EMPLOYMENT TRIBUNALS

Claimant: Mrs J

Respondent: K

Heard at: Watford by telephone **On:** 14 May 2020

Before: Employment Judge R Lewis (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mrs LM, solicitor

RESERVED JUDGMENT

1. The claimant's application to set aside the compromise agreement of 19 December 2017 is refused.

2. The proceedings are therefore struck out.

3. By consent, the parties are referred to as above, the tribunal having balanced the claimant's right to the privacy of intimate medical information with its duty to give public Judgment.

4. The respondent's representative is referred to as above, in order to avoid 'jigsaw' identification of the parties.

REASONS

1. This was the resumed hearing which I directed on 13 February 2020 should continue before me part heard. These Reasons should be read in conjunction with the Order made on that day.

Compliance

2. In accordance with the February Order, the respondent had prepared a supplemental bundle (pages 144-270) made up, in the main, of HR and medical records. The claimant submitted a witness statement. Mrs LM had supplied written submissions.

3. The claimant's witness statement expressly abandoned the issues of deception and duress. The claimant asked the tribunal to rely on medical incompetence as the only reason to set aside the compromise agreement.

4. The statement gave the following evidence on medical competence:

> " … I had a mental breakdown in August 2017. I was unable to return to work after that (Please see Occupational Health Report). I only managed to stay alive because of my mental health team.
> I decided to raise a Grievance to the Employment tribunal against my manager [name] and [respondent] citing Discrimination at Work. I was assisted by ACAS after approaching them for advice and a Conciliator Kristian Maton was appointed for me to support me through the process.
> I had spent the entire years 2015- 2018 in what I can describe as existing in a 'dazed' state. It was difficult for me to distinguish between reality and insanity, and although I appeared to be able to complete day to day tasks, at home and at work when I was working, I cannot say that any of my actions made sense to me.
> As you can see from my mental state at the time of signing the COT3, I was actively planning to take my own life and I recall attempting to crash into a barrier on the motorway on my way to take the piece of paper to the [respondent's] Solicitor [LM]. I did not understand the contents of the COT3 and I do not know why I signed what I did not understand.
> I can only state that I was insane and in a state of utter detachment from reality.
> I would like this Tribunal to allow me the opportunity to reinstate my claim of Discrimination on the basis of Mental Health against [respondent / manager].
> It has been extremely difficult to put into writing that I was not of sound mind when I signed the COT3 Agreement."

Procedure at this hearing

5. This hearing took place during the pandemic closure of the tribunal. It was converted to telephone remote hearing. I had the bundle which was available in February, along with the additional items referred to above.

6. At the start of the telephone hearing, I asked the claimant (in light of now having read her medical records) if she was fit enough to proceed. She said that she was. I reminded the parties that as with a face to face hearing, they should ask for breaks if need be; and that the claimant could ask me to dial in a person to support her, if she wished.

7. As this hearing was potentially determinative, it potentially fell within rule 56, to be conducted in public. I told the parties that I saw two possible procedures available today. In doing so, I reminded the parties of the maxim that it is more important for the tribunal to be fair than fast in its work.

8. The first possibility was to adjourn again part heard to the autumn, when the tribunal building might have re opened to the public; or when hearing by skype (or similar) might be available; but that the position then might be no different.

9. The second was that I suggested the following steps, which would enable me to determine the discrete issue of whether the compromise agreement should be set aside: that I would outline the issues, as they appeared to me after reading; that there would then be a break; the claimant would then put forward her arguments; the respondent would then reply; and I would reserve judgment. I told the respondent that I would not hear oral evidence; and that if it wished to cross examine the claimant on her statement of April 2020, that would not be permissible. It could however put questions to the claimant through the tribunal. In the event, it did not do so.

10. Both parties promptly agreed to follow the second course. I gave an outline, based on my understanding of having read the papers, and then adjourned for about 25 minutes to hear the parties' arguments. The claimant had the opportunity to answer the respondent's arguments, so that she had the last word.

11. At the end of the hearing, I explained that as judgment had been reserved, written Reasons would be sent out, which would be published on line in accordance with HMCTS practice. I expressed my concern about the implications of that procedure in this case, and asked if either party asked the tribunal to anonymise the relevant names. Both parties asked me to do so. The name of the respondent, and of its solicitor, have been anonymised (and extracts from documents redacted) so as to avoid 'jigsaw' identification of the claimant.

The question

12. It was not suggested that the compromise agreement (agreed on 18 December 2017, signed on 19 December and effective on 31 December, 113-114) was in any respect defective, or that there were any grounds on which its validity might be challenged, other than the claimant's capacity.

13. The question therefore for the tribunal was whether to set aside the parties' compromise agreement of 19 December 2017 on grounds that the claimant did not have capacity to enter into the agreement. It has been established by the EAT that that is a question which the tribunal has power to decide (City of Glasgow v Dahhan UKEATS/0024/15).

14. I have taken the question to mean, did the claimant understand sufficiently the nature and effect of (a) negotiating and (b) agreeing (c) the fact and (d) the terms of severance of her employment to be able to do so through a conciliation officer.

15. That question requires a logical, narrow focus on the negotiation period, which was between about 13 November and 19 December 2017. As the claimant began a period of sick leave in early September, I take the temporal focus period to be, in effect, the last four months of 2017.

16. The correct approach requires a focus on the specific transaction, not on the claimant's wider mental health history or the resulting behaviour. That

approach seems to me in accordance with the observation of the Supreme Court in Dunhill v Burgin 2014 UKSC 18 to the effect that,

> 'Capacity is to be judged in relation to the decision or activity in question and not globally.'

17. I also take it that that question, and approach, do not require the tribunal to assess whether the claimant's decision to enter into the compromise agreement was a wise or prudent decision.

The evidence

18. The claimant's witness evidence, quoted above, was of little assistance. It referred, in general terms, to wider events. I have attached great weight to the objective written records created at the time of the events. Both parties accepted them in full, although the claimant commented that there were, or may have been, telephone communications between the respondent and ACAS of which there was no record, and of which she had no knowledge. The bundle contained items written at the time by a number of those with whom the claimant interacted: members of the claimant's GP practice; a consultant psychiatrist; her social worker; Mrs LM, who was also the respondent's negotiator with ACAS; the manager within the respondent who investigated the claimant's grievance; the conciliation officer; and finally, the claimant herself.

Written sources

19. I here set out the relevant matters from the written sources which were available to me. I deal first with the non-medical points. I am not aware of any material dispute about any of what now follows:

    19.1 The respondent is a public service authority. The claimant had been employed by it in a specialist professional role since 2012.

    19.2 The claimant had a documented history of episodic, serious mental illness. Some episodes appeared to have been severe. HR records (144-5) showed that in 2016 she had one period of sick leave of about six weeks. In 2017 she was on sick leave for just over four weeks at the start of the year, and then for one day on 1 March. After that, she had full attendance until September. She was then signed off sick from 6 September 2017 until mid January 2018. A number of forms Med 3 were issued in that period. It appeared that the claimant did not submit the final one (30 November, 80) before the end of her employment.

    19.3 The claimant said that a trigger event for her illness and final absence was that she understood that her line manager had refused to provide her with a reference for a new employer, as a result of which the claimant had lost the opportunity to work for another authority at better pay. The claimant considered the manager's actions to constitute disability discrimination. I make no finding on any of those points, and record what I understand to be the claimant's belief.

19.4 While she was off sick, the claimant submitted a grievance about the above (198). The contents of the grievance were broadly the allegations which the claimant wanted the tribunal to hear and decide in this case. The grievance had not been resolved by the time the claimant left her employment. The bundle contained at least parts of the correspondence about the grievance with the investigator (eg 53-65). In that correspondence (notably at 59, 21 October) the claimant showed considerable insight. She wrote in particular about her personal need to move on, and so avoid the possibility of tribunal proceedings.

19.5 The claimant began contact with ACAS by 12 November at the latest. The bundle contained come of the correspondence between the claimant and the conciliation officer, Mr Maton. Mr Maton entered into correspondence with Mrs LM on 13 November (104). On 22 November Mr Maton raised the possibility of the parties negotiating (or at least meeting) face to face; it was common ground that the respondent did not agree to this.

19.6 A number of points emerge from these correspondence trails. First, the claimant's correspondence with Mr Maton shows no emotion, and no lack of understanding. I note in particular her probing questions about the respondent's reference policy (70). Secondly, the correspondence trail between Mr Maton and Mrs LM indicates that they had been on opposite sides of previous negotiations (which I take to evidence the existence of a professional relationship, and an understanding of each other's approach). There was no suggestion from Mr Maton that he perceived in the claimant any difficulty in communication or understanding.

19.7 I note the language of the compromise agreement itself. It should be read in full. It is relatively short, and it is clear. It provides for consensual termination of employment on 31 December, and payment of an ex gratia sum. It states that it is in full and final settlement of any claim under the Equality Act 2010. In particular, it deals with the claimant's outstanding grievance (and therefore the subject matter of this claim) as follows:

> 'The payment … is in full and final settlement of the claimant's internal grievance complaint which will not be pursued further.'

19.8 After signing the agreement, the claimant emailed Mrs LM to ask her to ensure payment by 31 December of the final sum due under the agreement, saying (in a phrase I find significant, 116), 'thus concluding all interests between parties involved.' On about 18 January 2018, she took up a comparable professional role with another, comparable authority. (There was no evidence, as might have been very helpful, of when she applied for, and obtained, that position).

19.9 The common feature of all the correspondence from the claimant at this time was that it was clear, lucid, courteous and professional. It was entirely rational, in the sense that it presented thoughtful analysis with a view to achieving objectives. I could see no hint of a want of understanding, or of the mental state suggested by the claimant's witness statement. None of the counterpart correspondence hinted at the

possibility of lack of understanding or rationality on the claimant's part having occurred to anyone else.

Medical sources

20. I now turn to the medical sources. In doing so, I remind the parties that my only task is to review the medical evidence in so far as it might help answer the question which I have defined above. I am not aware of any material dispute about any of what now follows:

    20.1 Between her return to work on about 10 February 2017, and the first week of September, the claimant recorded only a single day of sick leave;

    20.2 Between July and September 2017 the claimant was discharged from the care of a number of health and social service professionals (195-197);

    20.3 There was no evidence of the 'breakdown' which the claimant said had taken place in August 2017. She was signed off by her GP on 6 and 15 September, and then again on 3 October, 6 November, and 30 November (249-251). The overarching reason was stated to be a depressive disorder.

    20.4 The claimant was seen by an Occupational Health Adviser on 25 September. The report (75) should be read in full, with care. The claimant is described as unfit for any work, but fit to return within a short time frame, to adjusted duties, including a change of work location. The report states, more than once, that the trigger of the psychological problems has been perceived workplace issues. There is no hint of any difficulty in communication or understanding.

    20.5 The records indicate that the claimant reported suicidal thoughts in early October, and again in early November. There is little indication of an urgent or emergency medical intervention. The GP records show telephone consultations on 3 and 5 October and on 6 November; in between there was a face to face consultation on 10 October. The notes record the claimant describing the effect of events at work, and her desire to change her job.

    20.6 The claimant had for some time had an assigned social worker, Ms X. Ms X wrote a risk assessment on 11 December (203) on which the claimant placed considerable weight. It was the high point in evidence from the claimant's perspective, in that it used the strongest language of any document to which I was referred. Ms X ticked 'Yes' to boxes indicating risk of suicide, self harm and self neglect, and described the claimant's self description of feeling 'numb and in a dark place.' However, while the report noted that the claimant lived with two school age children, it expressed no concern about risk to a child; it did not contain Ms X's personal endorsement of the claimant's language; and while the report appears in the medical records in the tribunal bundle, Ms X is a social worker, not a person with any clinical qualification. Ms X did not advise

any urgent or emergency intervention, and gave no indication of any difficulty in communication or understanding.

20.7 I interpolate that at the time of Ms X's report, the claimant was in negotiation with the respondent, not only through ACAS, but directly about a return to work (149) in which she asserted that she felt well enough to return. (She may also have been in discussion with the employer whom she joined in January). While I accept that she felt under financial pressure to return to work, I add that discussing a return in the first half of December, in which the claimant asserted (untruthfully) that she was no longer signed off sick, is difficult to reconcile with the report written by Ms X at about the same time, and is compatible with the respondent's assertion that the claimant did not submit her Med 3 of 30 November before the end of her employment on 31 December.

20.8 The claimant was seen on 18 January by a consultant psychiatrist. Ms X was present. The psychiatrist's report recommended referral for art therapy, which the claimant is recorded as accepting at the time. It appears that her next direct contact with any doctor after that was on 10 May by telephone, and in person on 14 August (for a respiratory problem) (250).

21. I record one final matter for the sake of completeness. Almost immediately after the compromise agreement was signed, it was realised that the agreement failed to deal with one point: the claimant had an outstanding debt to Serco arising out of the respondent's car lease scheme, which was being discharged by monthly deductions from her pay. There was no reference to it in the compromise agreement, to which Serco was not a party in any event. It appears to have been omitted from the parties' negotiations by oversight on both sides. In the course of 2018 Serco obtained judgment for the outstanding sum in the County Court. While I have sympathy with the claimant's strength of feeling on this point, it does not assist me to decide whether she had capacity.

Discussion and conclusions

22. The claimant said in submission that the nature of her mental health is erratic and changeable, and that she has the ability to appear lucid while in fact being 'out of control.' She said that she is also impulsive, and that she has found it difficult to speak about her mental health. She placed weight on the request for a face to face meeting of 22 November, which, she said, indicated a need to obtain clarity and a better understanding. She also placed weight on Ms X's risk assessment of 11 December.

23. Even if I were to accept the claimant's submission that she was impulsive, and that the COT3 was unclear, those two points would not, in my view, be sufficient to prove lack of capacity. I do not however accept that either has been shown.

24. The claimant was looking for employment elsewhere during her period of uninterrupted attendance at work, between 2 March and the first week of September. During October she mentioned to her doctor and the grievance

investigator that she wished to move on. She contacted ACAS on about 12 November, and the COT3 was signed on 19 December. These timelines are not indications of an impulsive decision. The one point at which there was speedy decision making was the claimant's near immediate agreement to the draft COT3 on 18 December. I do not accept that viewed as a whole the time line shows impulsiveness.

25. I accept that the claimant asked for a face to face meeting, which the respondent declined. Even if that were evidence of a lack of clarity, I note that four weeks elapsed between the request for a meeting and signature of the COT3. The claimant had ample time to seek clarity.

26. There was, in contemporaneous written evidence, written over a period of many weeks, and from a variety of sources, including the claimant herself, nothing which indicated that the claimant did not understand the nature and effect of the negotiations conducted by ACAS, or of signing the compromise agreement. There was nothing in medical or other evidence which endorsed the language used by the claimant in her witness statement. No person, including the claimant, recorded any indication or concern of a lack of understanding. There was, on the contrary, considerable evidence which showed that the claimant approached the negotiations with a thoughtful understanding of her own long term best interests. As soon as the agreement was signed, she asked about prompt implementation, so as to achieve closure between these parties. She took up a new post, in a demanding professional role, shortly afterwards. As commented above, evidence of when she obtained that post might have been helpful.

27. I find that the claimant has fallen far short of proving that she lacked capacity to enter into the compromise agreement, and her application to set it aside is refused.

28. In light of the parties' confirmation, at the February hearing, that this claim related solely to events before termination of the claimant's employment, it follows that all such claims have been compromised and that the proceedings are struck out.

29. I add that if I had found otherwise, I would immediately have listed a second preliminary hearing to consider limitation. The claimant agreed, at the February hearing, that her complaint was of discrimination occurring before 1st January 2018. The claim was presented over 13 months out of time.

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Employment Judge R Lewis 01/07/2020

Sent to the parties on:01/07/2020

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For the Tribunal:

Jon Marlowe