EMPLOYMENT TRIBUNALS

Claimant: Mr Ronald DeSouza

Respondent: C & P Security Products Limited

Heard at: London South **On:** 2 December 2021

Before: Employment Judge Sekhon (sitting alone)

Representation
Claimant: In person
Respondent: In person, Mr Bryan, representative and Mr Collins

RESERVED JUDGMENT

1. The Tribunal has no jurisdiction to consider the claim as it was validly settled in an agreement reached verbally on 20 March 2019, that agreement being one which falls within the terms of s 203(2)(e) of the Employment Rights Act 1996 and s144(4)(a) of the Equality Act 2010.

REASONS

Introduction

1. The claimant was employed by the respondent C & P security Limited as a Fabricator Welder from 4 August 2014 until 19 March 2019. By an ET1 form presented on 3 April 2019, the claimant brought claims of unfair dismissal, disability discrimination and notice pay against the respondent, his former employer.

2. An ET3 was due to be filed with the Tribunal by 25 June 2019. Before the ET3 was due, Mr Bryan, representative on behalf of the respondent wrote to the Tribunal on 20 June 2019 enclosing a COT3 agreement and stating that the ACAS (Advisory, Conciliation and Arbitration service) conciliator confirmed to the respondent that the COT3 agreement was valid notwithstanding that both parties had not signed the agreement. The respondent relied on the EAT case of Gilbert v Kembridge Fibres Limited 1984 ICR 188 and accordingly the respondent submitted that the Tribunal has no jurisdiction to hear the claim. For confidentiality reasons, I have not set out in this

Judgment the amount the parties agreed upon as this does not affect my decision. I refer to this sum agreed between the parties as £AAA throughout this decision and counteroffers in terms £BBB, £CCC and £DDD.

3. The respondent believed that the case had been dismissed following a telephone conversation on 24 June 2019 with the Tribunal clerk and consequently did not serve an ET3. They confirmed the position in an email dated 28 June 2019. The respondent then received a notice of hearing to attend a hearing at the Tribunal on 18 November 2019 and wrote to the tribunal on 26 September 2019 seeking clarification of the position and an extension of time to serve the ET3 if the case was proceeding. The claimant confirmed in correspondence to the tribunal that £AAA was paid into his account by the respondent on 19 August 2019 without notifying the claimant they intended to do so.

4. Parties were informed by the Tribunal that the hearing listed for 18 November 2019 was postponed and that further directions and orders would be sent out in due course. The Tribunal wrote to Ms Valerie Donovan at ACAS on 9 December 2019 to obtain a written copy of the COT3 and to establish from the ACAS officer whether a binding agreement was reached over the phone and the claimant was warned that it would be binding.

5. Andrew Way, conciliation and mediation manager at ACAS wrote to the Tribunal on 10 December 2019 stating that the conciliator notes confirm a settlement was reached by telephone on 20 March 2019 and the claimant was informed that it was a binding agreement.

6. A copy of the correspondence from ACAS was sent by the Tribunal to the claimant and respondent on 14 February 2020 confirming that the case would be listed for a Preliminary hearing to consider the validity of the COT3 agreement and whether the proceedings ended at that point.

7. The Claimant wrote to the Tribunal on 26 November 2020 seeking an application for Judgment in default as the respondent had not served at ET3. The tribunal wrote to the claimant on 23 August 2021 confirming that an application for default Judgment cannot be addressed until the COT3 issue has been resolved, namely in order to determine whether Mr DeSouza is permitted to continue with his claim, or whether a valid agreement to settle the claim has been reached notwithstanding that the COT3 form had not been signed by either party, which would mean that the Tribunal has no jurisdiction to hear the claim. A preliminary hearing was listed for today to resolve with this issue.

Hearing

8. This hearing was listed to take place as a public preliminary hearing and arranged in person as the claimant did not have easy and private access to a computer for the purposes of a hearing by video platform. This led to a delay in the hearing taking place and the requirement to postpone the hearing several times due to the pandemic.

9. The respondent provided a bundle totalling 31 pages in advance of the hearing which had not been agreed by the claimant. The claimant attended the hearing and handed

a bundle to me comprising of 16 documents totalling 42 pages. During the hearing I was handed 3 further pages from the respondent endorsed 67,68 and 69 comprising of email correspondence between the claimant and Mr Raven (GMB trade union representative). I made it clear to the parties that the judicial file was comprehensive with correspondence produced between the parties and that I would be relying on the documentation in the bundle that they had provided me with in order to reach my decision.

10. The respondent confirmed that they intended to rely on the documentation provided in the bundle together with the additional documents given to me at the hearing and that they did not intend to call any witnesses. I heard evidence from Mr DeSouza on his own behalf whilst under oath. He had not prepared a statement but gave evidence in response to questions from me and under cross-examination from Mr Bryan. I was informed that the ACAS conciliator, Ms Valerie Donovan had left ACAS and there was no statement from Ms Donovan produced by either party. Finally, I heard submissions from both parties. I was unable to give a decision on the day as there was not sufficient time to read the documents provided by the claimant at the outset of the hearing and the additional documents produced by the respondent during the hearing.

Finding of fact

11. I make the following material findings of fact about the settlement negotiations, conciliation process and the purported agreement in this case based on the documentation that was provided to me at the hearing and the witness evidence before me. I do not refer to or deal with the substance of the claimant's allegations made in the claimant's ET1 as they are not relevant to the issues before me today and no evidence was heard at the hearing on these matters.

12. The claimant was employed by the respondent C & P Security Limited as a Fabricator Welder from 4 August 2014 until 19 March 2019. The claimant submitted his case to ACAS on 24 January 2019. The respondent gave the claimant a final written warning on 26 February 2019. Ms Valerie Donovan, conciliator at ACAS, wrote to the claimant by email on 4 March 2019 stating that the respondent had decided that he does not want further conciliation via ACAS and accordingly she confirmed that she had issued a Certificate to allow the claimant to make an Employment Tribunal claim if he wished to do so. The Early Conciliation Certificate is dated 4 March 2019 with reference R109192/19/76.

13. On or about 4 March 2019, the respondent made a settlement offer to the claimant for the sum of £BBB. Following a discussion between Ms Donovan and the claimant, he rejected this offer. A disciplinary appeal meeting took place on 19 March 2019 at 11am at the respondent's company office. Those in attendance were the claimant, Peter Raven (GMB union official), Colin Amer (representative of the respondent company) and Tracey Cater (member of HR from the respondent company). It is not in dispute that settlement discussions took place at the meeting and the claimant was offered £AAA by the respondent.

14. There is a dispute between the parties about whether the claimant accepted this sum of money and agreed to leave his employment on the same day, and I deal with this in the list of issues below.

15. Following this meeting, on 19 March 2019, the respondent contacted Ms Donovan, conciliator at ACAS informing her that settlement had been agreed. Later that day, the respondent also sent a draft reference to Ms Donovan to send to the claimant. Ms Donovan wrote to the claimant by email on 19 March 2019. This email sets out draft wording of the COT3 agreement and enclosed a draft reference and asked the claimant to let her know as soon as possible whether he agreed the wording. The material part of her email written in bold stated, "I understand that you have agreed a sum subject to COT3 terms with the respondent. The following is the draft COT3 wording, which when you tell me that you agree it, it becomes legally binding."

16. The claimant responded to Ms Donovan by email on 20 March 2019 stating,

    "1. There is a type error in respect of my gender reference (she) in the 6th paragraph needs amendment to: The Claimant warrants that (he)

    2. I am not in agreement with the job description (welder). That should be amended correctly to show (Fabricator Welder).

    Thank you for your time. I will expect an amended hard copy to be sent asap."

17. Ms Donovan, spoke to the claimant by telephone on 20 March 2019. There is no transcript of the conversation between the claimant and Ms Donovan as ACAS have confirmed in correspondence dated 22 October 2021 that they do not hold any data of audio recordings of telephone calls between conciliators and parties. I discuss this further in the list of issues below.

18. On the same day Ms Donovan sent the COT3 agreement with the amendments suggested by the claimant to the claimant and Paul Collins of the respondent by post. The material part of the letter states that,

    "Now that the terms of settlement have been agreed, I am in a position to issue the COT3 form which confirms the compromise has been reached in this case" and that, "payment due in settlement of the claim should be made directly to the claimant and not through ACAS and that from 6 April a party may be liable to a financial penalty not exceeding £5,000 if a payment due under the terms of settlement is not made."

19. The claimant wrote to Mr Paul Collins of the respondent on 21 March 2019. This letter refers to the disciplinary appeal meeting on 19 March 2019 when the claimant was accompanied by Mr Raven of the GMB trades union, and the company HR representative attended with Colin Amer. This states,

    "I have decided to go down the COT3 route……I am in agreement with the company's cash tax-free offers of a settlement of £AAA payable by BACS. I understand that the company will pay me for working time up to 19 March 2019. Any agreement will only be binding following both parties' agreement of any draft and my signed agreement to that ACAS draft, one of which is in the post to me following my discussion on 20 March

2019 with ACAS, V Donovan. I am in the process of ascertaining information which will help make the correct decision to the draught (draft). I understand that I have the right to submit alterations to any draughts (drafts) which could then be agreed by both parties."

20. The claimant wrote to Ms Donovan on 24 March 2019 by email which stated that he spoke with Ms Donovan on 20 March 2019, and he had received the draft paragraphs in the email dated 19 March 2019 but had not received the COT3 agreement in an official format. In this letter, the claimant stated that he was not represented by the GMB trade union legal department as there was a conflict of interest. By this I presume he is referring to Mr Raven. He set out in this email that he had not been provided any financial contribution towards legal costs by the respondent in respect of the COT3 settlement. He states, "the Claimant's counterclaim and amendments to the ACAS Draft agreement are as follows: - ". He then sets outs twelve paragraphs which include seeking an additional sum of £CCC in settlement of his personal injury claim, which had not been compromised previously and was to be paid in addition to £AAA. He also set out amendments to the draft agreement which included removal of certain paragraphs of the agreement, amendments to paragraphs of the agreement, an additional sum for salary from the end of February 2019 to 28 March 2019, an additional paragraph relating to social media references about the claimant and an amendment to the draft job reference for a future potential employer.

21. Ms Donovan wrote to the claimant on 25 March 2019 stating that,

    "I attach a case which has gone to the Court of Appeal which sets out the precedent for COT3 agreements. As you will see the verbal agreement is legally binding. However, if you want to put in writing to me what you would like changed in the Agreement, I will put it to the Respondent and if he is happy to have an amended COT3 then it can be done. If he does not, then this agreement will stand. You will see from the case that you would not be able to take a claim to the Employment Tribunal."

22. The claimant wrote to Ms Donovan on 27 March 2019 by email. The relevant parts of this letter include, "I have formally stated that I would not make a decision to accept this matter in an internet café. I see you have received my letter of rejection dated 24 March 2019 requesting amending of the draft agreement in its present form. I called you in advance to verbally state my rejection of the draft agreement by phone on Monday morning 25 March 2019 after I informed you, we got disconnected." The email also stated that the conciliation number of the draft COT3 agreement was wrong as it omitted the last 2 digits (76) and he made complaints about Ms Donovan's conduct.

23. Ms Donovan wrote to the claimant on 1 April 2019 stating,

    "I am sorry that you are dissatisfied with the amended terms that you accepted on 20 March 2019". She also provided the claimant with details of where he could make a complaint and confirmed that the certificate number as stated would be accepted by the Employment Tribunal.

24. The claimant sent an ET1 on 3 April 2019 and seeks claims for unfair dismissal, disability discrimination and notice pay. In Section 9.2. of the ET1 the claimant has written the following relating to the issues relevant for today's hearing: --

"Claimant's pay was frozen at £10 per hour. The unfavourable treatment continued until RD (claimant) agreed with C & P (respondent) to end employment on 19 March 2019. RD decision at the convening of meeting RD was offered by CA agreement to accept CA cash on termination of contract settlement offer (cash tax free offer of £AAA). Claimant's position stated in letter dated 21 March 2019 to C & P. This decision which had culminated through grievance procedure outcome on 10 .1.19".

25. He also wrote that, "C&P unsigned draft settlement agreement 19.3.2019: repudiatory in wording with detriments, termination of RD contract has amounted to wrongful dismissal" and, "20 March 2019, claimant in receipt of requested hard copy of draft agreement received on 22 March 2019. Claimant issued counterclaim (letter 24 March 2019) with amended agreement wording presented. Claimant's amended draft not having named a professional adviser. Claimant rights is to acquire legal advice in order to recover detriments. C & P refused to accept any amendments. ACAS letter 26 March 2019, 'changes cannot be made'."

26. I have been provided with a COT3 agreement which refers to a settlement being reached on 20 March 2019 as a result of the conciliation action. The key paragraphs state that,

"Without admission of liability the Respondent agrees to pay, and the Claimant agrees to accept the sum of £AAA in full and final settlement of all and any claims he may have regarding rights for which a conciliation officer has a duty and where the rights arise under the Employment Rights Act 1996, and the Equality Act and all rights relating to the Claimant's contract for employment and its termination….

Payment of above sum will be made by BACS transfer to the Claimant within 14 days of the Respondent receiving this agreement form signed by the Claimant.

The agreement for not affect any rights the Claimant may have in relation to industrial / personal injury claims for accrued pension rights. "

27. This agreement is not signed by either party. The claimant received £AAA into his account from the respondent on 19 August 2019.

Relevant Legal Principles

28. Both the Employment Rights Act 1996 ("ERA96") (which governs the unfair dismissal claims) and the Equality Act 2010 ("EqA") (which governs the disability discrimination claims) include provisions which prohibit employers and employees from 'contracting out' of the statutory protections. It renders void any provision in an agreement, whether a contract of employment or not, in so far as it purports to exclude or limit the operation of any provision of the ERA96 / EqA or preclude any person from bringing (or continuing) proceedings under the ERA96/ EqA before an Employment Tribunal.

29. However, there are exceptions to these provisions which permit claims to be compromised with the assistance of ACAS which are set out in section 203(2)(e) ERA96 and s144(4)(a) of the EqA. When an agreement is reached in accordance with those provisions, the tribunal has no jurisdiction to hear, or continue to hear the claim.

30. The Employment Tribunals Act 1996 makes provision for conciliation by ACAS. Section 18A sets out the requirement for a prospective Claimants to contact ACAS before instituting proceedings (i.e., Early conciliation). Section 18C deals with conciliation after institution of proceedings. Subsection (1) provides as follows:

    "Where an application instituting relevant proceedings have 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, or
    (b) if, in the absence of any such request, the conciliation officer considers that the officer could act under this section with a reasonable prospect of success."

31. General contractual principles apply to determining whether there is a binding agreement between the parties. There will be a binding legal agreement in the form the contract if there is an offer made by one party which is accepted by the other, where each party gives some "consideration" or benefit to the other in return for that agreement and where both sides intend to create a legally binding relationship. The terms of the offer and acceptance must be sufficiently clear to mean that the Tribunal can be satisfied that there is indeed an agreement.

32. There is no requirement that the agreement be reduced to writing. As the respondents submit, the practice of recording it in written form in a COT3 form is one which protects all of the parties but is not necessary for the sections to operate. I note, in this regard, the authority of Allma Construction v Bonner UKEATS/0060/09. it was held that the Employment Tribunal had erred in holding that no binding settlement reached where it found as fact that employers' agent had offered to settle the claim at £1,000 and that offer had been accepted by the claimant's solicitor. The authority also considers the extent of involvement required on the part of the ACAS officer to engage s203(2)(e) ERA. The belief of the ACAS officer involved to the effect that the settlement was not binding because he had not spoken directly to both parties was irrelevant, as was the finding that a COT3 settlement would "normally" contain other provisions as well, as were the findings in fact about what passed between the claimant's solicitor and the employers' agent subsequently, after the Claimant had changed his mind as to the acceptability of the offer.

33. Further in Gilbert v Kembridge Fibres, [1984] I.C.R. 188 (1983) it was held, dismissing the appeal, that an oral agreement between parties to settle a dispute with the assistance of a conciliation officer acting under section 134 of the Act of 1978, was enforceable without being put into writing; and that, accordingly, the industrial tribunal's decision that a concluded settlement had been reached notwithstanding that the official document, form COT3, had not been signed by the parties was correct.

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

List of issues

35. The parties had not considered a list of issues prior to the hearing and no witness evidence had been served or bundles agreed. At the outset of the hearing, I spent a considerable time with the parties ascertaining the list of issues that need to be resolved at today's hearing. The following issues were raised with me by the parties and are relevant in determining whether Mr De Souza is permitted to continue with his claim, or whether a valid agreement to settle the claim has been reached which would mean that the Tribunal has no jurisdiction to hear the claim.

The settlement on 19 March 2019 was against ACAS rules?

36. The claimant submitted that an early conciliation certificate was issued on 4 April 2019 after the respondent ended the conciliation process and told ACAS that they did not wish to go through ACAS. The respondents then initiated a negotiation during a disciplinary meeting without any warning to the claimant, which is against ACAS rules and illegal as ACAS does not allow for two periods of negotiation.

37. It is common ground that ACAS was not involved in the settlement negotiation on 19 March 2019. It is further not in dispute that after the disciplinary meeting on 19 March 2019, the respondent contacted ACAS confirming a settlement had been reached and Ms Donovan, conciliator at ACAS, then contacted the claimant by email on 19 March 2019 and 20 March 2019 and by telephone on 20 March 2019.

38. I do not accept the claimant's submissions on this point. The respondent is under no obligation to ensure all negotiations are undertaken through ACAS and the law does not preclude the claimant or respondent contacting ACAS at any time to facilitate a settlement. The ACAS website is clear and states that,

    "You and the claimant can still talk through ACAS up to and during the tribunal process, until a judgment is made. This is known as 'conciliation' (rather than 'early conciliation'). Normally, you'll have the same conciliator you had for early conciliation."

39. Further Section 18 C of the Employment Rights Act 1996 deals with conciliation after institution of proceedings and states that the conciliation officer shall endeavour to promote a settlement if requested to do so by either party and can do so in the absence of a request from either party if the conciliation officer considers that the officer could act with a reasonable prospect of success.

40. In line with this, the respondent contacted Ms Donovan after the meeting on 19 March 2019 informing her of the terms discussed and ACAS then contacted the claimant by email on the same day to establish whether terms were agreed. I note the claimant's letter to Mr Paul Collins of the respondent on 21 March 2019 stated that, "I have decided to go down the COT3 route" and that, "Any agreement will only be binding following both parties' agreement of any draft and my signed agreement to that ACAS draft, one of which is in the post to me following my discussion on 20 March 2019 with ACAS, V Donovan." The claimant did not raise in this correspondence, and I have not seen elsewhere in the documents provided in the bundle that the claimant had any issues with

ACAS not being involved in the meeting on 19 March 2019. The claimant's letter of 21 March 2019 confirms that he was content with liaising with Ms Donovan over the COT3.

41. Further, it was not the claimant's evidence before the Tribunal that he wished all negotiations take place with ACAS with a conciliator present or that he informed the respondent at the meeting on 19 March 2019 that he wished ACAS to be present for negotiations. I am persuaded by the respondent that having made an offer of £BBB prior to the disciplinary meeting (which was rejected by the claimant), the fact that a further offer was made at the disciplinary meeting cannot have been such to ambush the claimant as alleged.

42. The claimant also submits that the COT3 agreement was drafted by the respondent's HR department and not ACAS. The respondent disputes this. I do not find this point relevant to the issues in hand as correspondence from Ms Donovan dated 19 and 20 March 2019 confirm the COT3 agreement was sent by her to the claimant, and this was therefore provided by ACAS. The claimant had the same opportunity to suggest amendments to the COT3 regardless of whom drafted the COT3.

Whether an agreement was reached between the parties on 19 March 2019?

43. It is common ground that the claimant together with a GMB official, Mr Raven, attended a disciplinary appeal meeting on 19 March 2019 with Colin Amer and Tracey Cater (representatives of the respondent company). It is not disputed that the respondent made an improved offer from £BBB to £AAA to resolve the claimant's claims save for any claims relating to his personal injury claim.

44. The claimant's evidence is that he did not accept this offer. He says he told the respondent at the meeting that £AAA was not enough, but he would take legal advice on the matter, and he wished to see the terms in writing. He was not aware whether he would be able to keep his job and he needed advice. He stated that he was expecting that he should receive a minimum of £DDD (approximately double the amount offered) and that this would be reasonable to accept. He confirmed that he did not see a contract on the day. The claimant conceded that he had a trade union representative present at the meeting, but Mr Raven was not legally qualified and following previous dealings with Mr Raven the claimant did not consider him competent in legal issues and he was therefore not confident in his advice. Furthermore, there were issues of a conflict of interest with GMB, where his representative was from as the claimant had previously made a complaint about their conduct. The claimant also stated that he was told to, "take his stuff and go." He did not agree to terminate his employment. He was upset by this. He told the Tribunal that he expected to be given time to consider the respondent's offer and he thought he would be paid whilst he considered their offer and would be paid a fee so that he could seek legal advice.

45. The claimant referred me to his letter of 21 March 2019 to Mr Collins that he said he sent to protect his position and sets out the terms discussed on 19 March 2019. The claimant asserted that this letter provides evidence that he had not accepted the respondent's offer and was taking legal advice on the offer. I set out the contents of this letter below.

"I have decided to go down the COT3 route. I am in agreement with the company's cash tax-free offers of a settlement of £AAA payable by BACS. I understand that the company

will pay me for working time up to 19 March 2019. Any agreement will only be binding following both parties' agreement of any draft and my signed agreement to that ACAS draft, one of which is in the post to me following my discussion on 20 March 2019 with ACAS, V Donovan. I am in the process of ascertaining information which will help make the correct decision to the draught (draft). I understand that I have the right to submit alterations to any draughts (drafts) which could then be agreed by both parties."

46. The respondent relies on the plain reading of the letter of 21 March 2019 and submits that this letter accepts the sum of £AAA subject to the terms in the COT3 agreement. Under cross examination, the respondent sought clarification from the claimant as to where this letter referred to the claimant needing to take legal advice. The claimant referred to the wording "process of ascertaining information" to support this. The respondent disputed that an agreement was not reached on 19 March 2019 and states that the claimant accepted the sum of £AAA at the meeting on 19 March 2019 and to terminate his contract on the same day. He then took his belongings willingly and left the premises. The respondents rely on their conduct after the disciplinary appeal meeting to evidence that a settlement had been reached. The respondent contacted ACAS on the same day confirming settlement had been agreed and ACAS agreed to discuss this with the claimant and prepare a COT3. Later that day, the respondent sent over a draft reference to ACAS. The respondent provided no witness evidence from those attending the meeting.

47. Mr Bryan explained that when a previous offer of £BBB was rejected by the claimant and the increased offer of £AAA included an extra month's pay. The respondent relies on emails between the claimant and Mr Raven, GMB branch secretary, which confirm that a settlement was agreed on 19 March 2019. The respondent referred me to an email from Mr Raven to the claimant dated 17 April 2019 which states that,

    "The company made you an offer and you were obviously not happy. I asked you about me proposing an extra month and you agreed, I checked with you again and you again agreed. Once proposed the company adjourned and, on their return, they also agreed the extra month. When we left the meeting, I again explained that you would not be able to pursue any further issues with the company and again you agreed and confirmed you were happy with this. The company then must have confirmed this with ACAS then a while later I got a call from your company saying you had now changed your mind and I tried to ring you right away to speak to you and tried again a few days later but I had no response from you, so actually, I was concerned as to what had changed. I am happy to speak to you tomorrow if you let me know when best to call."

48. Mr Raven then wrote to the claimant again on 23 April 2019 Stating that, "I explained to you at the time that agreeing to a settlement agreement would mean that you would not be able to pursue any issues against the company, this is standard practice when a settlement agreement is reached. A reference is normally just to confirm your employment and to help you, they may just put that you were made redundant. I never said it was redundancy, I merely said that the agreement was considerably more that if you were to be made redundant."

49. There is a dispute of fact between the claimant and respondent on whether an agreement was reached between them on 19 March 2019. Despite the claimant's explanation, I struggle to read the letter of 21 March 2019 as the claimant suggests. I find that upon

plain reading of the letter, this letter accepts the offer of £AAA and for pay up until 19 March 2019 subject to the claimant agreeing the terms of a draft COT3 agreement. The letter does not refer to legal advice being sought. Even accepting the claimant's explanation, the correct reading of the sentence in its entirety is, "I am in the process of ascertaining information which will help make the correct decision to the draught (draft)." I find this therefore only provides support for the fact that the claimant is potentially seeking legal advice on the drafting of the terms of the COT3 but that the terms have been agreed in line with the second sentence of this letter agreeing a cash tax free offer of £AAA.

50. Although Mr Raven was not called as a witness for his evidence to be examined further, I am persuaded by his emails, written approximately one month after the disciplinary appeal meeting, that set out Mr Raven's recollections of the discussions that took place on 19 March 2019 and his belief that the claimant accepted the sum of £AAA (being £BBB plus one extra month's pay). He does not state that the claimant was seeking legal advice on the offer and sets out the advice that the gave the claimant at the time. These emails are consistent with the plain reading of the claimant's letter dated 21 March 2019.

51. In relation to whether the claimant agreed for his employment to be terminated on 19 March 2019, the letter of 21 March 2019 makes no specific reference to this, but it does state that the claimant expects to be paid up until the date of the disciplinary appeal meeting (19 March 2019), which suggests that he was not expecting to work after this date. The letter does not, contrary to the claimant's evidence, make any suggestion that he is expecting to be paid whilst he considers the offer (and the date that may be) or that he is expecting costs to be paid to him for seeking legal advice. It does not set out that he is angry, aggrieved, or upset for being asked to take his belongings and to leave. At this point the letter was written the claimant had taken his belongings and had not returned to work on Wednesday 20 or Thursday 21 March 2019. The letter does not seek clarification from the respondent as to why the claimant was asked to leave work or refer to whether he is expected to return to work. It is unclear what the claimant was expecting to happen with his employment if, as he says, he elected not to accept the respondent's offer.

52. The respondent sent a draft reference to Ms Donovan on 19 March 2019 and the claimant received this be email on 19 March 2019 indicating that the claimant's employment had been terminated. The claimant's correspondence in response was not that he was shocked to receive a reference as he was expecting to go back to work or that he sought clarification of why this was sent. Instead in his letter dated 24 March 2019 he sought to amend this. The claimant in his ET1 Form also states, "RD (claimant) agreed with C & P (respondent) to end employment on 19 March 2019." I am persuaded and find for the respondent that there was an agreement for the claimant's employment to be terminated on 19 March 2019.

Did the claimant agree terms of settlement with Ms Donovan of ACAS?
Was there an acceptance of the terms in the COT3?
Was the COT3 invalid as it is unsigned?

53. The claimant accepts that he sent an email to Ms Donovan on 20 March 2019 making two amendments to the COT3 document and seeking a hard copy. These amendments

changed the type of work he did from a welder to fabricator welder and reference from "she" to "he." He spoke to Ms Donovan on 20 March 2019, and it is his evidence that he felt that she was trying to push him into accepting the respondent's offer, but he told her that his plan was to review the draft agreement and take legal advice. He disputed that Ms Donovan could say that he made a decision to agree the respondent's offer or the draft COT3. The claimant also submits that the respondent failed to pay the sums due under the COT3 agreement until 19 August 2019, some 5 months after the agreement was reached and if the respondent believed that they had reached an agreement they should have paid this immediately after the meeting. The respondent explained that they were advised by ACAS not to make payment until a signed COT3 had been received but as the dispute was ongoing, they made payment to abate interest.

54. The respondent relied on the response the Tribunal received from ACAS on 10 December 2019 stating that,

    "The Conciliator, Valerie Donovan retired from ACAS in June 2019. I have limited information as ACAS changed computer systems this year and the case concerned is on the old system. The case notes are a brief record of any contact with the parties, and I can refer to them, but no email correspondence is available due to computer changes. The case notes confirm that a COT3 agreement was reached. The conciliator notes confirm a settlement was reached by telephone on 20 March 2019 and the claimant was informed that it was a binding agreement."

55. The respondent also relies on contemporaneous email correspondence from Ms Donovan at the time, namely 25 March 2019 and 1 April 2019 in which she stated that the claimant had accepted amended terms on 20 March 2019 and the verbal agreement is legally binding.

56. In this case I have to decide was there an oral agreement reached through ACAS between the claimant and Ms Donovan. There is a dispute of fact on this point. Ms Donovan has retired from ACAS and there is no witness evidence from her before the Tribunal. The claimant confirmed a conversation took place between himself and Ms Donovan on 20 March 2019, and I have heard that the claimant recollects not agreeing the COT3 or the respondent's offer. I refer to the documents which are helpful in his case.

57. I note that Ms Donovan's letter dated 19 March sending out the draft reference and COT3 stated, "The following is the draft COT3 wording, which when you tell me that you agree it, it becomes legally binding." She subsequently received an email from the claimant on 20 March 2019 amending two terms in the COT3 and spoke to the claimant on the same day. After this, she sent out a letter dated 20 March sending out the COT3 incorporating the amendments from the claimant in the COT3 set out in his email stating, "Now that the terms of settlement have been agreed, I am in a position to issue the COT3 form which confirms the compromise has been reached in this case". As set out in their email, the case notes reviewed by ACAS supports the position that Ms Donovan believed that the claimant had accepted the respondent's offer of £AAA and the terms of the COT3. I accept that Ms Donovan believed this to be the position otherwise Ms Donovan would not have sent out a COT3 to both parties using the wording that she did and referred to above in her email dated 20 March 2019. She also confirmed this in her subsequent correspondence to the claimant on 25 March 2019 and 1 April 2019. She specifically

stated in her email of 1 April that, "I am sorry that you are dissatisfied with the amended terms that you accepted on 20 March 2019".

58. The COT3 form which was sent to both parties on 20 March 2019 appears in the bundle, and I note that the wording of the agreement runs to eight paragraphs, about one page and a half of A4 in total. It is formal in tone, but not unduly complex or legalistic given its purpose. I find that the claimant's email response of 20 March 2019 setting out amendments to the COT3 could be reasonably construed by Ms Donovan as to him agreeing the terms of the respondent's offer and the draft COT3. The claimant was responding to an email which stated that once the claimant told her that he agreed the COT3 it became legally binding. This email does not query the bespoke terms which were relevant to the claimant's case, namely the amount of compensation, that the respondent will provide a reference or that the settlement does not affect any rights the claimant may have in relation to industrial/ personal injury claims or accrued pension rights. The email does not state that the claimant wishes to take legal advice on the revised draft COT3 or suggest in any way that the claimant was still considering whether the bespoke terms, namely the compensation was acceptable. It is unclear to me why the claimant responded so swiftly to Ms Donovan's email if he wished to take some time to consider the offer and to take legal advice. It was open to him to delay agreeing to the settlement, not to respond to any correspondence and inform Ms Donovan of the difficulties he was having.

59. In his letter dated 24 March 2019 to ACAS, the claimant sets out his amendments to the draft COT3. Amongst several other requests, he specifically stated in this letter that he seeks to make a counterclaim, to include an additional sum for his personal injury claim which the respondent's offer specifically excluded from settlement offered on 19 March 2019, an additional sum for salary from the end of February 2019 to 28 March 2019 and his legal costs. I find that the contents of the letter from the claimant dated 21 March 2019 and 24 March 2019 are at odds with each other and not consistent. This shows that something changed between these two dates. In his letter of 24 March 2019, the claimant was not simply reviewing and amending the terms of the draft COT3 but seeking to renegotiate the entire deal and resile from the terms set out in his letter of 21 March 2019. I find that the claimant changed his mind between 21 and 24 March 2019 on the sums on which he wished to settle for and believed that he could use the fact he had not signed the terms of the COT3 to withdraw from the agreement he had entered into.

60. The respondent relies on the on the law established by the Employment Appeal Tribunal in Gilbert v Kembridge Fires Limited 1984 ICR 188 which provides authority that an ACAS conciliated agreement to settle claims for unfair dismissal and discrimination does not need to be in writing. An oral agreement will do. An oral agreement which is evidenced on a COT3 does not need to be signed, though ordinarily it will be. It is therefore not the signature that concludes an agreement in these circumstances but instead an agreement will be binding if an oral agreement is entered by the parties through ACAS conciliation and recorded by the conciliator.

61. I find that there was a genuine, valid and binding agreement reached between the parties as a result of the phone call and email correspondence between Ms Donovan and the claimant on 20 March 2019. This is recorded as such by Ms Donovan, and I agree. Given that there was a valid agreement, I am satisfied that Ms Donovan's involvement in that agreement was more than sufficient to engage the statutory provisions referred to above.

Within the terms of s.203(2)(e) ERA she had "taken action" under s18C Employment Tribunals Act 1996 and within the terms of s.144(4)(a) the agreement had been made with her "assistance".

62. I have had regard to the fact that otherwise valid agreements may be set aside on various grounds, as noted in paragraph 34 above. Even though these arguments were not expressly raised by the claimant, I am conscious that he is a litigant in person and most likely unaware of these legal doctrines. The claimant's assertion that Ms Donovan was pushing him to settle on 20 March 2019 raises a potential argument that he was put under duress to consent to the agreement. To make such a finding is a serious matter and the claimant has not produced any evidence to support such an assertion. The claimant's evidence on this point was not that he settled due to Ms Donovan forcing him to do so but that he did not agree to settle the claim on the terms alleged at all. Further I note in his letter to Ms Donovan dated 27 March 2019, in which he complains about her conduct, he makes no reference to the fact that she was forceful or put him under duress during their discussions. I am not prepared, on the evidence presented, to make such a finding. The claimant did not expressly pursue any argument on any of the other grounds referred to in paragraph 34 above and I did not consider that any such argument could be inferred from the evidence I heard.

63. For the reasons set out above, I find that the settlement is valid, and that the tribunal has no jurisdiction to permit the claim to continue. For the avoidance of doubt and for completeness, to deal with the claimant's application made for a Judgment in default as a result of the respondent's failure to serve an ET3 in time, I find that the respondent made a timely application for an extension of time to serve the ET3 and confirmed it would serve an ET3 if the case proceeds. Given the judgment I have reached, there is no requirement for the respondent to serve an ET3 or for any further case management of the claim and the claim will be dismissed.

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Employment Judge Sekhon
Date: 10 December 2021