



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND)

5

**Judgment of the Employment Tribunal in Case No: 4103039/2020 Issued
Following Open Preliminary Hearing Held at Edinburgh “In Person” on
25th January 2021 at 10 am.**

10

Employment Judge J G d’Inverno

15

Mr R Watt

**Claimant
In Person**

20

Dalton Group Limited Metal Recycling

**Respondent
Represented by:
Mr Miller, Solicitor
Advocate**

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

30

(First) That on 24th of August 2020 the parties, per the claimant In Person and Mr Healey instructed Solicitor and Law Agent for the respondent, entered into a concluded Agreement for the settlement of the claims given notice of by the claimant in Case No. 4103039/2020.

35

(Second) The Settlement Agreement was entered into by the parties where an ACAS Conciliation Officer, Mr Alan Gibson, had endeavoured to promote a settlement in terms of section 18C of the Employment Tribunals Act 1996 and had taken action for the purposes of section 203(e) of the Employment Rights Act 1996.

(Third) By virtue of the said Settlement Agreement:-

5 (a) The claimant contracted out of his right to bring or insist upon and is precluded from bringing or insisting upon, proceedings under the Employment Rights Act 1996; and,

(b) The Employment Tribunal no longer has Jurisdiction to Consider the claims.

10

(Fourth) The claimant's claims are dismissed.

REASONS

15 1. This case, in which the residual issue insisted upon by the claimant was a complaint of Unfair Dismissal in terms of section 98 of the Employment Rights Act 1996, called for Open Preliminary Hearing, in conventional "In Person" form, at Edinburgh on the 25th of January 2021 at 10 am.

20

The Issue

25 2. The Preliminary Issue requiring investigation and determination at the Open Preliminary Hearing was whether, on the 24th of August 2020 the claimant, at his own hands and the respondent through the agency of their instructed legal representative, ("the parties"), entered into a concluded contract, for the settlement of the claimant's claims given notice of in Case Number 4103039/2020, which had the effect of precluding the claimant from further bringing or insisting upon these proceedings and, of ousting the Tribunal's
30 Jurisdiction to further consider those claims, by reason of its being an Agreement entered into in terms of section 18C of the Employment Tribunals Act 1996 and thus an Agreement compliant with the exceptional requirements of section 203(e) of the Employment Rights Act 1996.

3. In the course of Case Management Discussion conducted at the outset of the Hearing the Preliminary Issue was confirmed by parties as one which continued to present as a mixed question of fact and of law. The claimant, however, having confirmed in the course of his own evidence that he had entered into a concluded Agreement, albeit verbally, in the course of a telephone conversation with the respondent's legal representative on the evening of 24th August 2020, and the factual dispute thus falling away, the Issue ultimately fell to be determined as a question of law.

10 **Oral and Documentary Evidence**

4. The Tribunal heard evidence as follows:-

(a) for the respondent, who led at the Hearing, from Mr Healey (the respondent's Law Agent in the negotiation) on affirmation, and from,

(b) Mr Gibson (the nominated Conciliation Officer) on oath.

(c) The claimant gave evidence, on affirmation, on his own behalf.

5. The respondent lodged a bundle of documents to elements which reference is made by both parties in the course of evidence and submission.

Statutory and Case Authority

6. The respondent's representative lodged a bundle of authorities to all of which reference was made in the course of submission and containing:-

Case Law

(a) *Allma Construction Limited v Bonner*
UKEATS/0060/09/B1; and

Legislation

(ii) Employment Tribunals Act 1996 section 18 (repealed)

5

Employment Tribunals Act 1996 section 18C

(iv) Employment Rights Act section

10 7. Findings in Fact

7.0 On the oral and documentary evidence presented the Tribunal made the following essential Findings in Fact, restricted to those necessary and relevant to the determination of the Preliminary Issue.

15

7.1 In the discussions which led to the Settlement Agreement, the claimant acted on his own behalf and the respondents were represented by their instructed Solicitor and Law Agent, Mr Healey.

20

7.2 Each of the claimant and the respondent's Law Agent had the requisite capacity and authority to agree, compromise and settle the claims.

25

7.3 In the course of a second telephone conversation proceeding between the parties in the early evening of 24th August 2020, between 6 and 7 pm, the respondent's representative Mr Healey verbally offered to settle the claimant's claims in these proceedings by payment of the sum of £2,000. In the course of the same telephone conversation the claimant verbally accepted that offer, agreeing to settle his claims in exchange for a payment of £2,000. In so offering and accepting, parties agreed on the elements essential to the constitution of a binding contract being:-

30

- The parties

- The subject matter, and
- The price

5

7.4 In terms of the Agreement, the respondent undertook to make payment to the claimant in the sum of £2,000 and the claimant undertook, in consideration of such payment, to settle and refrain from continuing these proceedings. The Agreement between the parties was a verbal, and in the circumstances pertaining, a binding Agreement.

10

7.5 The Agreement was entered into by the parties in circumstances in which, a copy of the claimant's Application ET1 which instituted the proceedings having been sent to the "Conciliation Officer", Mr Gibson, he had thereafter "endeavoured to promote a settlement" in terms of section 18C of the Employment Tribunals Act 1996.

15

7.6 The Settlement Agreement was entered into by the parties in circumstances where the Conciliation Officer had taken action under section 18C of the Employment Tribunals Act 1996 and thus had taken action in terms of section 203(2)(c) of the Employment Rights Act 1996.

20

25 **The Applicable Law**

8. The applicable statutory provisions which prescribe the exception to the general prohibition against contracting out of statutory rights under the Employment Rights Act 1996, are to be found in section 18C of the Employment Tribunals Act and section 203(2)(e) of the Employment Rights Act 1996, which statutory provisions are respectively in the following terms:-

30

Section 18C Employment Tribunals Act 1996

“18C Conciliation after institution of proceedings

5 (1) Where an application instituting relevant proceedings has been presented to an employment tribunal, and a copy of it has been sent to a conciliation officer, the conciliation officer shall endeavour to promote a settlement—

10 (a) if requested to do so by the person by whom and the person against whom the proceedings are brought, or

(b) if, in the absence of any such request, the conciliation officer considers that the officer could act under this section with a reasonable prospect of success.

15 (2) Where a person who has presented a complaint to an employment tribunal under section 111 of the Employment Rights Act 1996 has ceased to be employed by the employer against whom the complaint was made, the conciliation officer may in particular—

20 (a) seek to promote the reinstatement or re-engagement of the complainant by the employer, or by a successor of the employer or by an associated employer, on terms appearing to the conciliation officer to be equitable, or

25 (b) where the complainant does not wish to be reinstated or re-engaged, or where reinstatement or re-engagement is not practicable, and the parties desire the conciliation officer to act, seek to promote agreement between them as to a sum by way of compensation to be paid by the employer to the complainant.

30

(3) In subsection (1) “settlement” means a settlement that brings proceedings to an end without their being determined by an employment tribunal.”

35

“203 Restrictions on contracting out.

5 (1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—

(a) to exclude or limit the operation of any provision of this Act, or

10 (b) to preclude a person from bringing any proceedings under this Act before an employment tribunal.

(2) Subsection (1)—

15 (a) does not apply to any provision in a collective agreement excluding rights under section 28 if an order under section 35 is for the time being in force in respect of it,

20 (b) does not apply to any provision in a dismissal procedures agreement excluding the right under section 94 if that provision is not to have effect unless an order under section 110 is for the time being in force in respect of it,

(c) does not apply to any provision in an agreement if an order under section 157 is for the time being in force in respect of it,

25 (d)

30 (e) does not apply to any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under any of sections 18A to 18C] of the Employment Tribunals Act 1996], and

(f) does not apply to any agreement to refrain from instituting or continuing ... any proceedings within

the following provisions of section 18(1) of the Employment Tribunals Act 1996 (cases where conciliation available)—

- 5 (i) paragraph (b) (proceedings under this Act),
- (ii) paragraph (l) (proceedings arising out of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000), if the conditions regulating settlement
10 agreements under this Act are satisfied in relation to the agreement
- (iii) paragraph (m) (proceedings arising out of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002),
15
- (iv) ...”

20 The terms of, the pre-“Early Conciliation” provisions of, section 18(2) of the Employment Tribunals Act 1996, and their comparison with the terms of the now section 18C also have relevance in establishing the continuing application and binding nature of the decision of the Employment Appeal Tribunal in **Allma Construction Limited v Bonner** UKEATS/0060/09/B1; viz,-

25

“Section 18(2) Employment Tribunals Act 1996

(2) Where an application has been presented to an industrial tribunal, and a copy of it has been sent to a conciliation officer, it is the duty of the
30 conciliation officer—

- (a) if he is requested to do so by the person by whom and the person against whom the proceedings are brought, or

(b) if, in the absence of any such request, the conciliation officer considers that he could act under this subsection with a reasonable prospect of success, to endeavour to promote a settlement of the proceedings without their being determined by an industrial tribunal.”

Submission for the Claimant

9. In submission Mr Watt reiterated the concession, honestly made by him in the course of his evidence, which was to the effect “*I did accept it and then backtracked*”, the “it” being the offer of (payment of) £2,000, made to him by Mr Healey on the respondent’s behalf, in settlement of his claims and in consideration of his refraining from continuing these proceedings. He explained that the reason he had sought to communicate a backtracking in his conversation with the Conciliation Officer the following morning, 25th August 20, was that having so agreed and reported to his wife, in subsequent discussion she had expressed the view that he should have sought and should seek to obtain a higher figure. He indicated that he accepted that he had agreed the terms of the settlement in his telephone conversation with Mr Healey and accepted further that at the conclusion of that telephone call both he and Mr Healey believed that they had agreed the terms of settlement. He stated, however, that he had thought that until something was signed in writing he could refuse to implement the Agreement and reopen the negotiations with a view to securing a higher figure. He went on to state that he accepted that “the law is the law” and he might be mistaken in that view. Finally, he expressed disappointment that Mr Healey, while conveying to his clients, after his first telephone conversation with the claimant of 24th August, the claimant’s counter offer of £2,500 and had authority to agree settlement at that figure if required, he, Mr Healey, had gone on to advise the respondents that it was likely that the claimant would agree to settle at a lesser figure of £2,000, if that were offered.

Submission for the Respondent

10. In a helpful submission Mr Miller founded upon the concession made by the claimant in evidence and invited the Tribunal to find in fact, consensus having been agreed on all essential elements of the contract, that parties
5 had verbally entered into a concluded and binding Agreement for the settlement of the claim, there being no requirement that such an Agreement be concluded in writing. In a helpful submission, fully articulated for the benefit of the claimant, Mr Miller thereafter submitted, under reference to the terms of the relevant statutory provisions and the decision of the
10 Employment Appeal Tribunal in the case of ***Allma Construction Limited v Bonner***, that the circumstances in which the Agreement was entered into were circumstances in which a Conciliation Officer had “endeavoured to promote a settlement” in terms of section 18C of the Employment Tribunals Act 1996, and that by his doing so “had taken action”, for the purposes of
15 section 203(e) of The Employment Rights Act 1996, thus bringing the Agreement within the exceptional category provided for in section 203(e), with the result if the same was that the Agreement was entered into was:-

- (a) precluded the claimant from continuing with the current
20 proceedings before the Employment Tribunal,
- (b) had effectively extra judicially settled the dispute between the parties; and,
- (c) had brought to an end any continuing jurisdiction of the
25 Employment Tribunal to consider the merits of the claims.

11. In the above circumstances Mr Miller invited the Tribunal to dismiss the claimant’s claims.

30

Discussion and Disposal

12. The factual dispute as to whether or not parties had agreed terms upon which the dispute was compromised and was to be settled having fallen

away in the course of evidence, and the Tribunal having found in fact that parties had so reached a concluded Agreement, the residual issue requiring determination was whether in law, the circumstances in which the Agreement had been reached were such as to bring it within the terms of section 203(2)(e) of The Employment Rights Act 1996 with the effect:-

5

(a) that the claimant, for his part was precluded from continuing with his claims before the Employment Tribunal; and,

10

(b) the Tribunal's Jurisdiction and for its part the Tribunal no longer retained Jurisdiction to Consider those claims.

13. An Agreement such as that founded upon by the respondents is one capable of being entered into and constituted verbally. There is no requirement that it be in writing. Accordingly such an Agreement is binding and effective as at the point at which parties have reached consensus (agreement) on all essential elements. That position was reached by the parties in the course of the second telephone conversation which proceeded between the claimant on the one hand and Mr Healey, Law Agent for the respondent, on the other hand on the evening of 24th August 2020.

15

20

14. The terms of the former section 18 of the Employment Tribunals Act 1996, was, following the introduction of the requirements of "Early Conciliation", substituted by the terms of the now section 18C (both set out at paragraph 8 above). A comparative consideration of the terms of both sections reveals that while, some of the words may have changed, "the essential construct", as Mr Miller put it, "remains the same". That is a conclusion with which I respectfully agree and one which forms a link between the circumstances presented in the current case and those which were before the Employment Tribunal and the Employment Appeal Tribunal in the case of **Allma Construction Limited v Bonner** and to the continuing applicability and binding nature of the EAT's decision in that case, albeit one made at a time when the then pertaining circumstances were regulated by the terms of the

25

30

now repealed section 18 ETA 96, to the facts and circumstances of the instant case.

15. The ratio of the EAT's decision in "Allma" and the articulation of the relevant law against which it was formed are set out in the following paragraphs of the Judgment of the Honourable Lady Smith (as she then was) viz:-

"Relevant Law

10 19. Where one party makes an offer to another that is sufficiently definite to indicate an intention to be bound which covers the essentials of the contract in question and it is accepted, a contract is concluded. Whether or not a contract has been concluded falls to be determined by an objective assessment. It does not matter that additional matters could be included in the contract at a later date by way of further agreement being entered into; as Professor McBride comments parties "are not rationed to one contract" (*The law of contract in Scotland* by William McBride at para 5 - 10). As to what are the essentials that will vary from case to case where a contract to settle litigation is concerned, it may be that the essentials of the particular agreement amount to nothing more than that a certain sum of money is to be paid by the defending party to the pursuing party as a price of bringing the litigation to an end";

25 "21. As to the effect, if any, of a change of mind by one party, it can only alter the contract or prevent it being concluded, if it is communicated to the other party before offer and acceptance have taken place (**Thomson v James** (1855) 18D1).

30 22. Given the factual background to this case, the case of **Gilbert v Kembridge Fibres Limited** [1984] ICR 188 is also of some interest. There, via an ACAS Officer, the employee offered to settle his claim for £500 plus an undertaking that the employers repay the sum of £42 which he contended he was owed. The employers' solicitor intimated to ACAS that the employers were agreeable to settle on that basis. Form COT3 was then

sent to the employee to complete and having signed it, he changed his mind, deleted his signature and returned the form to ACAS. The EAT upheld a finding by the Employment Tribunal that an enforceable agreement to settle had been reached before the processing of the COT3; the Agreement did not require to be in writing and offers and acceptances could be communicated through ACAS. The Tribunal's conclusion was said to be "unimpeachable". Plainly, the employee's change of heart made no difference; the deal was done and he was bound to it even although it was not, it seems the deal which, ultimately, he wanted."

10

16. Having noted the applicability of the then section 18 of the Employment Tribunals Act 1996 to what, in the case of Allma as in the instant case, was a claim for unfair dismissal, together with the relevant provisions of that section; and likewise those of section 203 of the Employment Rights Act 1996, the Lady Smith summarised the position at paragraph 26 of the Judgment in the following terms:-

15

20

25

30

"26. Thus, if parties agree to settle a claim in circumstances where an ACAS officer has "taken action", the jurisdiction of the Employment Tribunal is ousted. Taking action is not further defined and so must be given its ordinary meaning so as to cover any action taken by an ACAS officer in relation to the claim. He does not require to broker the settlement nor does he require to record it. His statutory duty goes no further than that he is to endeavour to promote a settlement of the proceedings. How he does that will be a matter for him and will vary from case to case according to its particular circumstances. Whilst there is a practice of ACAS being involved in the recording of settlements in standard paperwork (forms COT3), that practice does not need to have been followed for the Tribunal's jurisdiction to be ousted in a case which falls under section 18(2) of the Employment Tribunals Act 1996". [For which now read section 18C of the ETA]

17. I accept Mr Miller's submission that the Judgment of the EAT in Allma which continues to bind Employment Judges at first instance equally in circumstances of a case which falls under the now substituted section 18C of the Employment Tribunals Act 1996. Separately and in any event, I
5 I respectfully agree with the reasoning of the Lady Smith, as she then was, as set out in that Judgment. Applying the same, to the Findings in Fact made, I conclude that the Settlement Agreement entered into between parties on the 24th of August 2020 was which the circumstances in which it was entered into fall under section 18C of the Employment Tribunals Act
10 1996 and that the present case, to which the Agreement relates, is a case in which a Conciliation Officer "had taken action" for the purposes of section 203(2)(e) of the Employment Rights Act 1996.

18. The effect of the Agreement, in those circumstances, is to preclude the
15 claimant from continuing the present proceedings and to remove from the Employment Tribunal its Jurisdiction to further consider them.

19. The claimant's complaint is accordingly dismissed.
20

Employment Judge: Joseph d'Inverno
Date of Judgment: 29 January 2021
Entered in register: 01 February 2021
25 and copied to parties