



EMPLOYMENT TRIBUNALS

Claimant: Mr D Dean

Respondent: Dairy Crest Limited

Heard at: Liverpool

Before: Employment Judge Aspinall

On: 2 October 2019

Representatives

Claimant: in person

Respondent: Ms Tharoo (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims contained in case number 2410018/19 were settled by ACAS in a binding oral agreement on 12 July 2019.
2. The terms of the agreement were set out in writing in a COT3 form agreed between Mr Small on behalf of the claimant and Ms Kellie Glossop on behalf of the respondent, through ACAS Conciliator Shaun Slack.
3. The Tribunal has no jurisdiction to hear the claimant's claims.
4. The claims are dismissed

REASONS

1. By a claim form dated 8 July 2019 Mr Dean brought claims for unfair dismissal and disability discrimination.

2. His former employer Dairy Crest Limited responded to the claim in terms that the Tribunal had no jurisdiction to hear the case, a binding settlement having been reached, and in the alternative, the case had no reasonable prospect of success.
3. The matter was listed for a case management discussion in person on 2nd October 2019.
4. Dairy Crest Limited applied to have the case struck out. Judge Ryan considered the application and directed that it be dealt with on 2nd October 2019. The parties were given notice on 21 September 2019 that the 2nd October hearing would address the strike out application.
5. On 2nd October 2019 the case management hearing was converted to an open hearing to decide the preliminary issue of jurisdiction.
6. The claimant, a potentially disabled litigant in person, was supported by his daughter. His daughter had a young baby with her. She was given note paper and a pen and encouraged to support her father with note taking. Her baby was well behaved and was breast fed during the hearing. A break was provided after Mr Dean gave his evidence so that he and his daughter could confer.
7. Mr Dean confirmed that he had had notice of today's case. He had seen the letter dated 21 September 2019.
8. Checking back questions were asked to ensure that Mr Dean knew that if he could not persuade the Tribunal as to why he should not be bound by the agreement the respondent says was made, his claims would fail. He confirmed that in those circumstances he would "sign the COT3 and take the money" and not be able to pursue his claims in Tribunal.
9. The claimant gave oral evidence on his own behalf. He did not call any other witnesses. He relied on the bundle of documents provided by the respondent.
10. The respondent agreed that the claimant might be allowed some latitude to give the fullest answers he wished to give. It was explained to the claimant that after he answered the respondent's questions the Judge may have some questions for him and then he would have the opportunity to restate anything he wanted to clarify. There would then be a short adjournment for him to confer with his daughter and prepare submissions.
11. The respondent did not call any witnesses. It relied on the documents, and in particular the email exchanges on 12 July and the COT3 text in its bundle.
12. The claimant worked for Dairy Crest Limited for five years. He was a production maintenance engineer. He had a salary of approximately £ 38 000 and earned overtime payment in addition to that salary. He was a member of Unite. He had some periods of ill health and related absences. The respondent commenced capability proceedings. The claimant brought grievances.

13. The claimant had support from his Union in the difficulties he was having at work. He was supported by a Ms Casson in his grievance and latterly by Mr Small. He instructed Mr Small to act for him and to negotiate with the respondent on his behalf.

14. The claimant entered early conciliation on 26 April 2019. The Early Conciliation Certificate is dated 8 June 2019. The claimant approached ACAS himself and gave ACAS Mr Small's name as his representative.

15. The claimant believed that he had until 8 July 2019 to bring a claim in the Tribunal.

16. The claimant and respondent had a series of meetings. There were discussions between the respondent and Mr Small to resolve the case by settlement. This is corroborated by the document at page 64 of the bundle which is an email in which Mr Small asks the respondent "Can you send me the details of the proposed agreement so that I can share them with David please". David is the claimant. He told me he was initially "very displeased" to hear that there was talk of a cash settlement rather than him getting a job back.

17. Pausing there, I note that it was difficult to get clarity from the claimant as to a chronology of events. He jumped backwards and forwards in giving evidence. He wanted to talk about the failings in the appeal processes. He is no doubt aggrieved about the way in which his employment came to an end. He would have liked to remain employed. He was invited to focus on telling the Tribunal about settlement. When pressed under cross examination that he did know about a cash offer of settlement the claimant said he did not know. He went on to say that *after his appeal failed* his union told him that he would not be supported to take a case to Tribunal. He was advised that it was best to take the cash settlement offer. This was the position in June and early July 2019. Again, the documents are helpful. On 19 June the respondent tells Mr Small by email at page 65 of the bundle the financial breakdown of the offer that is made. The claimant was clearly engaged in financial settlement negotiations through his representative from 19 June 2019 onwards.

18. On 8 July 2019 the claimant brought his claim in the Tribunal. He had had advice from a law firm down south. He had spoken to that firm after contacting his domestic insurers for legal support. He thought getting a court date would increase the offer being made to him.

19. On 11 July at page 30 of the bundle, Kellie Glossop emailed Mr Small. She had been in touch with ACAS and draft COT3 wording was put to Mr Small for approval. The terms included a cash settlement of £ 24,393. The Respondent also offered to pay for any ongoing private counselling the Claimant was having up to 31 July 2019.

20. The claimant spoke to Mr Small on Thursday 11th July around tea time. The claimant says he thinks he rang Mr Small to tell him that his claim had been accepted at the Tribunal. The respondent at page 69 in the bundle sent the draft COT3 text to Mr Small at 16.56 on 11th July 2019. It is plausible that it was Mr Small who rang the claimant and that he rang to discuss the COT3 text he had received.

21. The claimant also spoke to Mr Small on Friday 12th July. When asked did he talk to Mr Small on Friday 12th July the claimant initially said no but then when taken to Mr Small's email at page 78 of the bundle in which Mr Small at 11.27 on 12 July tells the respondent that the COT3 "looks fine" and that he is "happy to proceed" he changed his answer from No to Yes.

22. The claimant was asked when he saw the COT3 text and he alternately said "first time I saw the text was on Friday when the COT3 was done" and "Monday afternoon, the 14".

23. At this point the respondent's counsel put it to the claimant that he was asking the Tribunal to believe that Mr Small had agreed terms on his behalf with the respondent through ACAS and had not put those terms to him. He said that was correct. That he did not know what had been agreed and that on Monday afternoon he was told by Mr Small that he had no choice but to agree to it.

24. I asked some further questions. The claimant now stated that he could only recall one offer being put to him. He did not know what it was for, personal injury or his loss of earnings. The claimant said "he (Mr Small) just bandied around the figures". The claimant said he had an email from Mr Small on 12th July and in response to it telephoned Mr Small. The claimant said there were lots of terms and conditions to go through. The claimant told Mr Small that he had just become a grandfather again.

25. Mr Small told the claimant that he could sign the agreement on his behalf. The claimant said that he told Mr Small "under no circumstances sign my name for me". When they spoke on Monday Mr Small told the claimant that he was bound by the terms that had been agreed orally.

26. Section 203 Employment Rights Act 1996 provides a general rule against contracting out of an employee's right to bring a claim for unfair dismissal. It renders void any provision in an agreement, whether a contract of employment or not, in so far as it purports to exclude or limit the operation of any provision of the ERA96 or preclude any person from bringing (or continuing) proceedings under the ERA96 before an Employment Tribunal.

27. One major exception to that general rule is where the agreement has been reached under the auspices of an ACAS conciliator. Once an ACAS conciliated agreement has been reached its terms are normally recorded on a COT3 form.

28. By virtue of S144(4) Equality Act 2010 a COT3 that makes it clear that a complaint under that act if also settled, will preclude the claimant from bringing or continuing with a discrimination complaint.

29. An ACAS conciliated agreement to settle claims for unfair dismissal and discrimination does not need to be in writing. This was established by the Employment Appeal Tribunal in *Gilbert v Kembridge Fires Limited* 1984 ICR 188 to which I was referred by counsel for the respondent. An oral agreement will do. An oral agreement which is evidenced on a COT3 does not need to be signed, though ordinarily it will be.

30. In this case I have to decide was there an oral agreement reached through ACAS between Mr Small acting for the claimant and Ms Glossop acting for the respondent.

31. The documents were very helpful in this case.

32. The COT3 records two terms which were bespoke to the claimant. They were the amount of compensation he was to receive, £ 24 393 and at clause 4 of the COT3 text a term to the effect that the respondent would pay for counselling for the claimant beyond the date of termination of his employment. Those bespoke terms when taken with the claimant's admissions that there had been conversations between him and Mr Small as to settlement and Mr Small and ACAS, persuade me that the claimant must have provided information to Mr Small. That is information that Mr Small would not otherwise have had.

33. The email exchanges are also helpful and they coincide with the claimant's evidence that he was talking to Mr Small on Thursday 11th July and Friday 12th July. I find that the claimant's suggestion that those conversations were not about settlement, is not plausible, in the light of the emails on those days.

34. The claimant says he expressly instructed Mr Small not to sign on his behalf. This reveals to me that there was conversation between the claimant and Mr Small on 12th July as to the mechanism of concluding a binding agreement.

35. When pressed as to the chronology of events on 11th and 12th July the claimant was evasive when elsewhere in his evidence he had shown himself to be someone who is accurate with times and dates. He told me that he lodged his ET1 Claim Form himself having achieved an ACAS EC certificate and that he had been careful to bring his claim within time, describing it as having been done "at the eleventh hour". He also told me how he accessed his domestic home insurance policy cover to speak to a solicitor to advise him about his Tribunal claim. I find he chose to be evasive about his conversations and emails with Mr Small on 11th and 12th July.

36. The claimant was also evasive as to when he had seen the COT3 text. He saw it on Friday 12th July 2019, but he attempted to tell me he first saw it on Monday 14th July 2019. He subsequently said he may have seen it on the 12th when he was taken to the email exchanges in the bundle. In this way he was seeking to anchor his evidence to the documents in the bundle, rather than rely on his own honest account.

37. It is implausible that, as the claimant would have me believe, Mr Small agreed terms without putting them to the claimant. To believe the claimant's version of events would require me to accept that Mr Small agreed a financial amount of £ 24 393 and provision for ongoing counselling without putting it to the claimant, that Mr Small worked with Ms Glossop and Mr Slack at ACAS behind the claimant's back and that although they spoke on 11th and 12th July Mr Small and the claimant did not talk about and agree the terms for settlement and Mr Small did not have the claimant's authority to settle the claims.

38. It is just not credible to suggest that the claimant said to Mr Small, on no account are you to sign my name. Nor is it plausible to suggest that if it had been said Mr Small, an experienced union representative, would have proceeded beyond that point. In any event, this misses the point. It was not the signature that concluded the agreement but the binding oral agreement entered by the parties through ACAS conciliation and recorded by the conciliator Mr Shaun Slack in his email of 11.37 on 12 July 2019 where he states "I am now in a position to declare that a binding and enforceable agreement exists between the parties". I agree.

39. For these reasons the Tribunal has no jurisdiction to hear these claims.

Employment Judge Aspinall

Date: 11 October 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

30 October 2019

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