EMPLOYMENT TRIBUNALS

Claimant: Mrs L Thompson

Respondent: New Islington Free School

Heard at: Manchester Employment Tribunal (by telephone)

On: 25 January 2021

Before: Employment Judge Dunlop (sitting alone)

Representation

Claimant: In person
Respondent: Ms A Niaz-Dickinson (Counsel)

RESERVED JUDGMENT

1. The Tribunal has no jurisdiction to consider the claim as it was validly settled in an agreement reached verbally on 6 October 2020, that agreement being one which falls within the terms of s203(2)(e) of the Employment Rights Act 1996 and s144(4)(a) of the Equality Act 2010.

REASONS

Introduction

1. By an ET1 form presented on 3 September 2019 the claimant brought claims of unfair dismissal and disability discrimination against the respondent, her former employer. Those claims proceeded through various preliminary hearings and a final hearing was due to be held on 18 and 19 November 2020.

2. On 6 October 2020 Clive Jones, an ACAS Conciliator, informed the Tribunal that an agreement to settle the case had been reached, and the hearing was vacated.

3. Mrs Thompson subsequently declined to sign the COT3 form recording the settlement agreement, and wrote to the Tribunal indicating her wish for the full merits hearing to proceed. This preliminary hearing was arranged as a result of that correspondence, in order to determine whether Mrs Thompson is permitted to continue with her claim, or whether a valid agreement to settle the claim has been reached, which would mean that the Tribunal has no jurisdiction to hear the claim.

The Hearing

4. This hearing was listed to take place as a public preliminary hearing via the Tribunal's cloud video platform (CVP). The start of the hearing was delayed due to connection difficulties with CVP. (It later transpired that there were significant difficulties with CVP across the service on the morning in question.) I arranged for the hearing to be reconvened as a telephone hearing, which all the participants were able to join.

5. I canvassed with the parties whether they were content for the hearing to proceed by telephone rather than by video. Both Mrs Thompson and the respondent were eager for the hearing to be effective rather than be postponed to another day. Although conscious that the hearing had been listed as a public hearing, I was aware that no member of the public had attempted to join the video call for the first hour of its duration whilst attempts were made to resolve the connectivity problems. I was able to instruct a clerk to continue to monitor the CVP room during the telephone hearing, so that any member of the public who did wish to observe the hearing could be enabled to join the telephone hearing instead, if they wished. I was not notified of anyone seeking to join either the CVP hearing or the telephone hearing. On that basis, I was satisfied that the telephone hearing constituted a hearing held in public for the purposes of Rule 56 of the Employment Tribunals Rules of Procedure.

6. I had regard to an agreed bundle of documents containing 92 pages. I heard evidence from Mrs Thompson on her own behalf. She had not prepared a statement but gave evidence in response to questions from me and cross-examination from Ms Niaz-Dickinson. I then heard evidence from Mr Jones, the ACAS Conciliator. He attended as a result of a witness order secured by the respondent. He had not prepared a statement as he considered that to do so would impinge on his duty of impartiality. I allowed Ms Niaz-Dickinson to question him to establish his evidence-in-chief. I then allowed Mrs Thompson to cross-examine Mr Jones. During his evidence, I allowed Mr Jones to refer to electronic case notes he had made on the day in question and which he had access to at home. These were not in the possession of either party and so did not appear in the bundle. Finally, I heard submissions from both parties.

7. The time lost due to the technical problems meant that I was unable to give a decision on the day.

Findings of Fact

8. I make the following material findings of fact about the conciliation process and the purported agreement in this case:

9. Mr Jones is a very experienced conciliator with around 20 years' experience in the role. He had had significant involvement in attempting to assist these parties in settling this matter over many months. I find that he attaches importance to the impartiality of his role and gave evidence to the best of his recollection, with no attempt to favour either party.

10. There were active settlement negotiations during September 2019. At this time the final hearing was approaching and, in particular, the parties were expecting to exchange witness statements for that hearing shortly. By an email of 15 September 2020 Mr Jones informed Mrs Thompson of a settlement offer of £5,000 put forward by the respondent. That email included observations (clearly attributed to the respondent's solicitor) that the prospects of success of the case were low, and that, even if successful, Mrs Thompson could expect to recover limited compensation.

11. Mrs Thompson described the email as "manipulating" and said it "made me think my case was hopeless". Whilst the views set out in the email were undoubtedly favourable to the respondent, I see nothing remotely illegitimate or impermissible in what was said. (There was, for example, no threat of any costs application against Mrs Thompson.) Mr Jones, as I have said, made it clear these were points being put forward by the respondent's solicitor, reflecting their view of the case, rather than the views of himself or ACAS.

12. Mrs Thompson responded to Mr Jones on 17 September 2009. The material part of her email reads "*In light of this I will be willing to accept a minimum offer of £10,000"*. I note, therefore, that her reaction was to continue to negotiation, despite her assertion now that the email placed her under pressure, she did not merely accept the figure put to her.

13. On 29 September, Mr Jones contacted Mrs Thompson again. He notified her that the respondent was prepared to accept the counter-proposal and was now making an offer of £10,000 in full and final settlement. This was said to be "*subject to the attached COT3 wording being agreed*." Attached to the email was wording intended to be included in a COT3 form once agreement has been reached. The COT3 form which resulted appears in the bundle, and I note that the wording of the agreement runs to six paragraphs, about one page of A4 in total. It is formal in tone, but not unduly complex or legalistic given its purpose.

14. On 2 October 2020 Mrs Thompson emailed Mr Jones to say that she had seen the email and would respond on Monday (i.e. on 5 October).

15. On 5 October 2020 Mrs Thompson emailed Mr Jones again, this time saying "*I will accept, but will respond tomorrow if that's okay with you*".

16. I accept the claimant's evidence that she has an eyesight condition which means she struggles to read small print. I also accept that she was feeling unwell around this period and was taking strong painkillers. She referred to

herself as being "out of it" although she has produced no medical evidence as to any of these matters. I find that she probably did not read the detail of the agreement that had been sent to her at this time.

17. On 6 October there was a call between Mr Jones and the claimant. The claimant's evidence as to this call is a little confused. On one hand she says that she agreed to the settlement in that call. On the other hand, she says that Mr Jones asked her if she agreed to the settlement and she replied "not reallu, but I am fed up at this stage". Mr Jones' evidence, supported by his case notes, is that the claimant told him that she did agree to the settlement because she "*wanted to draw a line and move on*". I am not sure that those are necessarily the words Mrs Thompson would have used, but I am happy that that was the sentiment she expressed.

18. I am confident that Mr Jones is well aware of the difference between someone agreeing, somewhat reluctantly, to settle a claim in circumstances where they have been pursuing it for a long time, are perhaps tired of the process, but are also wondering if they are doing the right thing, and someone who is *not* agreeing to settle the claim. Mr Jones, with his long experience of both cases in general and this case in particular, understood from the conversation that Mrs Thompson was agreeing to settle. I am entirely satisfied that he was entitled to take that view. I am also satisfied that Mr Jones explained to the claimant that the agreement was binding once both parties had verbally confirmed that to him, and that the written agreement that followed would be for confirmation purposes only.

19. The COT3 for signature was to be prepared and printed by the respondent, due to the impact of Covid-19 restrictions on ACAS operations. However, on 7 October 2020 Mrs Thompson emailed the tribunal as follows:
"I agreed to settle via ACAS yesterday and for them to send the letters, however after having the document carefully read to me as I struggle with small prints I have decided to go ahead with the case. With this in mind witness statement should go ahead as was planned with the original date set by the courts."

20. I pause to note that in her evidence to the Tribunal Mrs Thompson initially stated that the reason she changed her mind about settling the case was because she realised that if the respondent was prepared to offer £10,000 it could not be 'hopeless' and she might, therefore, get a higher payment by continuing with it. When it was pointed out that this appeared not to be something which had come about from reading the "small print" she continued to explain why she felt she deserved a higher sum, but seemed unable to engage with the issue of whether there was anything in the terms, that she had not anticipated and which changed her view of the settlement. Having listened to the whole of her evidence, I am satisfied that Mrs Thompson changed her mind about whether the sum offered was a good deal, and not a case where the terms of settlement themselves caused her to want to withdraw from the agreement. I find that Mrs Thompson was under a misapprehension that she was able to change her mind because she had not signed the terms, but that this misapprehension was her own error in circumstances where Mr Jones had explained to her that the verbal agreement was binding.

21. This was followed by an email on 8 October 2020 in which Mrs Thompson confirmed that "*I have not signed any for of paperwork which makes it legally binding and wish for my case to go ahead*". Further to this, and at the request of the respondent, Mr Jones emailed the Tribunal on the same day to set out his account of events, which concluded "*I confirm that a settlement was agreed and concluded between the parties on Tuesday 6th October 2020 and that I have now closed my file accordingly".*

Relevant Legal Principles

22. Both the Employment Rights Act 1996 (which governs the unfair dismissal claim) and the Equality Act 2010 (which governs the disability discrimination claim) include provisions which prohibit employers and employees from 'contracting out' of the statutory protections. However, there are exceptions to these provisions which permit claims to be compromised with the assistance of ACAS – see s203(2)(e) Employment Rights Act 1996 ("ERA") and s144(4)(a) Equality Act 2010 ("EqA"). When an agreement is reached in accordance with those provisions, the tribunal has no jurisdiction to hear (or, as in this case, continue to hear, the claim).

23. General contractual principles apply to determining whether there is a binding agreement between the parties. There is no requirement that the agreement be reduced to writing. As Mr Jones noted, the practice of recording it in written form in a COT3 form is one which protects all of the parties, but is not necessary for the sections to operate. I note, in this regard, the authority of **Allma Construction v Bonner UKEATS/0060/09** which was handed up by Ms Niaz-Dickinson. The authority also considers the extent of involvement required on the part of the ACAS officer to engage s203(2)(e) ERA.

24. The law provides that otherwise valid agreements may be set aside in certain circumstances on grounds of lack of capacity, misrepresentation, mistake, undue influence or duress. The Tribunal has jurisdiction to determine these issues and to set aside the agreement if appropriate (**Industrious Ltd v Horizon Recruitment Ltd [2010] ICR 491**).

Discussion and conclusions

25. I find that there was a genuine and valid agreement reached between the parties as a result of the phone call between Mrs Thompson and Mr Jones on 6th October. The respondent had made the offer of a settlement for the sum of £10,000 on the terms attached to the 29 September email and Mrs Thompson had chosen to accept that.

26. If she had not read the terms, then that does not mean there is no agreement. She had had opportunity to seek assistance from someone else or to enlarge them electronically if she wished to read them. If she was genuinely unable to do so then it was open to her to delay agreeing to the settlement, and inform Mr Jones of the difficulties she was having. However, I find that Mrs Thompson's concern was not genuinely about the terms of settlement, rather, she had changed her mind about the amount and

believed that she could use the fact she had not signed the terms to withdraw from the agreement she had entered into.

27. Given that there was a valid agreement, I am satisfied that Mr Jones's involvement in that agreement was more than sufficient to engage the statutory provisions referred to above. Within the terms of s.203(2)(e) ERA he had "taken action" under s18C Employment Tribunals Act 1996 and within the terms of s.144(4)(a) the agreement had been made with his "assistance".

28. I have had regard to the fact that otherwise valid agreements may be set aside on various grounds, as noted above. Even although these arguments were not expressly raised by Mrs Thompson, I am conscious that she is a litigant in person and most likely unaware of these legal doctrines.

29. Mrs Thompson's assertion during evidence that she was taking strong painkilling medication and was "out of it" during the period where the settlement was being agreed raises a potential argument that she lacked mental capacity to consent to the agreement. To make a finding of mental incapacity is a serious matter. Mrs Thompson has produced no medical evidence in support of her assertions. Although I have made findings of fact that she was unwell and was taking medication, it is stretch beyond this to find that she lacked capacity to make this decision for herself over the period of several days which we are dealing with. I am not prepared, on the evidence presented, to make such a finding. Further, the email correspondence appears to demonstrate the opposite – Mrs Thompson was capable of negotiating the settlement figure upwards in her favour and she was capable of telling Mr Jones that she needed more time to decide if she agreed because she was unwell.

30. Mrs Thompson did not expressly pursue any argument on any of the other grounds referred to in paragraph 24 and I did not consider that any such argument could be inferred from the evidence I heard.

31. For those reasons, I find that the settlement is valid and that the tribunal has no jurisdiction to permit the claim to continue. Given the judgment I have reached, there is no requirement for any further case management of the claim and the claim will be dismissed.

Employment Judge Dunlop

Date: 26 January 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

8 February 2021

FOR EMPLOYMENT TRIBUNALS