THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Miss Z E Zaremba	**AND**	Cawingredients Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: Teesside Justice Hearing Centre **On:** 5 February 2018

Before: **Employment Judge Arullendran**

Appearances

For the Claimant: Mr E Legard of Counsel

For the Respondent: Mr C Rajgopaul of Counsel

RESERVED JUDGMENT

1) The claimant's claims under the Tribunal number 2501060/2016 are struck out on the grounds that they have no reasonable prospect of success.

REASONS

1) The issue to be determined by this Tribunal was whether to list the claimant's claims for a full merits hearing or whether they should be struck out on the grounds of having no reasonable prospect of success.

2) The parties provided the Tribunal with a joint bundle of documents consisting of 162 pages. The respondent provided a further authorities bundle consisting of six authorities and an extract from Chitty on Contracts. The claimant provided copies of the decisions in Industrious Limited –v- Horizon Recruitment Limited, Glasgow City Council –v- Dahhn UK EATS/0024/15 and an extract from Chitty on Contracts consisting of pages 285 to 295.

3) The claimant provided a witness statement from Mark Foster of Jacksons Law Firm as the solicitor with conduct of the claimant's case at the time the parties entered into a settlement agreement (February 2017). Mr Foster attended the Tribunal to affirm his witness statement, however it was agreed by the respondent that the contents of Mr Foster's statement would be taken as read and there would be no cross examination by the respondent. As Mr Foster's evidence is not in dispute, I did not require him to affirm his evidence on oath, particularly as he is an officer of the court.

4) The claimant's representative had requested a number of reasonable adjustments to be made by the Employment Tribunal prior to today's hearing in order to assist the claimant with her attendance at this hearing. All of the requested adjustments were fulfilled by the Employment Tribunal and I made enquiries of the parties at the beginning of the hearing as to whether the claimant wished to leave the hearing room at the time I would be delivering my Judgment, as she had requested, or whether she would prefer to receive reserved decision in the post so that both parties could receive the decision at the same time. After taking instructions, Mr Legard indicated that the claimant preferred to receive a reserved decision and the respondent had no object to the same.

5) The original hearing which was chaired by Employment Judge Wade was convened to hear the claimant's claims of unfair dismissal and disability discrimination exactly one year ago, 3 to 17 February 2017. It is common ground that the hearing in 2017 did not continue after 6 February 2017 as the parties had asked Employment Judge Wade to issue a consent Judgment on the basis that the parties has settled the claims, the terms of which were not provided to the Tribunal at that time.

6) It is common ground that Employment Judge Wade issued a consent Judgment in the following terms "these proceedings will stand dismissed without further order on 20 February 2017 unless either parties make prior application" and that the claimant made an application on 17 February 2017 to vary the terms of the consent Judgement and requested that the date for the dismissal of the proceedings to be altered to 13 March in place of 20 February 2017.

7) A copy of the settlement agreement can be seen at pages 42 to 47 of the bundle. At paragraph one of the settlement agreement it states "the respondent agrees to provide and pay, without any admission of liability, and the claimant agrees to accept:

   1.1 the holding of a discussion ("discussion")

   1.2 a verbal apology ("apology")

   1.3 the sum of £30,000.00 (thirty thousand pounds) "Sum";

   And a written reference ("reference") in full and final settlement of these proceedings which brings these claims of unfair dismissal, disability discrimination and personal injury…".

8) At paragraph 2 of the agreement it states that "the discussion will be based on the points set out in the discussion schedule and will be held immediately before the apology. The apology will be given on behalf of the respondent by Richard Harrison at the claimant's solicitor's office at noon on 9 February 2017 in the presence of the claimant and Stacey West of Jackson Law Firm only…" Under the section of the settlement agreement with the heading "discussion schedule" the agreement states "to be conducted between the claimant and Richard Harrison only". The schedule then sets out a number of issues which were to form the basis of the discussion between the parties.

9) The claimant and Mr Harrison from the respondent company attended the offices of the claimant's solicitor on 9 February 2017, as agreed. However, the discussion did not take place because Mr Harrison insisted that he wanted a third party to be present in the meeting room during the discussion. The claimant's position was that this was contrary the agreement which had been reached on 6 February that the discussion would be held between the claimant and Mr Harrison only and, following the completion of the discussion, the claimant's solicitor would enter the room and would remain present whilst Mr Harrison apologised to the claimant.

10) It is clear from the uncontested statement of Mr Foster and the file notes he refers to in his statement, which are reproduced in their redacted form in the Tribunal bundle at pages 49 to 54, that attempts were made to resolve the issue about who should be in attendance during the discussion. It appears that this was a lengthy process which involved Mr Harrison contacting the respondent's solicitors, and, although Mr Harrison eventually agreed that he would conduct the discussion without a third party being present, the claimant was so upset by the events that she felt unable to conduct the discussion that afternoon and requested that it be rearranged for another day and Mr Harrison was amenable to this.

11) The situation appears to have deteriorated between the parties after the 9 February 2017 as Mr Harrison expressed his reluctance to meet with the claimant without a third party being present and the claimant's insistence upon the discussion taking place in a meeting room without the presence of a third party and with the door to the meeting room being closed.

12) On 24 April 2017 the respondent's solicitors applied to the Employment Tribunal to have the claimant's claims dismissed and the claimant's solicitor responded by applying to have the claimant's claims reinstated to be heard at a full merits Hearing. Mr Jamie Morgan of Counsel provided a skeleton argument dated 6 June 2017 on behalf of the claimant and the respondent submitted a reply arguing that the Tribunal had no jurisdiction to hear the claimant's complaints because they had been compromised in accordance with section 203 of the Employment Rights Act 1996 and section 147 of the Equality Act 2010. The matter came before Employment Judge Garnon on 17 July 2017 and he ordered that a public preliminary hearing be listed for the purposes of determining whether the claim should be struck out or reinstated and this is the matter which

comes before me today. A copy of Employment Judge Garnon's orders can be seen at pages 155 to 260 of the Tribunal bundle.

13) Neither party called any witness evidence before me, with the exception of the written statement of Mr Foster, and both sides presented skeleton arguments, in addition to making oral submissions, the contents of which are not reproduced in full here but have been considered in their entirety.

14) The parties agree that the statutory requirements of section 203 of the Employment Rights Act 1996 and section 147 of the Equality Act 2010 have been complied with and the only argument is whether the settlement agreement entered into by the parties on 6 February 2017 was a valid agreement. The parties agree that the relevant case law that applies is that of Industrious Limited –v- Horizon Recruitment Limited EAT 0478/09 and Glasgow City Council –v- Dahhan EATS/0024/15. It is common ground that, in order for the statutory requirements of settlement agreements to be met, the settlement contract must be enforceable as a matter of common law.

15) I note that the submissions made on behalf of the claimant today differ greatly with those made by Mr Jamie Morgan of Counsel in his skeleton argument of June 2017 and Mr Legard has indicated that he relies upon his own skeleton argument and refers only to paragraph 39 of Mr Morgan's skeleton argument. I also note that Employment Judge Garnon made some criticisms of Mr Morgan's skeleton argument in the reasons given for his Order of 17 July 2017 and this may account for the change in the arguments being presented on behalf of the claimant today.

16) The claimant relies on paragraph 17 of the Judgment in Glasgow City Council –v- Dahhan with regard to whether the Employment Tribunal can be released from the responsibility of determining a claim before it where a settlement has been reached between the parties. In particular, the claimant relies on the finding that "the significant of that, in my view, is that, absent a qualifying settlement agreement being valid in both form and substance, the Employment Tribunal cannot dismiss the claim on the basis that it has settled". The claimant also relies on the case of Hennesy –v- Craigmyle and Company Limited and ACAS (1986) IRLR 300, CA in which an argument arose as to whether the Tribunal had jurisdiction to consider if the agreement itself had been made in circumstances which would have rendered it voidable at common law. The Employment Appeal Tribunal proceeded on the assumption that economic duress was a ground capable of rendering a contract voidable. The respondent agrees in submissions that the approach in Hennesy is the correct approach to be followed.

17) The claimant submits that the reasons why a contract can be voidable may be wider than that held in the EAT case of Glasgow City Council –v- Dahhan and that the grounds on which a Tribunal might set aside a settlement agreement are not limited to misrepresentation, economic duress or mistake but can include any other grounds capable of invalidating the agreement. The claimant submits that the four obligations under paragraph 1 of the settlement agreements were interdependent and must be read as a whole and if one of the terms was not fulfilled then the others would fall and therefore the agreement would fail. The

claimant submits that further negotiations were required in order to conclude a valid agreement between the parties, such as those set out in the respondents skeleton argument relating to whether the door to the meeting room had to be closed or could be left open or whether somebody could be sitting in view of the open doorway etc., and that this demonstrates that the parties only had an agreement to agree, which is no agreement at all. The claimant submits that the uncertainty regarding the terms for the discussion are such that it renders the agreement between the parties invalid and the Employment Tribunal cannot impose its own terms of reasonableness in order for that discussion to take place.

18) The claimant submits that the respondent's assertion that the claimant need only return the signed schedule in order to receive the £30,000.00 settlement payment misses the point in that the discussion and the apology were vital elements in the settlement agreement.

19) The claimant submits that to strike out would be an injustice to the claimant as the civil court would not have the ability to adjudicate the discussion between the parties, they would not be able to order specific performance and the claimant could not be compensated in damages for the failure by the respondent to undertake the discussion and the apology which places the claimant in a very difficult position.

20) The claimant submits that the settlement contract is voidable at common law for lack of certainty and requests that the Tribunal set aside the settlement and reinstate the claims to the Tribunal for a full hearing.

21) The respondent submits that the claimant has changed the focus of her submission and that in the written skeleton the focus is on a breach of the terms of settlement and that the oral submissions made by Mr Legard now focus on the uncertainty of the term relating to the discussion and the argument that this makes the contract void or voidable. However, the respondent submits that the claimant has not said what it is that makes the terms surrounding the discussion uncertain.

22) The respondent relies on the extracts at tab seven of the authorities' bundle which consists of extracts from Chitty on Contracts and submits that the parties' subjective view must be ignored and the question of whether the settlement agreement is valid is an objective question. The respondent submits that the terms regarding the discussion prior to the apology as part of the settlement are not uncertain in that the discussion is to take place between the claimant and Mr Harrison and can be done in any part of the claimant's solicitor's offices. And the additional condition of whether the door remains open or closed during that discussion does not make it uncertain.

23) The respondent disagrees with the claimant's submission that the four elements at paragraph one of the settlement agreement are contingent on each other. The respondents submit that the agreement does not say that the four elements are contingent.

24) The respondent relies on paragraph 13-040, page 1036 to 1037 of Chitty on Contracts, which states that a contract will be held to be condition if the nature of the contract or the subject matter or the circumstances of the case lead to the conclusion that the parties must, by necessary implication, have intended that the innocent party would be discharged from further performance of his obligations in the event that the term was not fully and precisely complied with. Otherwise a term of a contract will be considered to be an intermediate term. "Failure to perform such a term would ordinarily entitle the party not in default to treat themselves as discharged only if the effect of breach of the term deprives him of substantially the whole benefit which it was intended that he should obtain from the contract". The respondent submits that the claimant had not been deprived from substantially the whole benefit of the contract as she could sign and return the schedule to the respondent in order for the £30,000.00 to be paid to her upon receipt of the same. Therefore, the term relating to the discussion is only an intermediate term.

25) The respondent submits that the claimant has misrepresented the basic law of contract in asserting that the settlement contract is voidable at common law because the agreement is conditional upon one party fulfilling a specific condition and has failed or refused to do so. The respondent submits that this is simply wrong and the claimant has not cited any authority for that proposition. The respondent submits that where a particular term or condition in a contract has not been fulfilled that term will constitute a repudiatory breach of contract entitling the innocent party to elect either to bring the contract to an end, or to affirm the contract, and either event leads to a claim of damages. However, it does not make the contract voidable.

26) The respondent submits that all of the cases dealing with the issues in this case, such as <u>Industrious Limited</u>, <u>Dahhan</u> and <u>Hennesy</u> consider whether matters which occurred prior to or at the time of entering into the agreement render the agreement void or voidable at common law (for example a mistake, misrepresentation, economic duress and the lack of legal capacity). Therefore, the respondent submits that the settlement agreement was binding when it was entered into because none of those matters existed in this case at that time which might render it void or voidable. The respondent submits that if the civil courts found that the respondent had committed a repudiatory breach of contract and that the claimant had accepted that breach then the claimant would be discharged from her future obligations, not her past obligations, and therefore the proceedings would have been settled up to the date of the acceptance of the repudiatory breach. The respondent submits that none of the authorities begin to suggest that the provisions of the legislation give the Tribunal jurisdiction to start determining whether a contract settling the dispute, which was binding when it was entered into and is not void to voidable at common law, was subsequently properly performed by the parties and, if it was not, what the consequences of that none performance are. The respondent submit that this would be an enormous and unwarranted extension of the Tribunals jurisdiction because it would have to determine that a valid agreement had been properly entered into and accorded with the statutory requirement but then have to go on to determine how the contract had subsequently been performed and the effects of such a performance.

27) With regard to the claimant's argument that the contract is voidable at common law for lack of certainty, the respondent submits that this submission is wrong as a lack of certainty in a contract would mean that there was no binding contract at all, not that it was otherwise binding but was voidable. As the parties agree that the settlement agreement complies with the relevant statutory provisions, the respondent submits that this is the end of the matter for the Employment Tribunal jurisdiction and asks that the claims be struck out.

28) In the alternative, the respondent submits that Mr Harrison from the respondent company is not prepared to agree to the additional conditions that the claimant wishes to impose on the discussion but remains ready and willing to conduct the discussion with the claimant alone at the claimant's solicitor's offices provided that someone else can see the room. Therefore, the respondent's submission is that it is the claimant who is in breach, not the respondent. In any event, the respondent submits that the requirement to have a third party who can see into the room where the discussion takes place could not be said to amount to a breach of the settlement agreement, but even if it is, judged objectively, the respondents submits that it is not repudiatory breach and so the claimant's remedy would be in damages in the civil courts and she would not be discharged from her performance of her other obligations under the settlement agreement and therefore the proceedings would remain settled.

<u>Conclusions</u>

29) My starting point is the settlement agreement which was drafted and concluded by the parties on 6 February 2017, a copy of which can be seen in the Tribunal bundle at pages 42 to 47. I note that this is the type of agreement which is often seen in the Employment Tribunal and is commonly executed by both employment practitioners and ACAS. It is not uncommon for parties to agree elements in a settlement which cannot be ordered by an Employment Tribunal, such as an apology and or a discussion, nor are they always capable of enforcement by way of specific performance. However, it is often these terms which are more important to one or both parties in comparison to the monetary settlement as it is often these solutions which go to the heart of the matter to be remedied.

30) It is clear to me that the parties in this case intended to reach a settlement on 6 February 2017 in order to bring the Tribunal proceedings to an end, which at that time were to be conducted by a full Tribunal chaired by Employment Judge Wade. There is no question in my mind that the parties intended to enter into a binding agreement with each other and they intended to create legal relations, using professional and qualified representatives to draw up the settlement agreement. It is also clear to me that the parties intended to create a workable agreement and that the individual terms of the settlement agreement were sufficiently clear for the parties to enter into performance of the terms on 9 February 2017 when Mr Harrison attended the claimant's solicitor's offices in order to undertake the discussion and provide the apology, as previously agreed.

31) The fact that the discussion did not take place on 9 February, along with the subsequent apology, is, in my view, a separate issue. It does not go to the heart

of whether the parties had entered into a valid agreement on 6 February, some three days earlier. It is common ground that the breach of a validly executed agreement is not something that would be actionable in the Employment Tribunal and it is a matter that would have to be enforced through the civil courts.

32) The question, therefore, is whether on 6 February 2017 there was a matter which had the effect of voiding the agreement. The terms of the settlement agreement are clearly set out and I can see no ambiguity on the second page of the agreement relating to the discussion which would be conducted by the claimant and Richard Harrison and, on the first page of the agreement, that Stacey West of Jackson Law Firm would be present at the time that the apology would be given by Mr Harrison to the claimant. Looking at the whole agreement objectively, the settlement agreement was not a contract to make a contract, as submitted by the claimant. This was the final contract setting out the settlement terms between the parties, not an agreement in principle with the terms to be agreed upon at a later date. I find that the fact that there is a dispute between the parties as to the specific performance of the term relating to the discussion does not mean that there was uncertainty in the terms specifically relating to the settlement agreement on this point on 6 February as the term, as it is set out, is capable of being performed and the parties clearly intended to perform in on 9 February 2017 without any further discussion or negotiation. I do not find that it is so vague or uncertain that no definite meaning can be given to it without adding further terms. Looking at it objectively, it is quite clear that the claimant and Richard Harrison were to meet immediately before the apology at the claimant's solicitor's offices and that the matters to be covered in the discussion were those set out in the discussion schedule.

33) I agree with Mr Rajgopaul's submission that the relevant case law deals with matters which occurred prior to or around the time of the settlement agreement was entered into which made it void or voidable and that in such cases the substantive case can be relisted by the Tribunal for a merits hearing. There is no evidence in front of me which suggests that either party was induced into entering the settlement agreement on 6 February 2017 by way of misrepresentation, economic duress, lack of legal capacity or mistake, or indeed any other ground which might render the agreement voidable at common law. As such, the issues which arose in the cases of <u>Industrious Ltd</u>, <u>Dahhan</u> and <u>Hennesy</u> do not arise in this case. The fact that the settlement terms may be interdependent would not render the agreement void or voidable so long as the terms are sufficiently certain, as they are here. Whether or not the terms have been performed goes to the question of breach and enforcement, not whether the agreement is void or voidable.

34) Having made the above findings, I find that the settlement agreement was valid and that all of its terms were clear. Therefore, the settlement agreement dated 6 February 2017 is a contract which is an enforceable contract as a matter of common law, in addition to meeting the statutory requirements for settlement agreements in the Employment Rights Act 1996 and the Equality Act 2010.

35) As such, the failure to carry out the terms set out in section 1.1 of paragraph 1 of the settlement agreement would amount to, prima facie, a breach of contract but

this would not render the contract void or voidable as the breach took place after the contract had been validly agreed and entered into by the parties. Therefore, the breach of contract is a matter that does not fall under the purview of the Employment Tribunal, either under the Employment Rights Act 1996 or the Equality Act 2010, and the proper course of action is for the settlement agreement to be enforced through the civil courts.

36) Under the circumstances, I have no option but to strike out the claimant's claims as having no reasonable prospect of success.

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EMPLOYMENT JUDGE ARULLENDRAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
...........21 February 2018............................