EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 2207932/2017 (V)

Held by Cloud Video Platform (CVP) on 5 August 2020

Employment Judge M Robison

C	**Claimant** **Not present &** **Not represented**
Office of Gas and Electricity Markets	**Respondent** **Represented by** **Ms D Miller -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Employment Tribunal does not have jurisdiction to hear the complaint, which is excluded by reason of an agreement reached complying with the provisions of section 144 Equality Act 2010 and section 203 Employment Rights Act 1996. The claim is therefore dismissed.

The Employment Tribunal, on its own initiative, orders that the identity of the claimant should not be disclosed to the public when this judgment is entered on the Register or otherwise forms part of the public record, in terms of Rule 50(2) (b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

In terms of Rule 50(4), either party, or other person with a legitimate interest, is entitled to apply to the Tribunal in writing requesting that the order be revoked or discharged.

REASONS

Introduction

1. At this preliminary hearing conducted by CVP, the respondent was represented by Ms Miller, solicitor. The claimant was not present and was not

represented. Notwithstanding, I made the decision to proceed in the absence of the claimant, hearing evidence only from Ms Furness, ACAS conciliator.

2. Before coming to the substantive matters for determination which were discussed at this preliminary hearing, I consider it necessary to set out the procedural history of this case, which explains my decision to proceed in the absence of the claimant.

Procedural history

3. The claimant raised a claim in the London Central Employment Tribunal in November 2017, which was transferred to the Employment Tribunal in Scotland. A preliminary hearing on case management issues was listed to take place in Edinburgh on 23 February 2018.

4. By e-mail dated 23 January 2018, the claimant advised that he was in hospital, having developed a "serious and life threatening septic post-operative infection", and that he would not be in a position to respond until 1 March 2018, and therefore the hearing due to take place on 23 February 2018 was postponed.

5. By email dated 4 March the claimant advised that he had a set back with low blood pressure and was due to see his GP. By e-mail dated 29 March 2018, the Tribunal wrote to the claimant asking when he was likely to be fit to proceed to a hearing. By e-mail dated 9 April 2018 the claimant responded by commenting on the respondent's ET3 and application for the claim to be transferred to London Central.

6. The respondent made an application for the claim to be transferred to London Central, apparently unaware that the claim had been transferred from there. The request for transfer was dealt with by the President Judge Simon. The claimant provided his comments by letter dated 3 June 2018. The respondent accepted that the claim would be proceed in the Glasgow Tribunal, the Tribunal applying English contract law if necessary and appropriate.

7. By letter dated 17 July 2018, in response to a request for his availability for a preliminary hearing in August and September, the claimant advised that he

was unable to confirm dates at that stage because his partner had been diagnosed with cancer and he had been formally diagnosed as having bi-polar disorder. He said that his psychiatrist thought it was unlikely he would be fit enough to attend a complex and lengthy employment tribunal hearing, although he felt that the preliminary hearing should still go ahead providing he had some form of legal representation.

8. The claimant lodged a letter from his consultant psychiatrist, Dr John Ferguson dated 25 June 2018, who confirmed that "he has a recently made diagnosis of bipolar affective disorder... he is currently very poorly resilient to stress and his mood is far from being under control. He has longstanding thoughts of suicide and I think for the moment he is not fit to be put under significant strain. I would expect that with medication his mental health will improve over the coming 18 months and at some point in that period it may be reasonable for him to re-engage with a tribunal process".

9. The claim was subsequently listed for a one day case management preliminary hearing to take place on 25 September 2018.

10. By e-mail dated 4 September 2018, the claimant asked for an extension on compassionate grounds (relying on the medical report) and Employment Judge Eccles decided to postpone the hearing listed for 25 September 2018 and to sist the case for two months until 30 November 2018.

11. Letters seeking availability were sent out to parties on 12 December 2018, and the case was listed for a preliminary hearing which took place on 28 March 2019.

12. A note was issued following that hearing, which should be referred to for its terms. The claimant had sought a postponement on health grounds in an e-mail sent the day before at 16.09, which was refused because it was too late, and the claimant attended the hearing to remake the application for the postponement in person. Notwithstanding opposition by the respondent (who relied on the fact that a witness and her manager had travelled from Birmingham and she had travelled from Dundee), the postponement was granted. The claimant was ordered to submit a medical certificate regarding

his inability to proceed with the hearing, confirming the nature of the health condition; that in the opinion of the claimant's GP the claimant was unfit to proceed with the hearing and the basis for that conclusion, and when it was expected the claimant would be fit to represent himself at a future hearing.

13. The claimant subsequently lodged a "statement of fitness for work" dated 28 March which simply stated that he was unfit for work for a stress related problem.

14. Letters seeking availability were sent out to parties on 28 March; and a further preliminary hearing was scheduled to take place on 27 June 2019.

15. On 26 June 2019, at 16.41 , the claimant e-mailed to advise that he had met a solicitor that day who had advised that he should seek an urgent postponement on medical grounds. As noted in the PH note following that hearing which is referred to for its terms, the postponement application was not considered by any judge because of the timing of the application. The claimant remade his application for a postponement at the preliminary hearing, and although it was opposed (the witness again having travelled from Birmingham), the postponement was granted, essentially on the grounds that the claimant did not feel fit enough to represent himself and he had engaged solicitors. Those solicitors were asked to confirm that they were able to represent the claimant at a postponed hearing on 9 September 2019, or suggest alternative dates when they were available.

16. The claimant confirmed that his instructed solicitor could represent him at that hearing by e-mail dated 4 July 2019, although no representative went on record at that time.

17. By e-mail dated 4 September, the claimant's partner wrote on his behalf to advise that he was too unwell to attend the hearing on 9 September 2019 due to recent surgery and post-surgery complications. She requested a postponement, attaching a "statement of fitness for work", with no reference to any conditions but confirming he was unfit for work, as well as an NHS24 Contact Report, and a copy of the medical report dated 25 June 2018 (previously submitted).

18. The postponement was granted, the respondent not objecting to a short postponement, but seeking an order requiring the claimant to provide medical evidence which satisfies the requirements of the Presidential Guidance on seeking postponements. He was requested to do so in a letter dated 12 September 2019. A formal order dated 19 September 2019 was issued requiring the claimant to produce medical information by way of an opinion from a doctor that in his or her professional opinion the claimant is unfit to attend the hearing and why (by 30 September 2019).

19. The claimant's partner made a formal complaint, requesting an investigation into why the Tribunal ignored the medical report of 25 June 2018, which was referred to the Vice President, who advised that she could not disclose details of the case without the specific authority of the claimant. That authority was intimated, and by direction of the Vice President (10 October 2018), the claimant's partner was added as the claimant's representative, and a response to the complaint sent to her. The case was then sisted (at the direction of the Vice President) until 13 December 2019 to provide an update from the claimant's psychiatrist as to whether the claimant was fit to proceed with the claim and if not, when it is anticipated that he will be.

20. By e-mail dated 8 December 2019, the claimant's partner advised that he had attended an appointment with his psychiatrist but that it would be three weeks before a medical report could be sent to the Tribunal.

21. Dr Ferguson wrote a medical report dated 11 December 2019, which stated as follows:

7 write at the request and with the consent of this man. He continues as a patient under my care. In addition to his various physical health conditions, he also has an undertreated bipolar disorder (type II). Unfortunately, he has struggled with side effects in relation to medicines thus far tried, although we have further changes to make over coming months. He reports that his mood continues to be significantly low with poor motivation, concentration and sleep. His resilience to stress is very low and he has regular thoughts of suicide, although has not been close to acting on these recently. He is finding the employment tribunal process extremely stressful and I understand he is

representing himself. I have concerns that he is not mentally well enough to deal with the strain of the ongoing process, nor indeed has the cognitive ability currently to represent himself in such a complex legal matter. I would be grateful for any consideration which could be given to postponing legal proceedings until such a time as the changes in medication have been made and hopefully prove to be successful with a stabilsation of his mood".

22. The claimant's partner sent this to the Tribunal, stating that he was currently too ill to attend any hearings, suggesting that he may be well enough in May or June, and offering to get an updated medical report in three months' time, and requesting that future hearings be held in Edinburgh.

23. The claimant's partner was asked to submit a medical report advising when the claimant would be fit to attend a hearing; and it was confirmed that future hearings would take place in Edinburgh.

24. The claimant's consultant provided a medical report dated 20 February 2020 which was written to the claimant's GP, which took the form of a progress report with recommendations regarding medication. This report did not address the question of whether he was fit to attend the preliminary hearing, and if not, when he would be fit.

25. On 15 April 2020, the claimant's partner wrote to the respondent's solicitor copied to the Tribunal to advise that the claimant was now well enough to attend a Tribunal hearing.

26. The case was thereafter listed for a case management preliminary hearing by telephone conference call on Monday 29 June 2020 to discuss how the case could progress in light of the Presidential Guidance on the Covid pandemic which states that no in-person hearings can currently be listed.

27. At 12.38 on Friday 26 June 2020, the claimant's partner, who is on record as his representative, e-mailed the Tribunal to advise that the claimant was unwell having "developed severe issues with his eyesight, so he is currently blind". She was asked if she would be participating on behalf of the claimant, and if so requesting a telephone number. She responded saying that she had no understanding of the case to be able to represent him.

28. Given that no specific request was made for a postponement, having considered the correspondence which was forwarded to me at 17.45 on Friday 26 June, I took the view that the preliminary hearing due to take place on the Monday should proceed in the absence of the claimant. I advised the clerk, given what was stated in the e-mails, and given previous concerns expressed by the claimant's partner about the claimant's mental health, that the Tribunal clerk should not attempt to dial in to the claimant on his mobile.

29. The claimant's partner e-mailed the Tribunal at 10 am stating that the claimant "is still not well with colitis", giving his mobile number and stating that he had sent a signed document to his lawyer last week to settle the case.

30. The preliminary hearing took place in the absence of the claimant. A note was subsequently issued which should be referred to for its terms. It notes settlement discussions were referred to both by the claimant's partner and the respondent's solicitor.

31. The outcome of the PH was that I directed that a preliminary hearing should be listed to take place by CVP. I took the view that if the case was about to settle, that settlement could be finalised before the preliminary hearing, which could be cancelled if settlement was indeed imminent.

32. A provisional date of 4 August 2020 was set down, and the parties were directed to all presidential directions and guidance on remote hearings.

33. I made it clear in the PH note however that since the claimant had not been present at the case management hearing, if for any reason (such as an issue with technology, or a requirement for reasonable adjustments or the fact that the date did not suit), that was not suitable for the claimant, the claimant should contact the Tribunal and the decision would be reconsidered.

34. The claimant's partner e-mailed (on 29 June at 11.23) to advise that the claimant had after all expected the Tribunal to telephone him to participate in the preliminary hearing. She advised in any event that he had arranged legal representation, and that he had "settled the claim" but his solicitor had asked for more information.

35. By letter dated 1 July 2020, the claimant's partner was asked if the claimant had settled his claim and whether he was withdrawing the claim.

Claimant's application for a postponement this CVP hearing

36. The Tribunal heard nothing further from the claimant until he was contacted to participate in a CVP test. The claimant's representative advised (by e-mail dated 3 August at 15.00) that the claimant could not attend the hearing due to illness and difficulties getting a legal representative. It was understood that this was a request for a postponement. That request was refused because it came too late in the day for the respondent to obtain instructions. The claimant was advised that he could re-make the application for the postponement at the outset of the hearing.

37. Although the claimant had been given instructions on how to connect to the hearing, he did not attend.

38. Ms Miller argued that the claim should be heard in the claimant's absence. She submitted that the claim should be dismissed because the Tribunal does not have jurisdiction. She said she would argue on an esto basis that in any event the claim should be struck out under rule 37(1)(a), that is that it has no reasonable prospects of success; (d) that it has not been actively pursued and (e) that it is not possible to have a fair trial, the events in this case pre-dating June 2017.

Decision to proceed in absence of claimant

39. I took the view, given the procedural history of this case set out at length above, that considering the overriding objective, and in fairness to the respondent as well as the claimant, that the hearing should go ahead.

40. Although the claimant was not present at this hearing, I took into account all written submissions he had made, not only the ET3 but also his correspondence with the Tribunal, specifically the letter to the President dated 13 September 2018, and that of his partner who is on record as his representative, the documents which he lodged in March and June, and the documents he called time-line and statement.

41. Given that the claimant was not present, I have set out comprehensive findings in fact based on the evidence of Ms Furness and the documentary evidence lodged.

Issues for determination at this PH

42. The issues for determination at this hearing had been identified some considerable time ago and these were:

    (i) Whether the claimant has complied with section 18A ETA;

    (ii) Whether the claimant's employment came to an end by mutual agreement pursuant to an agreement which satisfies the requirements of section 144 EqA and s203 ERA, such that the Tribunal does not have jurisdiction to hear these claims; and

    (iii) That the terms agreed were in full and final settlement of all and any claims arising out of or in connection with the claimant's employment and/or its termination and therefore he is precluded from bringing his current claims.

43. Following discussion with Ms Miller, it was agreed that it would not be appropriate to consider and determine the first of these issues without evidence from the claimant. She was however content that the second and third issues could and should be determined at this hearing following evidence from Ms Furness. I took a preliminary view that the hearing should proceed to consider those two questions. I indicated to Ms Miller that any strike out application could not be determined without input from the claimant, and she was content for the Tribunal to deal only with issues two and three, and to reserve the question of strike out (and expenses, already reserved from previous hearings) until the outcome of these questions was known.

Documentary evidence

44. It then transpired however that although Ms Miller confirmed the respondent's bundle had been sent to Ms Furness, to the Tribunal and to the claimant as I

had directed at the preliminary hearing on 29 June 2020, there were two different claimant's bundles.

45. Ms Miller (and Ms Furness) had a claimant's bundle which had been lodged by the claimant at the preliminary hearing which took place on 28 March 2019 (hereafter called the claimant's March bundle). I had on my file (and had written on that in my handwriting) a file which the claimant lodged for the June hearing (hereafter called the claimant's June bundle). Ms Miller was not aware that an updated file of productions had been lodged in June. It transpired that these two bundles contained some different documents. There was one document in particular in the June file which was not on the March file or in the respondent's bundle which was an e-mail from the claimant to Ms Furness. I thought that it would be important to question Ms Furness about that e-mail. Further there was an e-mail exchange between Ms Furness and the claimant lodged in the March bundle not contained in the June bundle, which I also thought it essential to refer to.

46. The hearing was therefore adjourned to arrange for the June bundle to be scanned and forwarded to Ms Miller and Ms Furness for their consideration.

47. Ms Kular the claimant's manager was observing the hearing, with Ms Furness waiting to give evidence in the "waiting room". I took the unusual step of asking her to liaise with Ms Furness in that regard to ensure that Ms Furness understood the circumstances and was content to proceed.

48. Following the adjournment, both Ms Miller and Ms Furness indicated that they were happy to proceed, and I concluded that the hearing should proceed.

49. I therefore heard evidence on oath from Ms Furness, who was questioned at some length by Ms Miller, and whom I subsequently questioned. The Tribunal was also referred to the respondent's bundle and the claimant's two bundles, referred to in this judgment by page number, or by other identifying descriptors (given the claimant's March bundle did not have page numbers).

Findings in fact

50. The respondent is a non-ministerial governmental department and an independent national regulatory authority responsible for carrying out the Gas and Electricity Markets Authority's day to day work and investigating matters on its behalf.

51. The claimant was employed by the respondent as assistant site audit manager from 7 April 2014 until 1 September 2017.

52. In or around September 2016, the claimant entered into settlement negotiations regarding the termination of his employment. These were conducted by Ms Phillips, solicitor for Ofgem, and an independent solicitor instructed by the claimant. A final revised settlement agreement for signature was forwarded to the claimant's solicitor by Ms Phillips on 14 September 2016 but it was never signed or concluded (page 3.1 claimant's June bundle).

53. On 13 October 2016 the claimant issued a claim of disability discrimination against the respondent in the London Central Employment Tribunal.

54. Preliminary hearings were held on 25 May and 16 June 2017 at London Central Employment Tribunal. In accordance with the usual practice, an ACAS conciliator in the London ACAS office was appointed to facilitate settlement.

55. The claimant's claim was initially dealt with by a conciliator in London, but in or around early to mid June 2017 the matter was transferred to be dealt with by Ms Furness, a conciliation officer in the Birmingham officer because, as she understood it, the claimant was unhappy with the ACAS officer in London. She understood that the case had previously been on the cusp of settlement; and that the claimant had replaced his previous solicitor with a new solicitor. Ms Furness then made contact with the claimant, who was not best pleased because he had not been happy with the previous ACAS service.

56. She explained to the claimant that the use of ACAS services is entirely voluntary. She explained to the claimant the difference between a private settlement agreement and an ACAS facilitated settlement agreement.

57. After considering his position, the claimant contacted ACAS to use their services. Ms Furness was advised by the claimant that he had engaged the services of a new solicitor, and as is common practice, the claimant proceeded to deal with Ms Furness directly, although she understood that there was a solicitor in the background who was giving the claimant advice (but who was not on record).

58. Several days after that further discussion with Ms Furness the claimant set out his position in an e-mail. With the claimant's permission, she forwarded a verbatim extract to the respondent's solicitor on 20 June at 17.41 (after telephoning her to advise that it was on its way) (page R138).

59. Ms Furness said that she had a good rapport with the claimant (as well as the respondent's representative). Her impression was that the claimant was very engaged with the process, and also that he understood that this was his opening position and she explained to him, as was her practice, that a willingness to negotiate and flexibility would be required if agreement was to be reached.

60. By e-mail dated 23 June 2017 (page R147), Ms Phillips responded to Ms Furness with a copy to the claimant making a counter proposal to the claimant's settlement proposal. A COT 3 draft agreement was attached (pages R 151-153), in the same terms as a previous draft which had been sent to the claimant during the 2016 negotiations. The offer was open for acceptance by 30 June 2017. The email stated that "As you are aware, settlement in relation to this matter has been substantially delayed by [the claimant] after material terms were essentially agreed. In the circumstances the respondents now require the attached COT3 agreement to be signed by 30 June 2017 failing which it will withdraw this offer".

61. Ms Furness spoke to the claimant regarding the counter offer which she said was not well received by the claimant. She talked through each of the points in the counter offer with the claimant.

62. The claimant then advised Ms Furness that he did not wish to accept the offer because he was worried about future employment prospects. She understood

that he was unhappy about the proposal regarding the reference because he said he was aware of another colleague who got a substantive reference.

63. Ms Furness accepted the claimant's position and said that he had the option to come back to ACAS and make a counter offer. She suggested that he might like to speak further with his legal adviser. She was however aware that there was an imminent hearing which would put time pressure on parties regarding settlement, although she was clear that she had not put any pressure on the claimant, as was her usual practice.

64. By e-mail dated 26 June 2017 at 09.20 (page R164), to which the claimant was copied in, Ms Furness stated, *"Thank you for your email and proposed terms of settlement. I have tried to call Ed this morning but the signal on his mobile is extremely poor. It is highly likely that Ed will be speaking to his legal adviser today about your proposed terms of settlement so I will let you know as soon as I have a firm response back from Ed".*

65. One of the issues for the claimant was the imminence of the termination date. Ms Furness made Ms Phillips aware of that.

66. By e-mail dated 26 June 2017 at 17.28 Ms Phillips wrote to Ms Furness, stating *"Further to our conversation, I attach a COT3 agreement which now includes the garden leave clause as per the March draft and sets an extended termination date as per our discussion. This does not constitute any offer by the respondent and I have not taken instructions from my client on it. As we discussed, if [the claimant] wishes to make a final offer in the attached terms to Ofgem, understanding that, if Ofgem accepts his offer a binding, effective agreement on those terms will have been reached then I will take instructions".*

67. Ms Furness spoke to the claimant and he asked for her advice about a termination date she advised that it was not her role to give him advice and that he should speak to his legal adviser and his partner and get back to her once he had arrived at a decision regarding the date.

68. Although the claimant was not copied into the email from Ms Phillips of 26 June (17.28), she shared it with the claimant and explained the situation to him.

69. By e-mail dated 26 June 2017 at 17.00 from Ms Furness to the claimant (claimant's March bundle 3/5), Ms Furness stated, *"the line was breaking up considerably, so impossible for me to continue with the feedback from the respondent. …it was explained to the respondent that the deal breaker was the termination date so the respondent representative invites you to give a specific date of termination, which she will bring back to the respondents side for final consideration. However she needs to have verification and confirmation that you are also able to confirm that you are in full agreement to the terms as laid out in the latest draft of the proposed COT3 agreement (attached) as this will need to be added again, if a later termination date is going to be agreed by the parties. If necessary, please engage with your legal and cross check all of the terms and confirm whether or not you would be happy to be legally bound (via email) through Acas to these terms and confirm your proposed termination of employment date. Please note if the respondent representative gets them to agree to your counter proposal of a later termination date as proposed by you and you have agreed to all the terms Ed, it will then automatically become legally binding via Acas via email at this stage of the process, NOT at the signing stage. If all of this is in place and I am satisfied as the Acas officer that both parties are in full agreement I will be able to confirm settlement to both parties and draw up a legally binding Acas COT3 agreement on Acas headed paper. This will put me in a position as the Acas officer to contact the Tribunal office to formally confirm settlement via Acas and they will remove the claim from the list. Please consider your position for settlement and come back to me with an update as soon as you have decided how you wish to proceed with this matter...."*

70. By e-mail dated 26 June 2017 at 18.25 (R176), Ms Furness e-mailed Ms Phillips (in response to the email at 17.28) *"thanks for the updated version. I will just keep it on record for now and let you know as soon as I have a firm position from the claimant on the matter as this is not an offer from your side. I did get to speak to Ed on the mobile but then the signal dropped. He did say*

that colleagues of his got extensive references in the last month from your client, so I'm afraid that this feedback did not go down well with the claimant, whether he compromises or not on this, I guess I will know more tomorrow. I have invited him to confirm a specified date for notice period and whether or not he is happy to be legally bound by the terms of the COT3 and the clause on gardening leave as this is the only way that you may be able to budge the respondent on their current position on settlement. I will let you know as soon as I get a response".

71. By e-mail dated 27 June 2017 at 14.44 from the claimant to Ms Furness (see the claimant's March bundle 2/5) he stated, *"thanks for chatting with me. As mentioned earlier, I would be looking at a termination date of Friday 4 August 2017. As far as the other points in the settlement agreement I am relatively happy with the content. The issue around references and so forth I am comfortable with .....I would want to speak to my partner about the decision to leave Ofgem first before the matter becomes legally binding. I do not see any issues, I just would not want to make the agreement without letting her know. I will speak to her this afternoon, and send a further e-mail confirming that I accept this is legally binding, and that I agree fully to the terms, providing the termination date is moved to 04/08/2017. Once again thank you for your time".*

72. By e-mail dated 28 June 2017, sent at 10.45, (claimant's March bundle 1/5) Ms Furness stated to the claimant, *"Thanks for your voicemail message, sorry to hear you were not well last night. I am pleased to hear that you have had a chance to speak to your partner and you are now ready to proceed to the next stage with a specific date. I tried to call you back just now as I am going in a meeting for an hour as I am keen to get this moving this morning as you have that meeting tomorrow, which you would like to avoid. I am not going to tell you which date to put forward... that is your choice entirely. However, it is probably likely that they will stick to your contractual notice, which is 6 weeks on your contract, as the respondents representative is going to have to convince them to budge from their current stance. So, as long as your "flexible" and strictly between you and Acas for now, I note that you would revert back to the 6 weeks a minimum for a deal today. So in order for me to progress your case..., please email me back to confirm your specific date and*

that you are happy to be legally bound via Acas to the terms set out and gardening leave clause".

73. In an e-mail response from the claimant to Ms Furness on 28 June 11.53 (claimant's March bundle 1/5) he responded, *"After discussions with everyone my end, I am happy for this to be legally binding today as long as Ofgem agree to a last date of employment of 01/09/2017, or until I get another offer of employment, whichever comes earliest. Therefore, if I get a job in 3 weeks' time, I will end my employment immediately. During the time on garden leave, I would ask that any reference given referred to me as an existing employee. Between you and I, I would be happy to have the last month as unpaid leave. I am simply thinking about the current employment market, and that date would hopefully mitigate the risk of having a gap in my CV. Also I could be prepared to negotiate, but let's see what they come back with. I understand this is legally binding and I am happy for it to be so providing I get that date of 01/09/2017."*

74. By e-mail dated 28 June 2017 at 12.16 from Ms Furness to Ms Phillips (R193) she sets out the claimant's position in italics verbatim, and states, *"I finally have a specific end date from the claimant it is later than anticipated and I have said that you will go back to the respondent direct but you may struggle beyond the contractual notice, all you can do is your best on that front Annelise, but I think we are almost there, have a look below and come back with your final position".*

75. By e-mail dated 28 June 2017 at 12.26 (R195) Ms Phillips asks Ms Furness, *"just so that we have absolute clarity so that I can get instructions - if Ofgem says yes to 01/09/2017 as the termination date do we have a binding agreement on the terms I specified yesterday at the moment Ofgem says yes?".*

76. Ms Furness spoke to the claimant on the phone to make sure that he understood the position, and he said that he was very pleased with the outcome.

77. By e-mail dated 28 June 2017 at 13.09 (R197), Ms Furness e-mailed Ms Phillips, *"sorry for the delay, mobile signalling issues! I rang the claimant again to get absolute clarity. I can confirm that if 1st September is agreed by your client as his termination date. He will accept & understands he will automatically legally bound to the terms via Acas that you specified yesterday. I look forward to hearing from you once you have firm instructions".*

78. Bye-mail dated 28 June 201 7 at 15.32 from Ms Phillips to Ms Furness (R201), she stated, *"I am pleased to advise that Ofgem will agree to the termination date of 1st September 2017 which means we have a binding agreement on the terms I sent to you at 17.28 on Monday. Thank you very much for your help with this matter and I look forward to receiving the confirmatory paperwork. Please could you advise the Employment Tribunal".*

79. Ms Furness sent the claimant a standard e-mail (copied to Ms Phillips) dated 28 June 2017 at 15.59 from (R206) confirming that as the respondent had agreed to his termination date of 1 September *"we now have a legally binding agreement via Acas. I am extremely pleased to confirm a legally binding agreement via Acas in the above mentioned case, the terms are now legally binding on both parties. I confirm that I have emailed the Tribunal in London Central to formally confirm settlement via Acas in these proceedings. Please find attached your COT3 agreement, please* ***PRINT TWO COPIES*** *of this agreement and follow the instructions attached.* ***In addition,*** *please print off schedule 1 and sign and send the Tribunal to confirm withdrawal of your claim, as this is a condition of the COT3 terms. This now concludes this matter in its entirety via Acas"* A standard letter of instruction was attached (R208).

80. By e-mail dated 18 July 201 7 at 15.32 from Ms Furness to [the claimant] with Ms Phillips copied in (R215), she stated, *7 tried earlier today and left a message and again this afternoon on both your mobile and your landline. I needed to check whether or not you had sent the signed COT3 back to the respondent's representative and emailed the Tribunal to withdraw your claim. The respondent's representative is unable to process any payment at her end until she has the signed COT3 from you and confirmation of the withdrawal from the Tribunal. She can accept the COT3 via scanned signature - send it*

direct to her... but will need the ink signed documents to follow in the post too. Please can you confirm the current status" (another copy of the COT3 was attached).

81. By e-mail dated 19 July 2017 at 15.53 (R222) , Ms Furness advised Ms Phillips that she had received a voicemail from the claimant in response to her messages and that he was currently in hospital but would call the next day when he expected to be out.

82. In an e-mail dated 25 July 2017 at 16.51 (R223), Ms Phillips asks Ms Furness if she had heard from the claimant.

83. On the evening of 25 July 2017, the claimant spoke to Ms Furness on the telephone and his tone was quite different from previous calls. He accused her of putting him under duress and that he had never seen the COT3. She explained the position regarding the legally binding nature of the COT3 again. She said that it was too late as the agreement had been reached several weeks before.

84. By e-mail dated 26 July 2017 at 08.24 (R226), Ms Furness asked Ms Phillips to call her that morning.

85. The claimant sent an e-mail to Ms Furness dated 26 July 2017 at 15.07 (claimant's June bundle, 3.3) which stated as follows *"the absolute fact of the matter is I never seen the COT3 agreement at any point before you stated that the agreement was legally binding. You failed to explain certain aspects of the final COT3 clearly enough, and therefore I feel it cannot be legally binding. The final COT3 has conditions that I am not prepared to accept. As you know, we discussed these last night. For the record, this includes the constraints of the garden leave on me as I made it clear during our discussions I still needed to access my IT to complete tasks such as ensuring my holiday and sickness records are correct. Do you have all our calls recorded? If so, I would like a copy of them as soon as reasonably practicable....! feel you rushed this through without allowing for me to check with a solicitor or others about the final conditions. There were a number of COT3/ settlement documents, and the final one is one I refuse to sign. I feel thoroughly cheated*

by ACAS, and regretfully feel I need to be progressing matters to a) the Employment Tribunal and b) the Public and Health Service Ombudsman. With this in mind, I would suggest that you send a final response letter explaining why you feel a document that I had never seen before should become legally binding. For the avoidance of doubt please treat this as a formal complaint. In addition, there is also a breach in your Public Sector Equality Duty. You know that during the time that we were discussing a settlement, that I was suffering from Post Traumatic Stress and additionally severe colitis complications. The simple fact of the matter is that I was in no fit state to agree to anything. I feel that you should have ensured that a solicitor was involved. I am not going to get drawn into a bun fight over this. I am offended that you have 'tricked and cheated' me over this matter. Whereas I was prepared to let matters go and simply not sign the document, I have now been badgered several times whilst in hospital over signing this document that I do not recognise nor agree to. On a final note, I made it clear last night that I was not prepared to sign this COT3, however, I made it clear I would sign one that I was happy with. As you know (yet fail to accept) the COT3 that was sent after a supposed legal agreement had never been seen by me, and has very restrictive clauses that I would never have agreed to".

86. Ms Furness said that she panicked when she first saw this because she thought that she may have forgotten to attach the COT3 to the correspondence, but she checked back and confirmed that she had.

87. The letter was treated as a formal complaint by Acas and Ms Furness's actions were the subject of an internal investigation by three area directors of Acas and her case notes were reviewed. They were satisfied that she had followed the correct protocol. She had very taken detailed notes but these have been destroyed in accordance with the practice at Acas to destroy all notes after six months.

88. By email dated 15 August 2017 at 17.08, from Ms Phillips to the claimant, copied to Ms Furness (R237) , she stated, *7 refer to this settlement reached between the parties via ACAS on 28 June 2017 and recorded in the attached COT3 agreement. You will note that, in accordance with clause 15 of the*

agreed settlement terms, you are obliged to write to the London Central Employment Tribunal in the form of the latter attached at Schedule 1, withdrawing your claim, copying me. You also note that, in accordance with clause 7 of the agreed settlement terms, the trigger for payment of the specified payment is: receipt.... of the COT3 agreement signed by you; your compliance with your obligation to withdraw your claim by letter as per clause 15; and the termination date. Please could you, therefore, forward the signed copies of the COT3 agreement to me and send me the withdrawal letter to the Tribunal copying me. Please note that in accordance with the terms of the agreement your employment will terminate on 1st September 201 7".

89. By e-mail dated 30 August 2017 at 09.45 from the claimant to Ms Phillips (page 245) the claimant stated, *"I just want to make it clear that I have not agreed to the terms of the COT3. I would point out at the time the agreement was supposedly struck, I had not seen all the documentation and I would not have agreed to certain conditions. I would also point out at the time the so called negotiations were taking place, I was both physically and mentally ill. I was taking strong controlled drug opiates in the form of Oxynorm - which made me hallucinate. In addition I had been diagnosed with Post Traumatic Stress - which was triggered by the events of the last year or so. Another point that I should make is not a single term or condition was explained in any way to me. I have had no legal advice over this matter. I was simply put under duress when mentally and physically vulnerable. These vulnerabilities were explained to both you and Acas - but it appears that rather than being compassionate and understanding, you have chosen to further bully me over the issues of a settlement .....I have NOT agreed anything and would reiterate the issues around my physical and mental incapacity at the time. I have not resigned or agreed to leave Ofgem ....."*

Relevant law

90. Section 144 of the Equality Act 2010 is headed up "contracting out" and so far as relevant states that *(1) a term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision or made under this Act .....(4) this section does not apply to a*

contract which settles a complaint within section 120 if the contract (a) is made with the assistance of a conciliation officer...."

91. Section 203 of the Employment Rights Act 1996 is headed "restrictions on contracting out' and so far as relevant states that *"(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 (b) to preclude a person from brining any proceedings under this Act before an employment tribunal. (2) Subsection (1)....(e) does not apply to any agreement to refrain from institution or continuing proceedings where a conciliation officer has taken action under any of sections 18A to 18C of the Employment Tribunals Act 1996".*

92. Section 18C Employment Tribunals Act is headed up *"conciliation after institution of proceedings" and so far as relevant states that (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 - (a) if requested to do so by the person by whom and the person against whom the proceedings are brought; and (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".*

Respondent's submissions

93. Ms Miller, at my request, and in the interests of completing the hearing on the date listed and not prolonging a video hearing, lodged written submissions which she had prepared for the hearing in March. She adjusted these during oral submissions.

94. The following represents a summary of those written submissions.

95. With regard to Acas conciliation, Ms Miller submitted that the parties have entered into a valid agreement pursuant to s. 144 of the Equality Act 2010 and s. 203 of the Employment Rights Act 1996, and therefore the prohibition on contracting out under the Equality Act 2010 and the Employment Rights

Act 1996 does not apply because the agreement was made with the assistance of a conciliation officer.

96. In this case, the first proceedings had been raised and ACAS were involved, in accordance with Section 18C of ETA, in settlement discussions in relation to those proceedings. The settlement discussions, which resulted in a conciliated settlement, began in June 2017. Ms Miller then set out a brief chronology by reference to the documents lodged and adjusted to take account of the evidence heard.

97. She submitted that it is abundantly clear from the chronology that a binding agreement had been entered into via ACAS. There was a clear offer and acceptance. The terms of the contract were clear and unequivocal.

98. Relying on *Gilbert v Kembridge Fibres Ltd* 1984 ICR 188 and *Alima Construction Ltd. v Bonner* 2011 IRLR 204, she submitted that it is not necessary for the claimant to have signed the COT3 agreement in order for the agreement to be legally binding.

99. She submitted that once a contracting-out agreement has been concluded through the intervention of a conciliation officer, there are limited grounds where the validity of the agreement can be challenged. Here the claimant challenges the validity of the agreement based on the actions of the conciliator, and on the grounds that he lacked mental capacity to contract.

100. With regard to the actions of the conciliator, she submitted that the duties and powers contained in what are now ETA 1996 ss 18A-18C have been construed widely in such a way as to impose as few restrictions upon conciliation officers as possible, thereby facilitating the whole conciliation process. Ms Miller set out the principles under which ACAS conciliators must act (summarised by the EAT in *Clarke and ors v Redcar and Cleveland Borough Council and another* 2006 ICR 897 paragraph 36).

101. The claimant asserts that he was *"misled into agreeing terms and conditions that were completely unfair and would compromise my professional status in the future",* but it is not the role of ACAS to ensure that the terms of settlement are fair on the employee. Nor is there any requirement in s.144 EqA or s.203

ERA for the claimant to receive independent advice in order for there to be a legally binding and enforceable agreement with the assistance of ACAS. In any event, in this case the claimant had his own legal adviser and had ample opportunity to seek advice.

102. The claimant also asserted that *"not one single term was explained in even the most minimal degree",* but it is not the role of ACAS to give advice on the meaning of any form of words chosen.

103. Ms Miller submitted that on the evidence, the ACAS officer acted in accordance with her duties and there was nothing about the conduct of the ACAS conciliator which would form the basis of the agreement reached by the parties being set aside.

104. On the issue of mental incapacity, the respondent accepts that the Tribunal has jurisdiction to set aside an agreement if the claimant lacked capacity to enter into that agreement *{Glasgow City Council v Dahhan* UKEAT/0024/15) but submits that there are no grounds to set aside this agreement on that basis.

105. Relying on the leading authority on the common law position in England (given the employment was in England) *(Imperial Loan Co Ltd v Stone* [1892] 1 QB 599), and Chitty on Contracts, Ms Miller argued that the claimant must prove the mental incapacity at the time of the contract; the other party must know about the incapacity or have constructive knowledge of it; and it depends on the nature of the transaction.

106. She set out the five principles identified in *Fehily v Atkinson* [2017] Bus LR by the High Court after a review of the previous case law, and noted that the High Court had emphasised the importance of medical evidence in determining the question of mental capacity.

107. Ms Miller submitted that no medical evidence has been produced which would support the claimant's assertion that he lacked mental capacity at the time the conciliated agreement was reached, and that the claimant's own assessment of his condition at that time is not sufficient to meet the burden of proving that he lacked mental capacity at the material time.

108. Furthermore, she submitted that the non-medical evidence at the time of the negotiations and settlement do not support the claimant's assertion that he suffered from any mental incapacity, referring in particular to the claimant's attendance at case management preliminary hearings when the claimant was fully engaged in the discussions; that he engaged fully in the negotiations with the Acas conciliator; that he did not simply accept the terms offered but engaged in negotiations, resulting in amendments to the agreement, as evidenced by the documents lodged. She argued that this overwhelmingly points to the claimant possessing the necessary mental capacity to enter into a legally binding contract to settle his claim. Moreover, there is nothing to suggest that even if the claimant lacked mental capacity, that the respondent was aware that this was the case. No medical evidence has been provided by the claimant to say he did not have capacity at the time of agreeing the COT3 was binding.

109. In supplementary oral submissions, Ms Miller submitted that the evidence of Ms Furness, who was not precognosed prior to the evidence session, should be accepted as credible and reliable. She submitted that she came across as truly impartial. She submitted that where there was a conflict between the evidence of Ms Furness and the claimant's assertions in documents that the evidence of Ms Furness should be preferred not least because her evidence is firmly backed up by the documentary evidence considered, for example in regard to the claimant's assertion that he had never seen the COT3.

110. With regard to the settlement negotiations, she submitted that these had clearly been initiated by the claimant who had approached Ms Furness.

111. The chronology in the written submissions does not include reference to evidence about e-mails contained in the claimant's March bundle, which Ms Miller submitted were important in making it clear that the COT3 was attached, as was the "garden leave" clause, and show that the claimant was told to engage legal advice and cross check; with references to the fact that the acceptance of a counterproposal would automatically be legally binding, emphasising that it was not at the signing stage, by putting these words in capital letters.

112. She submitted therefore that there could be no doubt in the claimant's mind as to the position, and in subsequent e-mails he says that he is happy with the content and wishes to proceed, and it is clear that he understood that the agreement was legally binding. Further it was very clear from the evidence of Ms Furness, as well as the documentary evidence, that she put no pressure on the claimant to agree to settlement; she gave evidence that at one point he said that he would prefer to proceed to the Tribunal and she said she was content to do that. Further he was given the opportunity to consult a solicitor, even though that was not required, so that he could have sought legal advice. Her evidence was clear that a solicitor's signature is not needed to make a COT3 legally binding, but that the agreement was binding on the oral confirmation of the acceptance, which is also clear from e-mails.

113. With regard to the issue of mental incapacity, Ms Furness in evidence said that it was normal for claimants to feel under stress going through the employment tribunal process; there was nothing to suggest that there was any concern about the claimant's capacity, and the detailed discussions are inconsistent with a lack of mental capacity, for example in regard to the reference to the reference and the termination date. The burden is on the claimant to show that he lacks mental capacity and he has not done that.

114. Ms Miller referred also to the note of the discussion during the preliminary hearing on 27 June 2019 at paragraph 23, when the claimant confirmed that he had no medical reports regarding the state of his health at the time that the agreement was reached; and he has produced nothing since then to change that position. There is thus no evidence regarding mental incapacity at the relevant time.

115. In conclusion, the respondent's position is that the claimant is precluded from bringing these proceedings by virtue of clause 9 of the agreement reached by the parties.

Claimant's position

116. The claimant lodged this claim at London Central on 30 November 2017, claiming unfair dismissal and disability discrimination, and confirming a date of termination of 1 September 2017.

117. At 8.2 (narrative) he stated:

"In late June 2017, I was coerced and mis Jed (by Ofgem's solicitors - and Acas) into agreeing to begin the processing of reaching a settlement agreement when I was asking for time off. However at the time I was (and still am) suffering from severe Post Traumatic Stress and Severe Anxiety brought on by a lack of support at work as documented in previous claims. I made it clear to all parties that I was unwell, and had a number of medical appointments. Along with the mental disabilities, I also had physical issues with a broken arm, and was being prescribed oxycodone and other opiates that cause sedation, confusion, hallucinations and such other issues. All parties also knew that I had been suicidal because of my treatment at work - I was being isolated and prevented from returning to work by staff at Ofgem .….because of whistleblowing over significant wrongdoings within the organisation, and the treatment I had had as a result of doing this. I was advised I would be able to agree terms, and with mounting pressure over a grievance that was being mishandled by Ofgem and in between hospital appointments I agreed to move forward with this. However my mental and physical disabilities were taken advantage of, and I was told to write a specific e-mail (by Acas) and without my agreement, I was then misled into agreeing terms and conditions that were completely unfair and would compromise my professional status in future. With this in mind, I made it clear to all parties (ACAS, Burges Salmon, and Ofgem) that I no longer wanted to consider a settlement and wanted what I had originally requested a number of times, which was simply a sabbatical to recover from my breakdown due to a lack of support at work. I was ignored, and made several attempts to resolve matters. I finally attempted to contact the CEO, however my employment was terminated on 01/09/2017 without my agreement. I feel this was a final act of discrimination - and my mental state was not taken into account. I also feel it

was a punishment for attempting to correctly make a declaration in the public interest through the proper channels (PCAW and NAO) Ofgem simply wanted rid of me at any cost, regardless of the impact this would have on my health". He sought reinstatement.

118. At section 15, headed, "additional information", he stated:

"Please see previous correspondence to the Tribunal, and note a hearing was set for December 2017 originally. I want to make it explicitly clear I did not agree to the terms and conditions of any agreement put forward by Ofgem [through] their solicitors or AC AS, and was mentally incapable of making such an agreement through the severe anxiety and severe PTSD I was suffering from, along with the strong hallucinogenic opiates I was taking at the time".

119. In the time line lodged by the claimant in the March and June bundles, he stated inter alia, that:

"By June 2017 1 had many issues I now know I was in no fit state to agree to a settlement without assistance from a solicitor. The issues I had include 1) isolation from my colleagues. I had a year where I was mostly off on garden leave. I hid this from my partner (I didn't want to worry her) and still came into London each day, and spent time alone, wandering the streets or sitting in museums, art galleries, and even sitting in the Supreme Court. Being isolated and alone I feel made me become very ill and it was during this time I became bi-polar 2) Ofgem continued to state they want me to leave, or they will move me to a team that I don't want to be in; 3) worries over the RHI inquiry correspondence and worrying that would get me into trouble; 4) ill with undiagnosed bipolar disorder; 5) suffering from drowsiness, cognitive impairment and euphoria through medicines such as Oxynorm and Oxycontin 6) confusion over employment tribunal and worry over lack of representation.

By June 2017 1 absolutely agreed that it was time to leave Ofgem as I had been treated badly for so long. However I should have had the support of a solicitor as promised to ensure that Settlement Agreement supported me in the best way. I told AC AS that I would only agree to the terms and conditions which had been agreed in September 2016. I was also led to believe by

Burges Salmon that I would be provided with a solicitor as had happened a year before. After all, I had been told by…. Burges Salmon that only a solicitor could sign off the Settlement Agreement. It is also worth pointing out that ACAS advise employees should be given a reasonable amount of time to consider the proposed conditions of a Settlement Agreement; and the ACAS code of practice on settlement agreements specifies a minimum of 10 calendar days. Yet I was really put under pressure every time a settlement was offered".

120. As the claimant was not present at this hearing, it is important to record that I have taken into account additional information which the claimant furnished the Tribunal in a letter to the president dated 13 September 2018, which was lodged by the respondent at 12b and 12c, which provides further details of the claimant's position regarding his dealings with Ms Furness, and upon which Ms Furness was questioned.

121. The relevant passages are as follows:

"I was at risk of suicide when ACAS and Burges Salmon asked me to reconsider a settlement agreement. To answer Burges Salmon's request for information, on 25 May 2018, 1 was approached by Annelise Tracy Phillips at the lifts as I was leaving the employment tribunal hearing. She asked me about my solicitor, as I was not represented that day, and I advised I was sorting matters out with my home insurance. She asked [why] I had not [agreed] to the settlement that had been offered in March 2018, and I explained I had hardly reviewed it, as I had been ill in hospital. In addition, the offer was to terminate employment, which I was reluctant to do, although I acknowledged it was getting very difficult to continue working at Ofgem as I continued to be treated so badly. Annelise Tracy Phillips offered to restart the negotiations, and I said I would consider it. Annelise also stated if I entered into a settlement, Ofgem would make a contribution to legal fees so I could get the settlement checked with a solicitor. On parting, Annelise said ACAS would need to be notified, which I was very reluctant of as I had fallen out with them previously and had complained to ACAS.

Annelise made it clear I would have legal input into the process, and off the back of that I did actually contact a solicitor and advised that a settlement may be reached which would need checking. This was exactly how the settlement offer from September 2018 had worked, so I was clear in my mind from the conversation I had with Annelise that I would have the opportunity to have terms and conditions checked with a solicitor before signing.

I was latterly contacted by Maria Furness from ACAS. It was her that contacted me on 20 June 2017. In the conversations I had with her, she stated that I may not win at the Tribunal, and that Ofgem could sack me on capability grounds. I was ill, and I referenced illness a number of times in e-mails sent to ACAS. Maria from ACAS made it clear that I would need to get the terms and conditions checked with a solicitor, and I stated I wanted the same terms and conditions as I had negotiated in September 2016. 1 was told this would not be a problem, but I was told that in order to progress matters, I needed to confirm I agreed to leave Ofgem. I sent one e-mail to Maria Furness on 27 June 2018, but I was told this was not correctly worded. I was also being told that I could not get what I wanted with end dates and a financial award unless everything else was in place. Maria Furness told me exactly what to write word for word in an e-mail, and it was her that told me I agree that I agreed that matters would be legally binding. I unfortunately did not have my faculties with me and was confused. I was taking opiate painkillers and was not of sound mind. That is why the opportunity to go through everything with a solicitor as had happened with the previous aborted settlement in September was important - but what happened is not one single terms was explained in even the most minimal degree. Essentially, Maria confused me when I was ill, misleading me into believing I would still have the opportunity to have terms and conditions checked with a solicitor that I had actually called (Cathy) and begun conversations with. The solicitor made it clear that in order to satisfy their indemnity insurance, the whole agreement had to be gone through in great detail and I needed to endure (sic) I understood every point- but this part of the process was never begun, meaning my mental and physical health, along with the hallucination effects of opiate painkillers were never mitigated....! would refer back to my request for a sabbatical which I continued to make throughout

the whole period of negotiations. Maria Furness and her colleagues at ACAS, Annelise Tracy Phillips of Burges Salmon refused to look at that option - which I had intimated was needed so I could recover".

Tribunal deliberations and decision

122. At this hearing the focus was on the narrow question of whether the Tribunal has jurisdiction to hear the claims at all, or whether jurisdiction is excluded by an agreement reached between the claimant and the respondent which satisfies the requirements of section 144 EqA and section 203 ERA.

123. Given the fact that the claimant was not present at this hearing, I have set out comprehensive findings in fact based not only on the evidence of Ms Furness, but also taking account of the written submissions of the claimant in documents lodged for this claim, and the documentary evidence lodged both by the respondent and the claimant.

124. Further, while it is understood that nothing communicated to an ACAS conciliator in the process of an individual conciliation is admissible in evidence before a Tribunal (beyond the fact of the settlement itself), without the consent of the party concerned, in this case the claimant (and the respondent) had made in clear in correspondence (dated 13 and 27 September 2018, in relation to the witness order sought for Ms Furness) that he was content for his correspondence with Acas to be referred to in this hearing.

125. I heard evidence only from Ms Furness. I was struck by the diligence and commitment of the Acas conciliator officer and the amount of time which she was able to spend in seeking to assist the claimant to achieve a settlement of his claim. She was clearly an experienced and knowledgeable conciliator, and having worked as a conciliator for 20 years was clearly very familiar with the role and duties and of a conciliator such that they were instinctive to her. I had no hesitation in accepting her evidence, which she gave in an impartial and undefensive way, despite what she was being accused of.

126. What is important to appreciate in this context is that there is no requirement for an Acas conciliated agreement to be in writing. This is clear from the decision of the EAT in the case of *Gilbert v Kembridge Fibres Ltd* 1984 IRLR

52, where it was confirmed that a legal agreement could be reached without the terms being reduced to writing, and the oral offer and acceptance through the conciliator officer has all the constituents of a binding agreement. This was subsequently confirmed by the EAT sitting in Scotland in *Alima Construction Ltd v Bonner* 201 1 IRLR 204. In that case, the EAT confirmed that where one party makes an offer to another that is sufficiently definite to indicate an intention to be bound, covering the essentials of the contract (which might only be the settlement sum in this context) a contract is concluded. Further, Lady Smith in that case stated that, "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 be followed for the Tribunal's jurisdiction to be ousted in a case which calls under [s.18C] of the ETA 1996".

127. Thus, for a valid agreement to be reached, there requires to be an offer and an acceptance. That can be a verbal offer and a verbal agreement, but the fundamental requirement is that the standard principles of contract law are adhered to. Here the offer was set out in an e-mail, and the acceptance was confirmed in writing in an e-mail, but that is not necessary. The constitutes a binding agreement of the type contemplated by section 203.

128. The claimant relies on the actions of the conciliation officer in the settlement negotiations to support his argument that no agreement was reached.

129. The EAT in *Clarke and ors v Redcar and Cleveland Borough Council and another* case 2006 ICR 897 at [36] after a review of the authorities, summarised the role of the ACAS officer as follows:

(a) The ACAS officer has no responsibility to see that the terms of the settlement are fair on the employee;

(b) The expression 'promote a settlement' must be given a liberal construction capable of covering whatever action by way of such promotion as is applicable in the circumstances of the particular case;

(c) The ACAS officer must never advise as to the merits of the case. It would be quite wrong to say that an ACAS officer was obliged to go

through the framework of the legislation. Indeed, it might defeat the officer's very function if s/he were obliged to tell a claimant, in effect, that they might receive considerably more money;

(d) It is not for the tribunal to consider whether the officer correctly interpreted her duties; it is sufficient that the officer intended and purported to act under the section;

(e) If the ACAS officer were to act in bad faith or adopt unfair methods when promoting a settlement, the agreement might be set aside and might not operate as a bar to proceedings.

130. Dealing with each of the points which the claimant raises in his ET1 and subsequent written submissions, and bearing in mind the role of a conciliator set out above and the evidence that I heard:

(i) He says that he was "coerced and mis-led" by Ofgem's solicitors and by Acas into agreeing to begin the process of reaching a settlement agreement and was pressurised into writing an e-mail by Acas without his agreement he felt under mounting pressure to agree terms. I was more than satisfied from the evidence I heard that there was no coercion or even pressure from the ACAS conciliator; I accepted her evidence that the wording had been drafted by the claimant, and that she was very particular to forward to the respondent his exact words.

(ii) He said he was misled into agreeing terms and conditions which were completely unfair and would compromise his professional status in future. As noted above, there is no obligation on an ACAS conciliator to ensure that terms are fair. Further and in any event, I got no sense from the evidence of Ms Furness, or indeed considering the documentary evidence, that he was in any way "mis-led". He negotiated a later termination date precisely with a view to buying more time to get another job.

(iii) He said that his employment was terminated without his agreement, but again the documentary evidence clearly indicates otherwise.

(iv) He says that he was suffering at the time from severe Post Traumatic Stress and Severe Anxiety; and that his mental and physical disability were taken advantage of. Ms Furness was not aware of the claimant's mental disabilities and I accepted her evidence that he gave no impression, beyond the normal stress that parties pursing claims in the tribunal are, that he was so suffering.

(v) He says that he was "in no fit state to agree to a settlement without assistance from a solicitor"; and he believed that the settlement could only be signed off by a solicitor. I accepted the evidence of Ms Furness that she had got the impression from the claimant that he was getting advice from a solicitor "in the background" which she says is common, and indeed there are various references in the documentary evidence to support that. It may be that he did not; but that was the clear impression which Ms Furness had. In any event, there is no requirement for the claimant to have legal advice before an agreement reached under the auspices of ACAS has legal effect. It would appear that the claimant is confused about the difference between an ACAS negotiated settlement and a private settlement agreement. In any event, I accepted Ms Furness's evidence that she had explained the difference between them more than once and given the way she gave evidence I have no doubt that she did so in clear terms.

(vi) He complained that the ACAS code of practice on settlement agreements had not been adhered to because it states that employees should be given a reasonable

amount of time to consider the proposed conditions of a settlement agreement, that is at least 10 days as specified in the code of practice. I questioned Ms Furness about this provision and she confirmed that this relates to private settlement agreements and not those reached with the assistance of an Acas conciliator; and she repeated in evidence that she had explained to the claimant the difference between an Acas conciliated settlement and a private settlement, as she was clearly used to doing.

131. Given the findings in fact, and specifically the documents which the claimant was a party to, it is quite clear that an agreement was reached, that the claimant was not put under any pressure to reach an agreement, that he was fully aware of the significance of the terms, and indeed was able to negotiate better terms than originally offered, and indeed that he was (at one point) happy with the agreement that had been reached. It seems that something happened to change his mind, and whether that was having discussed it further with his wife, or the impact which having made a decision had on his mental health is not clear, but the reason is irrelevant.

132. I accept too that there is no question that the claimant did have the mental capacity to enter into the agreement. I accepted Ms Miller's submission that the onus of proof is on the claimant to establish mental incapacity, and I accept that he would need medical evidence to support any assertion that he was incapacitated. That incapacity would require to be at the time that the agreement was reached (ie June 2017). Although the claimant had now lodged a number of medical reports which relate to his mental health, this was a matter which I raised with him at the preliminary hearing in March, that is that I stated that if he was seeking to rely on such an argument to suggest that any agreement reached was not valid, then he would require to lodge medical evidence to support that. He said at the time that he did not have medical evidence but if the claimant were of the view that medical evidence could have been obtained, he had time to obtain any medical evidence that might have supported his contention, but no such evidence was lodged.

133. While I am aware that the claimant has suggested that he was suffering undiagnosed bi-polar from January 2016, none of the medical reports lodged confirm that and in any event, any medical report would require to specifically address the question of mental incapacity at the time the agreement was reached.

134. Ms Furness in her evidence confirmed that she got no impression that the claimant was incapacitated, and that while he did indicate that he found the process stressful, that is very common with parties.

135. Ms Miller rehearsed the evidence which pointed to precisely the opposite, that is that the claimant was fully engaged in the process and understood exactly what he was agreeing to, as illustrated for example by the fact that the terms were changed in his favour as a result of the negotiations.

136. I therefore conclude that a valid agreement has been reached; that there is no suggestion that its validity could be questioned by the ACAS conciliation officer having acted in bad faith or adopting unfair methods (indeed quite the opposite) or by the fact that the claimant did not have capacity.

137. I conclude that that agreement fulfils the requirements of sections 144 EqA and 203 ERA, such that the jurisdiction of this Tribunal is ousted. Consequently, this Tribunal has no jurisdiction to hear the claimant's claims of disability discrimination and unfair dismissal, which have been settled "out of court", in full and final settlement of any sums which might have otherwise been due. The claims must therefore be dismissed.

Rule 50

138. This is a case where the claimant's detailed medical records have been considered and outlined in this written judgment. I have required to narrate these details in this decision because they are relevant to my decision to proceed in the absence of the claimant, and to my deliberations on the question whether the claimant was mentally incapacitated.

139. The rules ordinarily require any written decision to be published on the on-line register. Given the very detailed medical records set out here, I have taken

the view that it is in the interests of justice and in order to protect the claimant's right to privacy, that the claimant's identity should not be disclosed. I take account of the fundamental nature of the principle of open justice, but given the details contained in this judgment about the claimant's mental health, I considered that on balance the claimant's privacy should be protected. I have decided, on my own initiative, to make an order under Rule 50 that the claimant's identity should be anonymised. The claimant should therefore be referred to as "C" in any judgments which require to be published.

140. This was not a matter which was raised at the hearing. I came to realise that this was an appropriate order when considering my decision. I am therefore well aware that neither party has had an opportunity to make submissions on this matter. However, should either party have an issue with that order, then they should make an application in writing requesting that the order be revoked or discharged.

Employment Judge: Muriel Robison
Date of Judgment: 31 August 2020
Entered in register: 07 September 2020
and copied to parties