EMPLOYMENT TRIBUNALS

Claimant: Ms Brockwell

Respondent: Kent County Council

Heard at : London South Employment Tribunal (by CVP)

On: 1 March 2023

Before: Employment Judge Braganza KC

Appearances:
For the Claimant: In person, assisted by Mrs Baylis
For the Respondent: Mr Gray-Jones, Counsel

PRELIMINARY HEARING

JUDGMENT was delivered orally, with reasons, at the Preliminary Hearing held in public on 1 March 2023. No request for written reasons was made at that time. Judgment was sent out to the parties on 7 March 2023. The Claimant's claim was dismissed for want of jurisdiction as the parties reached a binding agreement of the Claimant's claim on 21 December 2022.

On 14 March 2023 the Claimant emailed the Tribunal that she had been informed by the Employment Appeal Tribunal that she did not have the correct details for her to submit an appeal. Attached to that email was a letter of 14 March 2023 from the Employment Appeal Tribunal that she had not supplied the Tribunal's written reasons of the judgment. On 29 March 2023 written reasons were requested by the Claimant by email. In accordance with rule 62(3) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the written reasons are set out below.

REASONS

Introduction

1. By a claim form received on 5 August 2022 the Claimant brought a claim of unfair dismissal. She was employed from 29 July 2019 initially as a Social Work Assistant

and then as an Early Help Worker at the time that she resigned on 3 March 2022. She claimed that she was constructively dismissed. The Respondent contested the claim. It asserted that the Claimant was offered the opportunity to reconsider her resignation and deal with her concerns through the Respondent's resolution procedure. This was rejected by the Claimant.

The issue at the Preliminary Hearing

2. The issue for the Tribunal at the Preliminary Hearing on 1 March 2023 was set out in the letter from the Tribunal of 17 February 2023. Employment Judge Webster instructed that "*the hearing on 1 March is converted into a 1 day open preliminary hearing to consider whether there has been a binding settlement of the Claimant's claims via an ACAS COT3*".

3. The Respondent's position was that a settlement agreement was reached between the parties on 21 December at 17.04pm. The Claimant disputed this. She maintained that she did not give instructions to her solicitor for an agreement to be concluded and that no COT3 agreement was signed by her. She argued that she should be permitted to proceed with her claim.

The hearing

4. I was provided with a Respondent bundle on the morning of the hearing of 126 pages, a skeleton argument from the Respondent, and three cases. These were *Gilbert v Kembridge Fibres Ltd* [1984] ICR 188; *Freeman v Sovereign Chicken Limited* [1991] ICR 853 and *Allma Construction Ltd v Bonner* [2011] IRLR 204, EAT. I was also provided with a bundle from the Claimant of 8 pages.

5. I heard evidence from Ms Brockwell, who was assisted by Mrs Baylis. Ms Brockwell explained at the outset that she suffered from extreme anxiety and so Mrs Bayliss was there to assist her. I offered Ms Brockwell breaks as and when she needed them and when Mrs Bayliss, understandably, wanted to assist Ms Brockwell, while Ms Brockwell was giving evidence, I reminded Mrs Bayliss that I needed to hear evidence from Ms Brockwell alone. Mrs Bayliss understood this and from that point did not interrupt any further. Mr Gray-Jones, appearing on behalf of the Respondent, assisted with asking Ms Brockwell questions-in-chief, when she outlined her case, and then also cross-examined her. I heard submissions from both Ms Brockwell and Mr Gray-Jones and I am grateful for their assistance.

Background and facts

6. At the time of her claim on 5 August 2022 the Claimant was legally represented. After submitting its grounds resisting the claim on 20 September 2022, on 23 November 2022 the Respondent's solicitor emailed the Claimant's solicitor offering to settle the claim [page 10 of the Respondent bundle].

7. Within that letter the Respondent offered to waive any claim for its costs on a 'drop hands' basis that is that the Claimant withdraw all claims and have the claims

dismissed without the Respondent making any application for an order for its costs to be paid by the Claimant. The offer was to remain open until 14 December 2022. The same day the Respondent forwarded its email to the Claimant to ACAS.

8. On 28 November 2022 the Claimant's solicitor replied to the Respondent and ACAS Conciliator "*I have taken instructions from my client who is willing to accept the below offer. I would be grateful if you could revert back with the COT3 agreement to reflect the same.*" [page 8] The same day the Respondent's solicitor confirmed that he would take on drafting the COT3 [13].

9. On 2 December 2022 the Claimant's solicitor informed the Respondent and ACAS that her colleague would be taking over conduct of the matter [14].

10. On 6 December 2022 the Respondent's solicitor wrote to the Claimant's solicitor and ACAS Conciliator confirming that he was awaiting final instructions on the draft COT3 which he intended to send over that day or Monday [14].

11. On 6 December 2022 in an e-mail headed 'without prejudice' the Respondent's solicitors wrote to ACAS and the Claimant's solicitor setting out "*I attach the draft COT3 agreement for consideration*" [17]. The draft COT3 is at page 19 of the bundle.

12. Clause 6.6 set out

> *"6.6 You agree that we can refer in a reference to a prospective employer to:*
> *• The dates of your employment with us;*
> *• The duties of your role; and*
> *• The fact that you were under disciplinary investigation at the time of your resignation and that any reference can contain our standard disclaimer of liability. You agree that you will only give the following email out as our point of contract for references … and that you will not approach any current or former employee of ours for an employment reference about you."*

13. On 6 December 2022 the ACAS conciliator wrote to the parties asking the Claimant's solicitor to take instructions and get back to him [34]. In an e-mail of 6 December 2022, in reply to both, the Claimant's solicitor wrote that she was taking instructions from the Claimant on the proposed COT3 wording [33].

14. On 15 December 2022 the Respondent emailed both ACAS and the Claimant to ask whether there had been any progress. On 16 December 2022, the Claimant's then solicitor advised that the previous case handler had been due to contact the Claimant but had fallen ill, she would therefore take instructions and revert by close of business on Monday, 19 December.

15. By email of 19 December 2022 to the Respondent and ACAS the Claimant's solicitor confirmed:-

> *"I have taken instruction from my client and although she is in agreement with the large majority of the terms, we would request that the third bullet point from clause 6.6 be removed - so that this clause then reflects that*

a standard factual reference will be provided on request, and there will be no mention of any disciplinary investigation.

If this could be removed then my client would be happy to accept." [43]

16. The Respondent objected to this in the email of 21 December 2022. In response, the same day, the Claimant's solicitor confirmed that she had taken instructions from the Claimant, who was "*not willing to accept the wording as it is"* and "*this matter will proceed to hearing*". [46]

17. It is clear from this sequence of events that the parties had entered into negotiations, reached a provisional agreement, subject to the wording of the COT3, and that at that stage negotiations had broken down because of the point on clause 6.6.

18. There then followed a further e-mail on 21 December from the Respondent's solicitor asking "*What wording would she be prepared to agree to? Given that she has already agreed to this very reference already.*" [47] This was at 16:35.

19. Some 5 minutes later, at 16:40, the Claimant's solicitor replied, to ACAS and the Respondent's solicitor:-

    "*My instructions are that she wanted the 3rd bullet point under 6.6 to be removed. Unless it is, she is not willing to accept the terms. I can understand her position – as it is the reference is pointless to her. She is not asking for much, just a basic factual reference.*" [48]

20. At 17:04, the Respondent, again to both, set out:-

    "*My client agrees to remove the third bullet point under 6.6. I believe that the wording is now agreed and that ACAS can declare a binding agreement.*" [49]

21. The following day, on 22 December, at 12:39, the ACAS Conciliator emailed the Respondent "*There appears to be an issue with the COT 3*". He explained that he had returned to the office and that at 17:10, on 21 December, the Claimant's solicitor had contacted him to "*hold off declaring the agreement to be legally binding*" and at 17:55 there was "*a further email that said her client was currently considering whether to accept the terms or proceed to Tribunal, and that she [the Claimant] wanted the Rep to stress that she does not currently accept the terms. In light of this communication I have not yet notified the ET that settlement has been reached.*" [51]

22. On 22 December 2022 at 15:24 the Claimant's solicitor came off the record as her representative [52].

23. There is a further email on 22 December 2022 at 17:09 from ACAS confirming again that the Tribunal had not been notified that settlement had been reached and recapping the sequence of events. In that email the Conciliator set out "*I have also discussed this matter with a manager at work and we both formed the view that since ACAS did not confirm that a Legally Binding Agreement had been reached before it*

was subsequently retracted (the email exchange occurred in my absence etc) that we do not have a COT3 in place yet.“

24. Meanwhile, on 21 December 22 at 17:32, this is a document in the Claimant's bundle at page 4, the Claimant wrote to her solicitor that she did not want her to advise the courts, ACAS or Respondent of anything as she was deciding whether to represent herself. That was just after the email of 17:04 from the Respondent that an agreement had been reached.

25. Also included in the Claimant’s bundle and relied on by the Claimant in her evidence is the email at 17:10 on 21 December from the Claimant’s solicitor to the ACAS officer asking him to hold off declaring a legally binding agreement and the email of 17:55 on 21 December again confirming that the Claimant was considering whether to accept the terms or proceed to the Tribunal [Claimant bundle page 5].

26. On 23 December 2022 the Respondent’s solicitor emailed ACAS setting out the basis on which a binding agreement had been reached between the parties. There was no further contact between the parties until 13 January 2023 when the Respondent’s solicitors contacted the Claimant, reserving their position as to a binding settlement having been reached and proposing certain dates for the progression of the case [Respondent bundle page 57]. On 26 January 2023 the ACAS conciliator contacted the Respondent advising that the parties agreed COT3 terms and reached a binding agreement on 21 December 2022 [87].

27. On 30 January 2023 the Claimant wrote to the Tribunal and the Respondent that she had not agreed to any COT3 and there was no binding agreement. She asked to go ahead with the hearing. She explained as follows:-

> “*The instruction to my solicitor was that if the third bullet point was remove from clause 6.6 and the other changes made on the annotated copy made, I might be prepared to sign the agreement. I must stress the MIGHT in that sentence (see my email to my representative Appendix A). My main concern at the time was the impact that the COT3 as drafted would have on any future employment and the amount of stress the situation was causing me. I was also under pressure from my solicitor to accept the COT3 as the only option available to me without vast costs and bankruptcy. On taking further advice from another source, I decided that I would rather go to Tribunal to have the case heard as the COT3 was not my only option. Carrying out one of the amendments requested is not an agreement to the terms on my part or an agreement to the COT3 whatever promises my solicitor may have made without my permission. My solicitor stopped being my representative on the 22nd December as I do not think she was representing my best interests and was giving me bad advice.*”

28. In her evidence before the Tribunal, Ms Brockwell was clear that she had not agreed to the terms set out within the COT3 and there was no binding agreement. She said that she felt pressurised by her solicitor and that her solicitor was not acting in her best interests. During the course of the negotiations she had three different solicitors acting for her. She then stopped using her solicitors. She was also unhappy with ACAS and had put in a formal complaint against ACAS.

Relevant law

29. Section 203 of the Employment Rights Act 1996 (ERA 1996) sets out:-

    203 Restrictions on contracting out.

    (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 bringing any proceedings under this Act before an employment tribunal.

    (2) Subsection (1)—

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

30. Section 18C of the Employment Tribunals Act 1996 (ETA 1996) sets out:-

    18C Conciliation after institution of proceedings

    (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—

31. In *Gilbert v Kembridge Fibres Ltd* [1984] ICR 188 the Employment Appeal Tribunal (EAT) held that it was not necessary for a settlement to be in writing. Provided there is clear evidence of an oral agreement between the parties in which a conciliator had exercised his function as an intermediary the agreement was enforceable.

32. In *Allma Construction Ltd v Bonner* [2011] IRLR 204, the EAT held 'taking action', as referred to in section 203 (2) (e), should be given its ordinary meaning so as to cover any action taken by an ACAS officer in relation to the claim. A conciliator's involvement in an individual case need not be particularly extensive for a binding settlement to be reached. Further, a contract is concluded 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 in question, which is then accepted. It does not matter that additional matters could be included in the contract at a later date by way of a further agreement. As to what the 'essentials' of the contract are, that will depend on the circumstances of each case. Where a contract to settle litigation is concerned, 'the essentials' could amount to nothing more than a certain sum of money being paid by the defending party to the pursuing party as the price of bringing the litigation to an end.

33. In *Freeman v Sovereign Chicken Limited* [1991] ICR 853 the EAT held that if a CAB adviser, having been named as a representative of a party, holds him or herself out as having authority to negotiate a settlement on behalf of the client, the other party is entitled to assume that the adviser does in fact have that authority, provided there is no notice to the contrary. The EAT added that where a barrister, a solicitor, or even

a CAB adviser or law centre is involved, the likelihood of disproving their ostensible authority to settle the proceedings is very slim.

Conclusion and analysis

34. There are three issues, I have to decide:

    34.1. Was there a binding agreement reached on 21 December 2022?
    34.2. Had an ACAS conciliation officer taken action in accordance with s203(2)(e) of the ERA 1996 and s18C of ETA 1996?
    34.3. Was the agreement entered into by the Claimant's solicitor with actual or ostensible authority of the Claimant?

35. I have considered the contemporaneous documentary evidence in detail, the oral evidence from Ms Brockwell and the submissions made by the parties. Having regard to the evidence and applying the test of whether, objectively, in all the circumstances, a binding agreement was reached on 21 December 2022, I have decided that there was a binding agreement.

36. This is for the following reasons. First, it is clear from the e-mail exchanges leading up to the final e-mail exchanges on 21 December that the essential parts of the agreement, that is that there would be a 'drop hands' agreement for the Claimant to withdraw her claim and the Respondent not to pursue any application for a costs order against her, was initially reached on 28 November 2022.

37. Second, it is clear from the parties' correspondence that at that stage that was not a concluded agreement in that they then continued negotiations. In fact, there was a breakdown between them on the morning of 21 December, when the Respondent categorically set out that the wording of clause 6.6 could not be deleted. The Claimant categorically replied that in that case she would be proceeding to Tribunal.

38. Third, the Respondent then approached the Claimant to ask what wording she would agree, to which the Claimant made clear that her offer was that she wanted the third bullet point under clause 6.6 removed and unless it was, she would not be willing to accept the terms. That echoed what she previously asked for.

39. There is no further communication in that e-mail and the negotiations up until that point had been conducted by the Claimant's solicitor.

40. The Respondent clearly set out in the e-mail of 21 December at 17:04 that his client agreed to remove the clause 6.6. bullet point. There therefore remained nothing else by way of essentials to the contract that needed to be agreed. In my view, applying the principles set out in *Bonner*, a binding agreement was reached. *Bonner* makes clear that where a party makes an offer to another that is sufficiently definite to indicate an intention to be bound, covering the essentials of the contract in question and it is accepted, a binding agreement is reached.

41. Fourth, considering the background to the e-mail exchanges on 21 December, the final, and only, sticking point was the third bullet point in clause 6.6. That was reiterated in the Claimant's e-mail at 16.40 [48] on 21 December and promptly

confirmed as having been deleted by the e-mail which followed, some 24 minutes later, from the Respondent's solicitor at 17.04 [49].

42. Considering the three issues that I have to decide, I find that there was a binding agreement reached on 21 December 2022. I find, applying the wording of s203 of the ERA 1996 that an ACAS conciliation officer had taken action in accordance with s18C of the ETA 1996 so that the agreement reached was not void, in precluding the Claimant from pursuing her claim before the Tribunal. The third issue is whether the agreement was entered with actual or ostensible authority of the Claimant.

43. Whilst I accept from Ms Brockwell's submissions and her evidence that on the afternoon of 21 December 2022 she instructed her solicitor that she was considering the terms and had not accepted them, which was communicated to ACAS at 17.10 on 21 December, there was nothing highlighted to either ACAS or to the Respondent to suggest that her solicitor, at the relevant time of the Respondent agreeing to remove the third bullet point in clause 6.6 at 17.04, did not have authority to negotiate a settlement on the Claimant's behalf.

44. Whilst I have sympathy with Ms Brockwell and recognize that if the emails to ACAS and the Respondent about her changing her mind had been sent earlier than 17:04, it may have been open to her to have withdrawn the offer that she made, by 17:04 when her only point of contention was resolved, I find that viewing all the relevant circumstances objectively, a binding agreement was reached. That means that the Tribunal does not have jurisdiction to adjudicate this claim.

…………………….
Employment Judge Braganza KC

12 June 2023

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