Case No: 1401593/2021

EMPLOYMENT TRIBUNALS

Claimant: **Ms S Kovero**

Respondent: **International House Bristol Ltd**

By: VHS **On: 3 March 2022**

Before: **Employment Judge Craft**

Representation
Claimant: Herself
Respondent: Mr N Henry, Croner

JUDGMENT ON PRELIMINARY ISSUES

1. The Claimant's application to add Mr N Henry as a second Respondent to these proceedings is refused.

2. The Claimant's application to amend her Particulars of Claim to include a claim of victimization arising from the alleged conduct of Mr N Henry during privileged discussions as to potential settlement between the parties is refused.

3. There having been no agreement binding on the Claimant to settle these proceedings the Claimant is not precluded from pursuing her complaints against the Respondent.

REASONS

1. By a claim form dated 23 April 2021 the Claimant pursues claims of pregnancy and maternity discrimination (including victimization) and constructive unfair dismissal because of her pregnancy and maternity against the Respondent. The Respondent denies these claims.

2. The Tribunal held a Case Management hearing on 1 December 2021 to consider the position in these proceedings. It was determined that a Preliminary Hearing would be held on 5 and 6 April 2022, and appropriate

and extensive directions were given to the parties for that hearing, to determine whether an email (and its attachment) which the Claimant sent to the Respondent on 5 June 2020 was a protected act for the purposes of s.27 Equality Act 2010, with discretion for the Tribunal to consider other such issues and, in any event to clarify and confirm the issues to be dealt with by the Tribunal at the Final hearing.

3. On 12 January 2022 the Respondent made an application to the Tribunal for an Order to dismiss the Claimant's claims on settlement. The Respondent's letter supporting this application stated, inter alia, as follows:

> *"On 4 November 2021 the Claimant made an offer to settle through ACAS. That offer was formally accepted by the Respondent via ACAS on 9 November 2021. Having reached an agreement to settle the claim for an agreed amount, the Claimant then queried a standard term of confidentiality in the COT3 form, further leading to her reneging on the agreement by email direct to the Respondent's representative on 19 November 2021.*
>
> *The Respondent now applies for the claim to be dismissed on the basis that having agreed core terms of a settlement despite disagreement over a minor COT3 terms the Respondent is entitled to rely on the core of the agreement.*
>
> *Following the decision in* ***Allma Construction Ltd v Bonner 2010 WL3807971(2010)****, the Claimant is precluded from continuing her claim as the Tribunal jurisdiction is ousted under s.18 of the Employment Tribunals Act 1996, namely that the settlement agreement had been brokered by ACAS"*

4. The Claimant opposes this application. She has also applied for Mr Henry, who represents the Respondent in these proceedings, to be joined in to the proceedings, and to amend her Particulars of Claim to include a claim of victimization referring to alleged misconduct by Mr Henry during negotiations involving ACAS.

5. The Appellant submitted written representations in response to the Respondent's application in her letter dated 13 January 2022. The Tribunal received oral submissions from Mr Henry and the Claimant. They agreed that these applications could be dealt with by the Tribunal by reference to their representations and the correspondence between the Respondent, the ACAS representative, Mrs Maynard, and the Claimant through which settlement of the Claimant's claims was considered. The amount of the proposed settlement sum has been redacted from this correspondence. It remains unknown to the Tribunal.

6. The Tribunal accepts that it was the Claimant's understanding from her discussions with ACAS that it was open to her to put forward a settlement proposal to the Respondent to settle the proceedings via ACAS on the basis that, if she did so, she would be commencing a negotiation with the Respondent through ACAS. This is confirmed by an email which Mrs Maynard, the ACAS officer involved, sent to the Claimant on 1 September which stated, inter alia, as follows:

   > *"If the Respondent contacts me with any offers of settlement I will let you know.*
   >
   > *In the meantime if you wish to put a proposal to the Respondent to start negotiations, again let me know"*

7. On or around 4 November 2021 the Claimant agreed with Mrs Maynard that she would submit a proposal of settlement to the Respondent for its consideration. Initially, Mrs Maynard notified this proposal to the Respondent's previous representative and then to Mr Henry. Mrs Maynard informed Mr Henry that the Claimant had confirmed that she was prepared to settle her claim at £y and that this proposal would remain open for the Respondent to accept until 8 November 2021.

8. On 9 November Mr Henry sent an email to Mrs Maynard which stated, inter alia, as follows:

   > *"I have spoken to the Respondent today who is willing to settle the claim without an admission of liability on a purely commercial basis.*
   >
   > *I have attached a draft COT3 summarizing the conditions under which settlement would be offered. Please could you forward to the Claimant for approval.*

9. Mrs Maynard replied to Mr Henry by email of 10 November. This email states, inter alia, as follows:

   > *"I have spoken to the Claimant regarding the offer and the draft terms.*
   >
   > *The Claimant is asking for the additional £6 …*
   >
   > *She has also indicated that she wants to be able to speak about her experiences but without mentioning the school or the individuals involved.*
   >
   > *The Claimant would like clauses 5 & 6 to be both ways for the Claimant and Respondents.*
   >
   > *She is also seeking a reference – dates and job title would be acceptable.*

Please can you discuss with the respondents and let me know their position on the above. If they agree to the above, please forward updated terms".

10. Mr Henry sent an email to Mrs Maynard on 11 November. This stated, inter alia, as follows:

    "4 It is a fundamental term of the agreement not to "speak about her experiences" as the Respondent would have no opportunity to state their case. In addition, the prospect is raised that the Claimant would attempt to earn revenue or prestige in addition to the settlement sum by stating a distorted version of events.

    5 Clause 5 of the COT3 relates to both parties. Clause 6 specifically prevents the Claimant from making posts which diminish the reputation or good will of the Respondent. The Claimant does not have a business interest of this kind to protect she is not covered by clause 5. The terms and conditions on confidentiality are therefore not negotiable.

    6 The Respondent is willing to provide a basic reference in this case on the terms outlined in the attachment.

    In the event that the Claimant does not wish to settle on the terms specified by Wednesday 17 November 2021 the Respondent has instructed me to make an application to have the majority of claims struck out at the December 1 preliminary hearing and a Deposit Order placed on the remainder."

11. The draft COT3 sent to Mrs Maynard by Mr Henry with this email is headed: *"Settlement reached 10 November 2021 as a result of conciliation action. Without prejudice and subject to contract."*

12. Mrs Maynard wrote to the Claimant on the same day to send her a copy of the Respondent's response and draft COT3. She explained the amendments which the Respondent had made to the draft terms initially proposed by the Respondent. These were that the Respondent had increased the settlement figure by £6 and its position on the other points she had raised with Mr Henry on her behalf which were that clause 5 was proposed to relate to both parties, that clause 6 did not and that the terms and conditions proposed by the Respondent were non-negotiable and required a response from the Claimant by no later than 17 November 2021.

13. The Claimant sent an email to Mr Henry at 13:05 on 17 November which was copied to Mrs Maynard. This email is stated to be without prejudice and included a response to the revised settlement offer made by the Respondent in which the Claimant stated that she could not accept the terms of clause 5 of the settlement agreement. The Claimant stated as follows:

    "It is unfortunate that the respondent is not willing to compromise on clause 5 of the settlement agreement. To be clear, what I have

offered is to be able to speak about my personal experiences without implicating the respondent by not using their names or the name of the company. This provides anonymity for the respondent. The events that happened are so interlinked with my experience of my pregnancy and birth, that I cannot speak honestly about my pregnancy and birth without speaking of the events surrounding them. It is unreasonable to ask me to not to speak about this period of my life and would be detrimental to my mental health. Clause 6 clearly covers any "bad mouthing" of the company".

14. The Claimant sent a further email to Mr Henry at 13:08 on that day. In this email she responds to Mr Henry's representations as to the weakness of her claims which Mr Henry had made in his email to Mrs Maynard of 11 November and attaches a copy of her proposed agenda for the Preliminary Hearing scheduled for hearing on 1 December.

15. The Claimant then sent a third email at 13:12. This was also stated to be without prejudice and was copied to Mrs Maynard. It stated, inter alia, as follows:

> *"I have sent you two separate emails which form my response to the settlement agreement.*
>
> *If the respondent is willing to compromise on clause 5, please let me know by Friday, if not we shall proceed to the preliminary hearing."*

16. Mr Henry replied at 14:39 on that day. The first paragraph of his email stated:

> *"I do not see any response to your settlement agreement within the documents you have provided. It is certainly not self-explanatory. What compromise are you specifically asking for in clause 5?" I await your explanation regarding settlement only."*

At 17:14 the Claimant replied to Mr Henry by email and stated:

> *"You will excuse me if I don't do things correctly or if things are "certainly not self-explanatory, as I am not a lawyer".*

The Claimant then repeated the response she had set out in her earlier email which is set out above and then stated:

> *"Clause 5 should simply say, the Claimant will not use the name of the company, or the people involved when communicating about any events".*

17. Mr Henry replied at 17:50 and stated, inter alia, as follows:

> *"To recap, the respondent has accepted your settlement offer to withdraw the claim in the sum of £x. You are now refusing to ratify the terms of the agreement because you disagree with the standard*

confidentiality clause.

For clarity, clause 5 refers only to the agreement and the circumstances giving rise to the agreement. The circumstances do not include your experience of pregnancy and birth.

For the reasons given in previous correspondence, the claim has very little chance of success. I will not therefore advise my client to accept any deletion of clause 5.

On Friday 19 November I will be making an application to the Tribunal for the claim to be struck out and/or a Deposit Order. You will then be on notice that our client intends to make an application to the Tribunal for a Costs Order to be made against you under rule 76 of the Employment Tribunals Rules of Procedure 2013."

The Respondent did not make an application to the Tribunal for any claims to be struck out and / or a Deposit Order to be made at the Preliminary hearing on 1 December.

<u>Conclusions</u>

18. I deal firstly with the Respondent's application that these proceedings should be dismissed on settlement. The relevant statutory provisions are to be found in s.18C(2) Employment Tribunals Act 1996, s.203(2) Employment Rights Act 1996 and s.144(4) Equality Act 2010. The question for this Tribunal is whether the parties entered into a contractually binding agreement that settled these proceedings.

19. Although the established conventions and procedures anticipate that the parties will sign either a Form COT3 facilitated by ACAS or a Settlement Agreement to compromise Employment Tribunal Proceedings, an oral agreement can be contractually binding on the parties. Furthermore, it is not necessary for an ACAS conciliated agreement to be in writing.

20. A contract is concluded where one party makes an offer to another that is sufficiently definite to indicate an intention to be bound by it, covering the essentials of the contract in question, and which is then accepted by the other party. In such circumstances it may not matter that additional matters could be included in the contract at a later date by way of further agreement. As to what the essentials of the contract are that will depend on the circumstances of each case. Mr Henry referred the Tribunal to the **Allma** case in which Lady Smith concluded that in a contract to settle litigation the essentials could amount to nothing more than a certain sum of money being paid by a respondent to a claimant, and that on the facts in the **Allma** case the offer to settle made by the Respondent was not merely an invitation to negotiate. This was because Lady Smith found that Mr Bonner had instructed his solicitor to accept the offer which had been made by Allma, who had then contacted the ACAS officer who had then confirmed to Allma's solicitor that the offer had been accepted. Each case has to be considered on its own facts. Here, the relevant correspondence provides a full history of

the progress of the negotiation between the parties, helpfully and appropriately, assisted by ACAS. It falls far short of establishing that the parties entered into a contractually binding agreement.

21. The Claimant put forward a settlement proposal via ACAS to which Mr Henry responded to ACAS on behalf of the Respondent in writing. He also submitted a draft COT3 with that response indicating that this summarised the conditions under which the Respondent would offer settlement to the Claimant, and asked for this to be forwarded to the Claimant for approval. The Claimant responded via the ACAS representative seeking a small increase in the settlement sum, changes to the terms of the draft COT3 and a reference.

22. Mr Henry's response via ACAS was to make it clear that it was a fundamental term of the agreement for the Claimant not to speak about her experiences and that the terms and conditions in the Respondent's offer set out in the draft COT3 were not negotiable. The Tribunal also notes that the draft COT3 was headed "Without Prejudice" and "Subject to Contract".

23. Mr Henry also indicated to ACAS that if the Claimant was not prepared to settle ,that is, would not agree on the proposed terms, then the Respondent would be making certain applications to the Tribunal at the Preliminary Hearing on 1 December. The Claimant made clear to Mr Henry in correspondence between them that she was not prepared to accept those terms and thereafter the matter proceeded to the Preliminary Hearing on 1 December. This application by the Respondent was not submitted until 12 January 2002.

24. The negotiation had been commenced by the proposal made by the Claimant via ACAS which was followed by the Respondent making an offer of terms by the Respondent agreeing to the settlement sum but requiring the Claimant to accept what it terms fundamental terms before that agreement could be completed and become binding. The relevant correspondence was stated to be without prejudice and subject to contract. This provided an additional protection to the parties in the ongoing negotiation to see if agreement could be reached. The negotiations were not able to achieve settlement. The Tribunal has already stated that each case has to be determined on its own facts. However, the Tribunal notes the stark contrast between the extent, and circumstances, of the ACAS assisted negotiation in this case, and the facts in **Allma**. The Tribunal has found that there was no contractually binding agreement made between the Respondent and the Claimant to settle these proceedings. This means that the Claimant is not precluded from pursuing her complaints against the Respondent and the Respondent's application that her claim should be dismissed on settlement must be dismissed.

25. The Tribunal can deal briefly with the Claimant's applications apparently filed in response to the Respondent's application. The Tribunal did so at the outset of the hearing. Mr Henry is acting on behalf of the Respondent. He was not involved in any way with the Claimant's employment with the Respondent and allegations which the Claimant has made against Respondent in respect of her employment. There are no grounds on which

Mr Henry could be joined in to these proceedings. Furthermore, the Claimant's dissatisfaction with Mr Henry's approach to without prejudice discussions (on which the Tribunal makes no findings) provides no grounds to pursue the claim of victimisation which the Claimant has put forward. These applications have been refused for these reasons.

Employment Judge Craft
Date: 18 March 2022

Judgment & reasons sent to parties: 6 April 2022

FOR THE TRIBUNAL OFFICE