EMPLOYMENT TRIBUNALS

Claimant: Mr N Schofield

Respondent: Bolton Textiles Group Limited

Heard at: Manchester **On:** 6 August 2019
7 January 2020
28 February 2020
25 June 2020
(in chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr Ferron, Advocate
Respondent: Mr Morton, Consultant

JUDGMENT

The judgment of the Tribunal is that the jurisdiction of the Tribunal is not ousted in respect of unfair dismissal, wrongful dismissal and/ or disability discrimination.

REASONS

1. The claimant presented a claim of unfair dismissal, disability discrimination and wrongful dismissal on 25 August 2018. The claimant claims that he was disabled due to Osteoporosis of the hip and the spine and Hip Dysplasia and that the respondent was aware that he was having considerable difficulties at work undertaking his normal job, that he asked for amended duties and the respondent consequently dismissed him saying there were no amended duties available.

2. The respondent stated that the claimant was dismissed following his refusal to have an Occupational Health assessment, stating that he did not want his job

back, for his continued refusal to work as directed and his ever-changing medical conditions to suit. They stated they were not aware that the claimant had a disability and believed they had followed a reasonable procedure.

3. Jurisdictional issues were raised by the respondent, some of which were considered at a previous Preliminary Hearing. However, the issue for this Preliminary Hearing was whether the claimant could not pursue his claims because there was a pre-existing Settlement Agreement which was binding. This was first raised by an amended response form, submitted on 7 May 2019, the original response form was received on 11 October 2018.

4. It has been explained by the solicitor (not in evidence) that he only became aware of what he regards as a concluded settlement when he received the paperwork from the respondent.

Issues

5. Was there a binding settlement ousting the jurisdiction of the Tribunal?

6. If so, was the claimant's disability discrimination claim excluded by that agreement?

Witnesses

7. For the claimant I heard from Mr Ramji, his solicitor, and for the respondent from Mr Philip Dawson, a Consultant, and Mr Joshua Dawson, Director of the respondent.

The Law

8. Under Section 203(1) of the Employment Rights Act 1996 and similar equivalent provisions in the Equality Act, individuals cannot contract out of their statutory employment rights except via a COT3 with ACAS or via a Settlement Agreement previously referred to as Compromise Agreement.

9. Settlement Agreements allow parties to settle an employment dispute for themselves before or after Tribunal proceedings have been instituted. A properly constituted settlement agreement will bar the employee from taking a claim further. There are some claims that cannot be compromised in this way in any event but they do not concern us here. The statutory requirements for a legally binding Settlement Agreements are that the agreement must :

    (i) Be in writing;

    (ii) Relate to the particular proceedings;

    (iii) Only be made where the employee or worker has received advice from a relevant independent advisor as to the terms and effect of the proposed agreement and in particular its effect on his or her ability to pursue his or her rights before an Employment Tribunal.

    (iv) Identify the relevant independent advisor;

(v) State that the conditions regulating Settlement Agreements have been satisfied.

10. Issues arise regarding at what point the settlement becomes binding and its relevant to consider here the terminology "subject to contract". The leading case on this highlighted that any proposed settlement offer should expressly be made subject to contract to enable the parties to continue to negotiate until all terms have been finalised otherwise the oral agreement will be binding

11. In **Newbury -v- Sun Microsystems 2013** an issue arose in proceeding against SM for unpaid commission in the sum of approximately two million and SM counter claimed for overpayments. SM's solicitors on the eve of the court hearing wrote to N's solicitors making a final settlement offer of £601,000 approximately in full and final settlement of the claim and counter claim plus legal costs. The letter making the offer further provided the settlement was to be recorded in a suitably worded agreement and was open until 5:30. The claimant's solicitors accepted the terms of the offer and went on to state they would forward a draft agreement for approval. When SM subsequently tried to insert new terms relating to other matters N applied for a declaration in the High Court that the proceedings between SM had been settled on the terms set out in correspondence between the respective solicitors. The High Court decided that the correspondence showed that there was an intention to create legal relations and that the parties had agreed all the terms which they regarded as essential for the formation of a legally binding contract. The fact the offer was to be recorded in a suitably worded agreement did not mean that a binding agreement had not been reached. This was particularly in view of the fact that an eight-day trial was due to imminently start. Neither was the initial offer expressly subject to contract.

12. However, if offers are not expressly subject to contract and therefore there is presumed intention to conclude a binding contract even though a formal document recording the terms agreed has not yet been executed, this does not operate to settle anything other than contractual claims in order for the parties to settle any statutory claim the employer may have it is necessary that the conditions in Section 203 or equivalent statute in other legislation have been complied with. However those conditions are set out above and therefore a completely separate clause for e.g. a non disclosure clause would be introducing something in new if not included in the original discussions whether written or oral.

13. The other matter affecting the binding nature of any settlement is the issue of particular proceedings. Section 203(3)(b) of the Employment Rights Act 1996 says that Settlement Agreements must "relate to the particular proceedings". This does not require separate agreements, one Settlement Agreement is capable of settling all the matters and disputes between the parties, **Lunt -v- Merseyside Tech Limited 1999 EAT**.

14. In **Hinton -v- University of East London 2005** the Court of Appeal took the view that although there was a general claim stating that the agreement was in full and final settlement of all claims in all jurisdictions whether arising under statute, common law or otherwise which the employee has or may have

against the University arising out of or in connection with an employment with the University, the termination of his employment or otherwise, and also including a lengthy list of possible claims to be settled, even though the claimant had not raised most of them, the list however did not include claims under Section 47(B) regarding suffering a detriment because of making a protected disclosure. The claimant brought Tribunal proceedings on the basis of these alleged detriments, the Tribunal held a Settlement Agreement did not prevent H from bringing these proceedings because it did not specifically cover them. The EAT allowed the employer's appeal, the Court of Appeal however stated that contractually the Settlement Agreement was wide enough to cover the Section 47B claim but turning to Section 203 it was said it was not sufficient for a Settlement Agreement to use a rolled-up expression such as all statutory rights, nor even to identify proceedings only by reference to the statute under which they arose. In H's case although from a contractual point of view the wording of the agreement was wide enough to cover his potential Section 47B claim the agreement had not specifically referred to Section 47B and thus did not relate to particular proceedings within the meaning of Section 203(3)(b), H could therefore proceed with his claim.

15. In **McWilliam and Others -v- Glasgow City Council 2011 EAT**, the EAT made it clear the legislation does not require the complaint to have been articulated by the employee at some earlier stage before it can be effectively settled. What matters is that both parties know to which particular complaint the Settlement Agreement relates. It does not matter whether there has been a history of communication or dialogue about the particular complaint or complaints, and that a complaint was wide enough to include circumstances where there is nothing more than an expression of dissatisfaction about something.

16. Further in this case the agreement itself required both parties to sign it in order to come out of "without prejudice" and "subject to contract" mode.

17. If there is a binding settlement and the respondent fails to honour any payment under that settlement the claimant can pursue the matter in the County Court or in the Tribunal if it meets the criteria of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

Findings of Fact

18. There were difficulties with the claimant's employment and he provided the respondent with a letter from his doctor of 9 March which stated:

> "I confirm that he has an ongoing history of RT hip and groin pains and is under the care of North Manchester Hospital team. He awaits an appointment with their pain team, in the meantime he is on strong painkillers. He tells me his work as a Textile Cutter could involve climbing onto tables and keeping his hip bent. I have suggested his pains could worsen with these movements and activities and he is better off avoiding lifting activities too. He could benefit from amended duties and activities at his work place, hence his letter to whom it may concern."

19. Mr P. Dawson had replied in an undated letter which the claimant received on his return to work from holiday on 26 March 2018:

> "Dear Neil
>
> With regards to your letter dated 9 March it is with regret that we are unable to continue to employ you. Whilst we have tried to accommodate your physical needs we don't have a position in the company that will allow us to deploy your skills in another role. There have been various discussions in the business regarding your health and as confirmed by a letter written on 9 March 2018 by Dr Pradeep Note this this does stop you fulfilling your role as a cutter. We are unable to offer amended duties and will not be able to guarantee you work on other roles, we are therefore left with no option than to cease employment with the group. I believe you have one weeks' notice period and in this time, you should take any outstanding holiday."

20. Subsequently an agreement was reached whereby the respondent agreed to pay a termination payment of £1,778.40 to the claimant having dismissed him as described above. The respondent provided the claimant with a Settlement Agreement. Whilst it has been suggested the respondent was unrepresented and therefore at a disadvantage, they must have obtained this Agreement from somewhere, either at the time from their solicitors or it was an agreement obtained in previous proceedings, and further as can be seen from subsequent correspondence the respondent constantly refer to their legal advisers, therefore even if not "on the record" they were not acting without advice. I mention this as it has been suggested by the respondent that Mr Ramji was acting in an unethical way when he allowed a Settlement Agreement to be used that did not include disability discrimination.

21. The claimant went to Premier Advocates in order to obtain the advice necessary to ensure a section 203 Settlement Agreement was valid.

22. Mr Ramji of Premier Advocates acted for the claimant and wrote to Mr P Dawson by email on 18 May 2018 headed "Settlement Agreement" and "without prejudice" stating:

> "We are instructed by Mr Neil Schofield in respect of the Settlement Agreement, would you kindly note our interest in the matter. In order to advise him fully and give him further advice may we ask how you have arrived at or calculated the termination figure of £1,778.40 please as he is unhappy with the amount. We understand that his job is no longer there and the reason for termination was on the grounds of redundancy. Mr Schofield had eleven years' service with your company so on the face of it would be entitled to eleven weeks' notice pay under Section 86 of the Employment Rights Act 1996 together with a redundancy payment which would be 1 or 1 ½ weeks' pay for each completed year of service. He would be entitled to notice of eleven weeks regardless. Would you be kind enough to clarify the above points so we may advise Mr Schofield further in the matter."

23. Mr Dawson replied "without prejudice":

> "Mr Schofield was not dismissed on the grounds of redundancy, his job is still live, I don't believe your client is being totally honest with you. Once you have spoken to your client again please let me know so we can forward you to our solicitors."

24. There was a further email from Mr Ramji saying, "could you let us have the information requested as to the reasons for termination, Mr Schofield would still be entitled to eleven weeks' notice plus outstanding would he not."

25. Mr Dawson replied again on 18 May:

> "I suggest you clarify with Mr Schofield and then lay out your position so we can pass on to our solicitors. For the benefit of yourself Mr Schofield was originally offered one week which was increased to four then both parties agreed on six. Not sure what has changed with your client therefore our offer at this stage is withdrawn."

26. It is not clear what happened in between but on 21 May 2018 Mr Dawson wrote to Mr Ramji stating:

> "Please can you tell me what your fee will be for representing your client so we can do an overall cost benefit for Neil."

27. On 24 May Mr Ramji replied:

> "We were referred to the above matter and your recent communication, you must have clearly noted what we stated in our email communication regarding the entitlement in law for Mr Schofield. As his lawyers it would be our job to act in his best interests, however Mr Schofield has confirmed to us that he wishes to accept the offer made in accordance with the proposed Settlement Agreement if this is still on the table, perhaps you could confirm. As he wishes to accept we trust you will re-instate so the matter can be settled amicably as soon as possible."

28. Mr Dawson replied saying, "Please confirm once signed and we will start the fee transaction".

29. On 25 an Assistant at Premier Advocates advised that they would be contacting Mr Schofield for his signature and would forward the documentation once they had it back from him. An invoice for £250 for Mr Ramji's fees was also included.

30. On 31 May Premier Advocates wrote to the respondents saying:

> "I have attached a copy of the Settlement Agreement in respect of the above duly signed by Neil Schofield as requested. I have also attached our invoice of our legal charges. Please can you confirm receipt and provide the address to post the two original copies and we would be obliged if you could send a completed signed copy back to Mr Schofield for his records."

31. What seemed to happen then was the address provided was actually an address no longer being used by the respondent, Royal Mail could not affect delivery and left a card requiring the recipient to re-arrange the delivery or collect from the Post Office. The respondent did neither.

32. On 18 June Premier Advocates wrote again to Mr Dawson saying:

> "Following on from your receipt of the attached Settlement Agreement by email and by post tracking number XXX could you please confirm to Mr Schofield when he can expect payment, our legal charges invoice attached are also outstanding if you could please advise when payment will be received on this."

33. On 18 June there was a rather terse reply from Philip Dawson, "I have not received the original documents. Regards."

34. The reply from Premier Advocates the same day was:

> "Thank you for your email I have tracked the original documents, Royal Mail tracking shows that they attempted to deliver this to you on 4 June at 12.11pm but there was no answer and a card was left advising you to either collect the package or re-arrange delivery. I have arranged online with Royal Mail for this to be re-delivered to you on Wednesday 20 June 2018, could you please confirm receipt."

35. In any event Premier Advocates arranged re-delivery to the respondent on Wednesday 20 June 2018 and on 27 June stated that:

> "We have sent the signed papers off to you by way of Recorded Delivery service on 31 May 2018 but have today been returned to us uncollected. Having spoken to you we are resending them to the above address, Bolton Textiles Group, Duke Street Mill, Rochdale, OL12 OLW which you gave us over the telephone. We hope that this matter can be sorted soon, as a precaution in the event for whatever reason it is not resolved then we have advised Mr Schofield in any event to lodge his application for early conciliation with ACAS, then to issue Tribunal process. We hope the above will not be necessary and the matter can be resolved amicably."

36. On 4 July Mr Ramji had cause to write again:

> "Further to the above we refer to our client's matter and the proposed Settlement Agreement, we are not sure exactly what the position is, for the record the signed agreements were sent out to you – again – by first class post with a posting receipt obtained from West Bridgford Post Office on 28 June. Please confirm receipt and to confirm the dates payment will be made to Mr Schofield and also the date you will discharge our legal costs. Whilst writing would you kindly note, and we wish to advise you upon our advice Mr Schofield has lodged an early conciliation application with ACAS under reference number xxx, this was a precautionary step to ensure compliance with the law and as soon as the matter has been fully resolved

> the early conciliation will be withdrawn. Please confirm your exact position. Thanks."

37. Mr Dawson replied on 4 July:

> "Please send copy of the conciliation paperwork, once received we will respond to your email in full. For the record I am on holiday."

38. Premier Advocates replied:

> "Thank you for your email. With respect we are seeking to resolve a proposed Settlement Agreement as soon as possible for the benefit of our client, for your information we are not able to send you copies of the conciliation paperwork as the process is through ACAS. We have provided you with the reference number, please feel free to contact ACAS. The fact that you are on holiday is not our concern, would you, your company or the designated person dealing with this matter please kindly respond immediately to the substantive enquiry in our email. For the record, should the matter not proceed to conclusion swiftly, and should this matter go to an Employment Tribunal please be advised we will make a claim for our legal costs on a full indemnity basis, Premier Advocates hourly rates are £195 an hour."

39. Mr Dawson then replied:

> "I am not bothered that you are not concerned about my holiday, when I get back I will check the post and will ask ACAS to provide a copy, when I have a copy I will send you a full response as previously stated. Please remember that it is you that has gone to ACAS not us so if this delays things we cannot accept any responsibility or cost. For your records I have checked with the office and the letter arrived yesterday, you will also note that until we sign the original the 21 days has not started, however we are reasonable people and will look at this as a matter of urgency but please don't play games as I don't like that."

40. Mr Josh Dawson then replied the same date:

> "Mr Ramji, I have contacted your office today and believe you are with a client, following on from some emails I have been forwarded I would like to make our position clear, we received your letter in the post Monday 2 July 2018, I will review the document and was looking to forward back to you tomorrow via email and a copy in the post, however, since then you have lodged an ACAS reconciliation and we will now seek the advice of Avensure who deal with all our HR matters before forwarding. I must point out to you clause 2.3 that states 'payment will be made within 21 days of the employer receiving a copy of the agreement'. I have confirmed receipt of this now, this means we are up to 23 July 2018 to pay your client. I am therefore unsure as to why you have filed for early reconciliation, maybe because you think your scanned email was suitable, unfortunately it was not as approximately 1/3rd of each page is unreadable and therefore was unable to be accepted as a copy. Maybe your

> photocopier has a fault. Thank you for advising me off your costs, mine are £500 per hour for the record."

41. Mr Ramji replied in a very dignified way to what was a somewhat confused and sarcastic email from Mr Dawson unnecessarily so as follows:

> "Further to your communication our position is that you need to sign the documentation, send a fully signed copy to us, make a payment to Mr Schofield in accordance with the Settlement Agreement and to discharge our legal costs and the matter can then be concluded, provided that you have done the above ACAS can for the moment be parked on one side as long as the settlement is completed as above."

42. This was in response to an email on 5 July from Mr Dawson saying, "so I am clear the payment is due before 23 July 2018, so long as this is the case the ACAS case will not progress".

43. Mr Ramji confirmed that was correct.

44. Mr Dawson then replied; "thank you I will arrange as early as possible to try and close the case" and again Premier Advocates replied:

> "Very good, could you forward one signed copy of the Settlement Agreement to us by the post today please. Our charges need to be paid and the payment details are on the invoice."

45. It might have been thought at this stage that all was sorted out and a signed copy would duly arrive the next day at Premier Advocates office.

46. The respondent stated that the agreement was signed shortly after it was received on 3 July 2018 and Mr Joshua Dawson gave evidence that he signed it on 4 July and produced a copy which as will be seen later Mr Ramji was not certain was the same copy he had sent to the respondent. However, Mr Joshua Dawson could not advise as to what had happened to that signed copy afterwards, certainly it was not sent to the claimant, neither was there are reference whatsoever in any of the subsequent correspondence regarding this signed copy.

47. On 26 July ACAS advised Mr Ramji as follows:

> "I have spoken to the respondent Joshua Dawson regarding the case and his current position is that he is intending to pay the £1,778.40 tomorrow as long as Mr Schofield agrees not to pursue the claim any further. He stated that Neil had sent the signed Settlement Agreement to the wrong address and that this is why they did not pick it up. I have just left you a voicemail and was hoping to get your perspective on this as I am aware there may not be a huge deal of trust between the parties at this stage."

48. There was no payment the next day.

49. On 30 July Mr Dawson wrote to Premier Advocates beginning Dear Credit Control in response to an automatic reminder about the fee:

> "We had a call from ACAS last week about your client stating he wishes to take things further therefore until this is resolved we are obviously in dispute, I suggest you get the funds from your client who has ignored the signed contract thus it seems like he has decided to go further."

50. The respondent gave evidence that they had spoken to ACAS and ACAS had told them not to pay the money until they had made further enquiries and then ACAS had never got back to them. Accordingly, they did not pay the money. There was no evidence from ACAS. I do not find this credible as from my knowledge they would not interfere in the party's dealings to this extent. Whilst the respondent has since argued their dealings with ACAS should be confidential there was no objection at the time of the hearings to the inclusion of emails in relation to ACAS being in the bundle nor to Messrs Dawson being cross examined about it. Accordingly, any privilege was clearly waived.

51. On 1 August Premier Advocates wrote to Mr Dawson again:

> "We refer to your email of Monday 30 July, we wish to formally record with you the following:-
>
> (i) It is palpably clear from the way you have conducted communications with the contents of your communications that you have had no intention to conclude matters by way of agreement that is clear;
>
> (ii) The ACAS Conciliation Officer Andrew Smith would not have indicated as stated below, we simply do not accept what you say, you had a signed document from our client indicating that he did wish to settle but you have failed to understand that;
>
> (iii) Please be advised and take formal notice that you have failed to act reasonably, you have failed to comply with the terms of proposed Settlement Agreement within the timescales that Mr Schofield cancels and hereby withdraws from the said proposed agreement which as far as he is concerned is revoked".

52. Mr Joshua Dawson replied the same day:

> "Your client broke the agreement by going to ACAS shortly after signing the agreement."

53. A further response from Phil Dawson on 1 August said:

> "In communications with yourself you stated you had started an ACAS claim then when we questioned this you stated it had been stopped. Clearly it is you who has no intention of honouring the agreement. You sent the agreement via recorded delivery and it never arrived then you clearly attacked us for not following the agreement, you did then receive it back. When we finally received the agreement, you proceeded to threaten us but actually you hadn't read the agreement when you realised this you again backed off. Our agreement was to pay as per the agreement, you clearly didn't have the same intention, we told ACAS we

would wait for him to return back to us before we proceeded, as far as I am aware we are still waiting for this. I think it was you acting on behalf of your client who has not followed the agreement. We still await a response from ACAS".

54. The next communication from the respondent was 30 August 2018:

> "Dear Sir
>
> We are in receipt of the attached letter, we would request details of the Tribunal case and the address to which we shall send our correspondence. We object to a number of your claims in the letter and state now that you have again not done your research or fully understood what your client is telling you. When we receive your claim, we will defend our position separately as I believe from my perspective you are making statements which are slanderous and complete fiction. For the record you should check the spelling and English before sending out letters. We also state that for the record we are still waiting for ACAS to come back to us so to say we have not engaged is incorrect. We are also not aware that your client is disabled, please can you provide further detail, when we asked your client to have an occupational health check he declined stating he just wanted to finish and go on full disability, as his son in law had been given this even though your client didn't think the son in law was worse than him, when asked what his disability was he said the doctor wouldn't give him one. We would suggest that our offer which you rejected and whilst signing started an ACAS claim, given your client's position. …
>
> We would state again for record we believe our offer was fair and this would still be the situation if you so wished."

55. There was then some correspondence about settling the matter again in October. On 16 October was a further offer on the table. However, an email of November 23 from ACAS stated that offer was also withdrawn and the respondent was now back to the original £1,700 as a proposal. These attempts to settle the matter fizzled out.

56. The details of the original Settlement Agreement included the following clauses that are relevant:

> "2.3 The termination payment will be paid to the employee within 21 days of the termination date, or receipt by the employer of a copy of this agreement, signed by the employee including the certificate signed by the employee's adviser as set out a Schedule two whichever is later.
>
> 4. <u>Waiver</u>
>
> 4.1 The terms of this agreement are offered by the employer without any admission of liability and are in full and final settlement of all and any claims or rights of action that the

> employee has or may have arising out of his employment with the employer, or its termination whether under common law, contract, statute or otherwise, whether or not such claims are or could be known to the parties or in their contemplation the date of this agreement in any jurisdiction and including, but not limited to the claims specified in Schedule 1 (each of which is intimated and waived) but excluding any claims by the employee to enforce this agreement, any personal injuries claims which have not arisen as at the date of this agreement and any existing personal injury claims or any claims in relation to accrued pension entitlements."

57. There was also in addition to the financial settlement an agreed reference. There were provisions about the parties' not criticising each other.

58. At paragraph 12 it says:

> "Subject to contract and without prejudice this agreement shall be deemed to be without prejudice and subject to contracts until such time as it is signed by both parties and dated, when it shall be treated as an open document evidencing a binding agreement".

59. Then, in relation to the Schedule 1 claims breach of contract and unfair dismissal was referred to. However, there was no reference to any disability discrimination claims, strangely there was reference to discrimination, harassment, victimisation claims relating to age, part time status, reference to information consultation provisions and lots of other types of claims amounting to over thirty references in all.

60. The respondent had in these proceedings produced a copy of the original Settlement Agreement which they submitted was signed on 4 July by Mr Joshua Dawson.

61. Mr Ramji pointed out some differences between that copy and the one he sent to them, in terms as follows:

    (i) The claimant's signature on the original copy compared to the respondent's new copy looked different;

    (ii) The reference in the original copy compared to the respondent's copy was different, somebody had made amendments;

    (iii) The Premier Advocates address in the original copy was different from that in the respondent's new copy;

    (iv) Finally, that his own signature in the original copy was not the same as the new copy."

62. The respondent believed this was down to photocopying although they could not explain why it would be different, the difference being quite significant in

that in the respondent's copy 'NOT' (presumably for Nottingham) was included before the postcode.

63. Of course, this could be explained by the copy held on file by the claimant's solicitor being different from that actually sent to the respondent, however, this seems unlikely as everything was signed on 29 May and simply re-sent to the respondent when it remained uncollected. On the other hand, it would be reasonable to amend the reference although not unilaterally. It would also be bad practice for the claimant's solicitor to amend and then keep an un-amended copy on file. I found Mr Ramji a measured and knowledgeable witness and so doubted on the balance of probabilities that he did this. Of course, the respondent would have a blank copy of the agreement anyway as this had been provided by them to the claimant.

Claimant's Submissions

64. The claimant submitted the Agreement was not binding as it had never been signed nor returned to the claimant. Further, in the light of the respondent's behaviour the claimant revoked the agreement that the way that the respondent behaved was completely unfair and prejudicial to the claimant: offering a settlement, withdrawing the settlement, offering it again, not answering correspondence, seeking to renegotiate the settlement, never mentioned that they had signed it.

65. The claimant submitted that the respondent could not have signed it as there was correspondence on the actual date of the alleged signature and nothing was mentioned, neither had it been mentioned at all in subsequent correspondence, nor could the respondent even say that it had been sent back to the claimant. The claimant stated it was in the interests of the overriding objective that the settlement not be regarded as binding. The fact that the respondent failed to include disability discrimination in the list of claims to be settled enabled the claimant to pursue that claim irrespective of the position in respect of unfair dismissal, etc.

Respondent's Submissions

66. The respondent submitted that the case in Newbury meant that there was a meeting of minds and an agreement and there was no requirement for any subsequent conditions in writing which would alter that agreement. It was irrelevant whether the settlement and the respondent's behaviour was prejudicial or unfair to the claimant or contrary to the overriding objective, indeed the overriding objective was irrelevant. There were legal principles to apply.

67. The respondent submitted it was a legally binding agreement. In respect of the disability discrimination the respondent had no knowledge of such action at the time the settlement was agreed and suggested that if there was a known DDA claim the solicitor for the claimant was acting in breach of his ethical duty to allow an unrepresented party to agree to a settlement which did not include disability discrimination in order that this could be pursued after the settlement monies were paid.

Comments on Submissions

68. The respondent is correct that the claimant could not revoke a binding agreement, neither is the overriding objective unfair behaviour or prejudice of any relevance.

69. In respect of the respondent's submissions I would comment that:

    (1) The respondent always gave the impression they were being legally advised throughout, a position apparently substantiated by the provision of a legalistic Settlement Agreement being provided to the claimant.

    (2) No evidence was put regarding Mr Ramji's actions being unfair because the respondent was unrepresented, or even that his actions were deliberate in order to obtain the Settlement Agreement and then issue proceedings for disability discrimination.

    (3) In fact such a scenario was highly unlikely as from the correspondence it was clear that Mr Ramji was at all times anxious to obtain the settlement monies and his professional fee.

Conclusions

<u>Was the agreement signed</u>

70. I have to make some findings of fact. I considered whether I needed to find as a fact if the signed agreement produced by the respondent was genuinely the one sent to them – potentially it may assist in deciding the more crucial 4 July issue.

71. I need to decide if the respondent had signed that agreement on 4 July 2018

72. I find that the respondent did not sign that agreement on 4 July. I did not find the respondent's witnesses credible. In part because their dealings with the claimant and his solicitor they showed bad faith by replying to quite proper correspondence in an intemperate and sarcastic way.

73. There was evidence Mr P Dawson had dealt with Tribunal claims before, it was disingenuous of his to act as if oblivious to the point that the claimant would have to "get the ball rolling" regarding his claim if the matter was not done and dusted within what are strict time limits. I would not go so far as to suggest they respondent were acting deliberately in the hope the claimant would miss his time limits.

74. I find that they were disingenuous also about the address provided from correspondence and in their failure to make any effort to find the original signed Settlement Agreement.

75. I find it unbelievable that if Mr J Dawson signed the agreement on 4 July he would not know what happened to it thereafter.

76. In addition, it is not credible that he would have signed it on 4 July and then not mentioned on the 4 July whilst in contemporaneous correspondence with the claimant's solicitor and subsequently; and then continue to negotiate a settlement.

77. Further the discrepancies between the two documents suggest the copy produced by the respondent was not genuine.

Was the agreement binding

78. Firstly, in the Employment Tribunal the Tribunal's jurisdiction is only ousted by an agreement compliant with section 203. In particular the agreement has to be in writing, accordingly Newbury's effect is limited as a purely oral agreement cannot oust thetribunal's jurisdiction. Further the agreement itself says that it remains without prejudice and subject to contract until both parties have signed it.

79. Accordingly, as I have found that it was not signed on 4 July as contended by the respondent, it was not binding as a contractual term to the effect that both parties had to sign and date the agreement before it became contractually binding had been introduced by the written agreement.

80. If I am wrong regarding the effect of section 203 and the oral agreement was ostensibly binding the respondent then introduced a new provision in respect of paragraph 12 which the claimant agreed to by signing the agreement. In Newbury the claimant did not agree to new provisions introduced following the agreement and he was entitled to rely on the original oral agreement – here however the claimant acquiesced in the introduction of a number of new terms which there was no evidence had ever been discussed including paragraph 12. Again, because paragraph 12 was not adhered to the agreement cannot be binding,

Did the agreement cover a disability discrimination claim?

81. The list of claims which the agreement was supposed to cover was lengthy, many irrelevant issues were included. It is odd that age and part time discrimination claims were included so some thought had been given to that but one can only assume the draft provided had different circumstances in mind. There clearly had been some issues raised in relation to the claimant's condition which may be a disability as can be seen from the provision of the doctor's letter.

82. The agreement clearly does not include disability discrimination therefore it is not apparent that this is a dispute the parties intended to be settled at the time of any agreement, and therefore nothing from which I can infer that that was the intention at the time. The Hinton case makes it clear that the particular complaint has to be referred to and it was not. Whilst there is a general waiver I find this was insufficient to satisfy 'particular proceedings'.

83. To accordance with section 203 and the relevant case law therefore I find disability discrimination should have to be referred to, consequently if I am

wrong about the settlement not being binding I would find it did not exclude the claimant bringing a disability discrimination claim.

Summary

84. Accordingly, I have found that there was not a binding agreement and if I am wrong on that there was in any event no agreement to settle a disability discrimination claim.

Employment Judge Feeney

25 August 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

25 August 2020

FOR THE TRIBUNAL OFFICE

[JE]