dispute resolution procedure offered under the CVA, and seeks to proceed with this claim, this Tribunal must (or should) give effect to the CVA by acceding to the respondent's request to dismiss or strike out the claim.

The remedy available to Ms Parry under the CVA

(47) Ms Owusu-Agyei's submissions emphasised the availability of a dispute resolution procedure under the CVA, and the fact that it does not leave Ms Parry entirely without remedy for her claims.

(48) Having regard to the level of compensation generally payable in successful discrimination cases, and Ms Parry's earnings (and therefore financial losses) it is, in my view, unlikely that the total value of Ms Parry's claim would exceed £50,000 and highly unlikely that it would exceed £100,000. (That is a generalisation based on my experience of this type of claim, and should not be taken as indicating that I have formed any view on either the merits or the value of this particular claim.) That generalisation enables me to put into context the very small sums that Ms Parry might ultimately recover from the CVA funds: 2% of the value of her claim, may be something up to £2,000, and possibly only a small fraction of that sum.

(49) I consider that both the content of the terms of the CVA, and the complexity of the way the document is written and structured, render it, to all intent and purposes, impossible for a former employee such as Ms Parry to navigate the process of claiming under the CVA without the benefit of professional advice. Further, even if she could make a claim, she could not pursue it unless she was prepared to pay jointly for the instruction of an expert and/or accountant to assess the claim. Even if Ms Parry did have the funds to pursue the matter, given the sums that she might reasonably expect to recover, it is hard to imagine that it would be cost-effective for her to make a claim under the CVA process. The only realistic conclusion is – as the saying goes – that the game is not worth the candle.

(50) Further, I see no prospect of the CVA process examining in any meaningful way the evidence pertaining to the way in which Ms Parry was treated as an employee of New Look or making any finding that she has been unfair dismissed or subjected to unlawful discrimination. Those matters are often very important to litigants bringing claims in the Tribunal.

Recovery from the Insolvency Service

(51) In some circumstances, a former employee of an insolvent employer will be able to recover money in respect of their claims from the national insurance fund operated by the Department for Business, Energy and Industrial Strategy ("BEIS").

(52) In respect of Ms Parry's ability to do so, Ms Owusu-Agyei agreed with me that the position was as follows:

42.1 Section 182 ERA provides that an employee can be paid out of the national insurance fund sums in respect of various debts where the Secretary of State is satisfied that the employer has become insolvent, that the employment has been terminated, and that on the appropriate date the employee was entitled to be paid the whole or part of any relevant debt.

42.2 Under s183(3)(c) ERA an employer has become insolvent if a CVA has been approved under Part 1 Insolvency Act 1986.

42.3 S184 sets out the debts to which this part applies and includes a basic award of compensation for unfair dismissal 184(1)(d).

42.4 S185 provides that the relevant date in respect of a basic award is the latest of the date of the insolvency, the date of termination of employment and the date on which the award was made.

(53) This means that if the unfair dismissal claim is to proceed, and be successful, then Ms Parry would appear to be entitled to recover a basic award from the national insurance fund. She would not be able to recover that award if the claim is dismissed or struck out. If it were accepted as a liability under the CVA, she would recover only 2% of its value.

Respondent's argument that the Employment Tribunal is required to dismiss the claim

(54) If the Tribunal is obliged to accede to the respondent's application then the practical effect of the CVA, notwithstanding the provisions at clause 30, is that it enables the respondent to entirely jettison Ms Parry's claim (along with the claims of other former employees who may find themselves in the same position). Ms Parry finds that both hard to understand and unfair, particularly when, as she points out, the Chester store where she worked remains open and she believes that the business may be opening new stores.

(55) Whilst I have sympathy for Ms Parry's perspective, it is also necessary to recognise that it is in the nature of insolvency that creditors lose out to a greater or lesser extent. If New Look had entered administration (which the supervisors state was the likely alternative if the CVA was not agreed) the effect would have been that the claim would have been automatically stayed unless consent was obtained from the administrators for it to proceed. Whilst permission is regularly granted for protective award claims (where awards can ultimately be recovered from the Department of Business and Industry's Insolvency Service) it is rare for permission to be obtained for disputed claims such as this.

(56) The most obvious argument for a litigant in Ms Parry's position, who wishes to pursue their claim, is to rely on s.203 Employment Rights Act 1996 (in respect of the unfair dismissal claim) and s.144 Equality Act 2010 (in respect of the discrimination claims). Those sections prohibit contracting out of statutory employment protections and require that agreements between employees and employers which limit employees' rights to bring such claims, or purport to compromise claims which have been brought, must meet certain criteria in order to be effective. As the CVA does not meet

those criteria, it cannot be effective in compromising the claims (so the argument goes).

(57) This argument was considered in respect of s.203 ERA by the High Court (HHJ Norris QC) in **Re Britannia Heat Transfer Ltd (In Administration) [2007] 2 WLUK 697**, the authority relied on by the respondent. The Britannia case was a case brought by the administrator of the company who sought the guidance of the court as to whether the particular terms of the CVA which compromised the redundancy and notice pay claims of the respondent's workforce were rendered void by s.203 ERA. The conclusion was that the section did not apply to the CVA, because it is not an "agreement" at all. Rather, it is "*a creation of stature designed to achieve a particular end, and rests not upon the actual consent of those bound by its obligations but upon adherence to a specified procedure*." Such a "statutory contract" is not an "agreement" for the purpose of s.203 (see paragraph 25 of the judgment).

(58) It appears that the evidence and argument in the case focused exclusively on the common position of employees who would lose their employment as a result of the insolvency of the business and their entitlement to payments out of the administration and/or from the Insolvency Service as a result. This is encapsulated at paragraph 25(d):

"*In the absence of clear direction in the ERA there is no compelling policy reason to extend s.203 to IVAs or to CVAs. Purely contractual rights are inevitably bound by the CVA. The key statutory rights are in any event guaranteed by the state, and it is difficult to see why non-guaranteed statutory rights (e.g those in excess of the statutory cap) are sufficiently important to require protection under s.203 if they are not of sufficient importance to be underpinned by a guarantee in the first place."*

(59) The position of an employee with a pre-existing claim arising from their individual circumstances, is not considered at all in the judgment. From the perspective of employment law, rather than insolvency law, the right not be discriminated against on the grounds of a protected characteristic might well be characterised as a "key statutory right". It is not guaranteed by the state to any extent.

(60) The policy considerations which were at play in **Britannia** in relation to s.203 ERA are therefore subtly different to the policy considerations which might have been in play had the discussion revolved around s.144 EA (which contains equivalent provisions in relation to discrimination claims).

(61) Notwithstanding those observations, I am satisfied that **Britannia** is binding on me as regards the effect of s.203 in respect of the unfair dismissal claim. It is axiomatic that the prohibitions on contracting out which apply in various statutes conferring jurisdiction on the Employment Tribunals are analogous and, whatever differences there may be in policy considerations, I am compelled to conclude that **Britannia** is also binding as regards the effect of s.144 in respect of the discrimination claims.

(62) The upshot of that analysis is that Ms Parry is deemed to have compromised her claims against New Look.

(63) She now seeks, in breach of that deemed compromise, to pursue the claim before this Tribunal.

Conclusions

(64) The jurisdiction of the Employment Tribunal derives from statute. At the point when the CVA was agreed the Employment Tribunal was seized of Ms Parry's claim, and, in my view, there is nothing in the CVA which necessarily deprives the Employment Tribunal of its statutory jurisdiction. In particular, there is no moratorium on claims, as there would be in an administration and as there may be in a CVA where this has been granted by a court.

(65) I do not consider that the existence of this CVA requires the Tribunal to act to dismiss a claim which Ms Parry has chosen to continue with, notwithstanding the compromise which is deemed to be imposed on her by the CVA. In these circumstances, I do not believe it can be said, for example, that there is any abuse of process in allowing the claim to be determined by the Tribunal. It is a matter for New Look and the Supervisors of the CVA whether they wish to continue to actively defend the claim. There is no obligation on them to do so and, in that respect, this judgment does not oblige either the business or the creditors to bear additional cost.

(66) If the claim is unsuccessful (which may be the case, even if it is not actively defended) then that will obviously be the end of the matter. If Ms Parry is successful then she will have the benefit of the findings of unfair dismissal and/or discrimination to which she is entitled. She may also have the benefit of being able to recover any basic award made in respect of her unfair dismissal claim from the national insurance fund which she would not otherwise be able to recover. Those outcomes both benefit Ms Parry without materially prejudicing the respondent or other CVA creditors.

(67) Other sums may be awarded if the claim is successful. As with any Employment Tribunal award, enforcement of that judgment would be a matter for the civil courts. The existence of the CVA would be a relevant matter to be taken into account at that stage. It may be that the court would determine that, for the reasons argued by the respondent today, Ms Parry is precluded from enforcing any judgment against New Look. (I would not intend either party to take that as an indication of how the court would view matters, I simply say it to draw Ms Parry's attention to the possibility that even if she is successful in obtaining a judgment from the Tribunal, that does not necessarily mean that she will be successful in recovering the judgment sums).

(68) In the alternative to dismissing the claim the respondent asks for it to be struck out as having no reasonable prospect of success. I do not consider that the CVA has a bearing on the prospects of success on the claim, notwithstanding that it may have a bearing on the prospects of Ms Parry enforcing any judgment. I therefore also decline the strike out application.

(69) In view of this judgment, Ms Parry may take the view that she does not wish to proceed with her claims, that is obviously a matter for her.

Equally, if Ms Parry were to choose to avail herself of the scheme for determination of her claim provided for within the CVA, then the respondent may be in a better position to renew its application that this claim should be dismissed. For the time being, however, I decline the respondent's application that the claim must be dismissed or struck out.

(70) The case will be listed for a further case management hearing to clarify the issues in the claim and set directions through to a final hearing. I will also direct that the claim is listed for a 3-day final hearing. This listing will be provisional, but is done with the aim of avoiding further delay in these proceedings.

(71) Finally, it came to my attention in considering this judgment after the hearing, that the claim is currently brought against "New Look", which is a trading name and not a corporate entity. I have amended the name of the respondent to "New Look Retailers Ltd" which appears to be the correct name of the corporate entity. If either party considers this is incorrect, they should raise the matter at the next preliminary hearing.

Employment Judge Dunlop

Date: 26 May 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

23 June 2021

FOR EMPLOYMENT TRIBUNALS