THE EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr R Nyandwi	LHA London Ltd

Heard at: London Central **On**: 10 February 2017

Before: Employment Judge Pearl

Representation:
Claimant: In Person
Respondent: Mr A Allen, Counsel

JUDGMENT

The Judgment of the Tribunal is that the Claimant's application to reinstate his claim is dismissed.

REASONS

1 The Claimant brought claims to the tribunal that included race discrimination and unfair dismissal in an ET1 that was received on 28 April 2016. On 3 October 2016 the tribunal was informed that the matter had settled in a COT 3 agreement that was concluded with the assistance of ACAS. This was one day before a preliminary hearing was due to be heard, with a day's time estimate, and this hearing would have dealt with employment status as well as a question of time and jurisdiction.

2 On 10 October 2016 the Claimant wrote to the tribunal and stated that his decision to enter into a COT3 agreement: "had been reached when I was not of the right mind/sound mind. Furthermore I informed ACAS that I was in the hospital at the time of a call on the 3 October 2016, my friend also informed ACAS that I was in the hospital. Please can I ask for the COT3 to be set aside in the interest of justice as I was under duress and mentally unwell. ACAS was notified that I was not mentally well and they had been aware that I was uncomfortable and I was being pressurised by my former representative and the other side to accept a settlement."

3 On 19 October he wrote again to the tribunal and stated that: "the Claimant has decided not to accept the terms of the COT3 agreement negotiated between the parties and now wishes his claims before the tribunal to proceed accordingly. All previous submission advanced in regards to the Claimant's state of mind is hereby withdrawn."

4 The only medical evidence that was submitted before I heard this application was a short letter from the Claimant's GP practice. This stated that the Claimant "was diagnosed with an Acute Adjustment Reaction, Mild Depression and Anxiety after being assessed by the local Psychiatry team in July 2015. He was seen again by the community mental health team in August 2016 and was referred for psychological therapy."

5 The second piece of medical evidence that was handed in is a letter of 3 February 2017 from a CBT therapist. This states that the Claimant had been referred to the Talking Therapies Service, Westminster, and thereafter was referred to community mental health in August 2016. That team referred him to secondary care psychology. Because he did not attend certain sessions, he was discharged back to the care of the GP. The letter, in broad terms, shows that the Claimant has not progressed with this aspect of his treatment to date. I shall comment again on this evidence a little further on.

6 The Claimant gave evidence and I am satisfied that the shorter account in the 10 October email is only a partial one. His attendance at the hospital was because he woke up short of breath and he needed an inhaler for his asthma. I accept that there was a degree of pressure that arose from the simple fact of the preliminary hearing that was listed for the next day. However, I do not accept that the Claimant was under any form of duress.

7 This is demonstrated by the documents which have been exhibited by the Respondent's solicitor. Up until a point shortly before 3 October, the Claimant was represented. An email from Ms McCartney, the Respondent's solicitor, dated 30 September 2016, informed ACAS that certain amendments to a draft COT3 were agreed. The Claimant, or his representative, had asked for a monetary settlement of £16,000 and in this email the solicitor rejected that offer and made no counter-offer. She also said that a postponement of the preliminary hearing had been refused and that, therefore, a settlement "will need to be reached before the Respondent has to incur any more costs."

8 On 3 October, a Monday which was the next working day, Ms McCartney made three attendance notes which are material and the ACAS officer who gave short evidence to me, Mr Sothern, confirmed that those attendance notes are entirely accurate and match what he has himself recorded. The first note timed at to 12.00pm records that there had been no contact from the Claimant. Ms McCartney said that costs will shortly have to be incurred for the hearing the next day and there was a possibility of the existing offer, which was £10,000, being unequivocally withdrawn. Mr Sothern then said that he was going to call Mr Nwabueze. He is a friend of the Claimant who has kindly come to assist me today by giving evidence; and he was helping the Claimant at the time. It transpires that

there was a three-way conversation and that Mr Sothern was able to discover the Claimant's views on settlement.

9 The Claimant said that he was vexed that the figure had not changed. However "they", and I take this to be the Claimant and his friend, "will agree to a settlement on these terms for £14,500." These words are taken from the second attendance note made by Ms McCartney. She then records that she tried to persuade Mr Sothern that a binding settlement had been reached at that point, but he wanted to revert to the Claimant to confirm acceptance and was being very cautious about matters. In evidence he explained to me that he wanted it to be clear beyond doubt that the terms were agreed. A little later this attendance note records a third telephone call between the solicitor and Mr Sothern in which it was agreed that the Respondent was formally making its offer of £14,500.

10 The next attendance note is timed at 5:15pm and reads as follows: "Geoff Southern [sic] confirms that there is now legally binding settlement at £14,500 on the most recently amended terms (i.e. amending clause 7 to include Ian Nbweze). He is going to notify the tribunal. He will also confirm in writing to the parties that there is a legally binding agreement. He says he took particular care to clarify with the Claimant that the Claimant's understanding was that there was a legally binding agreement and that he understood this to be the case and the Claimant confirm[ed] that he did. He is going to make a note of that." About 15 minutes later Mr Sothern wrote to the Claimant and the solicitor, with a copy to the friend, that "following discussions this afternoon and confirmation from [the Claimant] that sum and terms are agreed, I can confirm there is now legally binding agreement and the claim is concluded on settlement. I will confirm the settlement with the tribunal …" About 90 minutes later a copy of the email settlement notification was sent to the parties and about half an hour later, at 6:18pm, the Claimant replied to him: "this is in agreement of the new amount settled."

11 The Claimant told me that he was very stressed at the time and he also referred to ongoing earlier mental health problems, although he was not taking any medication when the terms were agreed. It became evident to me during his initial evidence that there were substantial difficulties in the application that he was making and these were only confirmed in the short cross examination. He agreed that a negotiation had taken place. He agreed that he had been the party who suggested £14,500. He agreed that he told the ACAS conciliator that he understood this was a legally binding agreement.

12 Mr Nwabueze told me how he had, in effect, put Mr Sothern and the Claimant in contact that day. He thought the Claimant was very confused about a lot of things. He thought that the Claimant had unfortunately succumbed to pressure and given in, but the necessary inference from his evidence is that he (Mr Nwabueze) understood at the end of the various telephone calls that an agreement had been reached. It was not his advice to seek to upset the agreement. It was only a week later that he discovered from the Claimant that he had misgivings. He also agreed that he was there to support the Claimant but that he could not do anything and he used these words: "it's what he chooses to do."

13 I accept that the Claimant would have been under pressure at the time and I further accept that, in common with many employees who come to the tribunal, he had experienced mental health difficulties. He was worried and coming to court the next day and even questions of costs might well have played upon his mind. I have no doubt that, these points notwithstanding, he consciously entered into an agreement for a sum of money that he had proposed and on settlement terms that he was happy to accept. Mr Sothern gave evidence with the agreement of the parties and he struck me as a conscientious witness; and I accept that he did not feel at any point that the Claimant was uncomfortable about settling. He says that the Claimant was reserved and that Ian did most of the talking, which strikes me as entirely realistic, but that the Claimant took the key decisions. He did not say he was being pressurised or felt that he was being pressurised. Mr Sothern said it is not his function to advise on terms of settlement, but he had to ensure that the Claimant understood the terms. He was aware that the Claimant was in hospital for asthma treatment. It was not the case that he was there for psychological treatment, but even in that event he would not have been deterred from brokering a settlement, although he might have been more cautious. When it was suggested that he might be wrong about knowing about asthma treatment, he was able to refer to a note he made at 2:36pm that confirmed his recollection. All of this evidence was unimpeachable.

14 In coming to a conclusion on this application, I consider that the starting point is the following at 4-03 and 04 of the current edition of Foskett on Compromise. "At common law, a mentally disordered person will be held to a contract unless he did not know what he was doing and the other party was aware of the incapacity which resulted in him not knowing what he was doing at the time he entered into the contract. If the mentally disordered person can establish this, the contract would be regarded as avoidable at his option. An otherwise voidable contract for this reason may be ratified by the mentally disordered person after he has recovered or during a rational period. A person who 'lacks capacity in relation to a matter' is someone who 'at the material time… 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.' " This is section 2(1) of the Mental Capacity Act 2005, although that Act does not apply in this jurisdiction.

15 Mr Allen has submitted a comprehensive skeleton argument which deals with various aspects of COT3 settlements concluded with the assistance of an ACAS officer and I do not need to repeat these here. He refers to common law principles about the setting aside of a compromise agreement, including undue influence or duress. In relation to economic duress the case law will sanction such a result where the will of an employee was overborne to such an extent that his or her entering into a contract was not a voluntary act, although the Court of Appeal has stated that this will be a rare event. I accept that subsequent case law has established that a lack of capacity as a result of a mental condition could render an agreement void (or voidable), but the evidence here patently falls very far short of such a case. In relation to the second piece of medical evidence that the Claimant has submitted, from the CBT Therapist, it can clearly be seen that the Claimant is able to revert to his GP and ask for a referral to the psychology service at the hospital. The contents of the letter expressly contradict any suggestion that he lacks mental capacity. If this were to be seriously advanced, it

would require some detailed medical evidence. It is not merely that the Claimant has not obtained such evidence. What he has obtained suggest that it would be impossible for him to obtain it, because he is not in that category of person who lacks mental capacity. In my view, he was acting sensibly when he withdrew the point in his 19 October email. There being no basis at all to support any other ground for setting aside the settlement, and the evidence all pointing to the Claimant having freely compromised his claim when he knew exactly what he was doing, this application must necessarily fail.

Employment Judge Pearl
8 March 2017