EMPLOYMENT TRIBUNALS

Claimant: Mr C Phillips

Respondent: Tata Steel UK Limited

JUDGMENT

The proceedings are dismissed following a withdrawal of the claim by the claimant.

REASONS

1. Judgments under Rule 52 of the Employment Tribunals Rules of Procedure ("Rules"), dismissing claims following withdrawal, are usually issued automatically and therefore without written reasons. However, in view of the circumstances of this case, and the fact that a preliminary hearing took place to consider the parties' recent correspondence relating to the withdrawal of the claims, I considered it appropriate to set out in writing the reasons I gave orally at that hearing.

Background

2. The Claimant brought two claims of unfair dismissal against the Respondent on 23 June 2022. The claims were identical, save for the recording of a different registered office for the Respondent, and have been dealt with together at all times.

3. In both claims, Joanne Briscoe, of Waldrons solicitors was recorded as the Claimant's representative.

4. A preliminary hearing was scheduled to take place on 5 April 2023, but, on the day before, 4 April 2023, the Tribunal received emails from ACAS, noting that both claims had been settled. An email was then received by the Tribunal on the evening of 4 April 2023, from the Claimant's solicitor (by this time. Maria Fernandez as Ms Briscoe had left the firm), informing the Tribunal that the claims were being withdrawn, and that the Claimant understood that the claims would now be dismissed pursuant to Rule 52 of the Employment Tribunals Rules of Procedure ("Rules"), confirming that he consented to such dismissals.

5. Earlier on 4 April 2023 however, the Claimant had emailed the Tribunal, at 11:55am, noting that he had only been made aware by his solicitors the day before, i.e. on 3 April 2023, of the preliminary hearing on 5 April, and that he really needed to speak to somebody about the case as "*I have had issues with Waldrons and I need to understand what is actually going on*". That email was not picked up by the Tribunal administration until some time later, but was not an email that could materially have been responded to in any event.

6. The Claimant sent in further emails to the Tribunal on 5 and 6 April 2023 asking for information on the outcome of the preliminary hearing. An email was then sent to him on 6 April 2023, at 11:43am, noting that the Tribunal had received notification of settlement from ACAS on 4 April 2023, and, therefore, that the preliminary hearing had not gone ahead. It was noted that there would be no further correspondence on the matter, as the case was closed.

7. The Claimant wrote further to the Tribunal by email on 11 April 2023. He noted that he wished to dispute the legality of the COT3 form (the form on which the ACAS-conciliated settlement had been confirmed), and asked how he could go about writing to dispute the legality of that document. He then sent a letter attached to an email on 12 April 2023, setting out the chronology of the settlement discussions on 4 April 2023.

8. From that summary, it appeared that the Claimant was informed by his solicitors of a settlement offer on 4 April 2023 at 12:11pm, and was told that he had to make a decision by 2:00pm that day. He confirmed that he accepted the offer, i.e. told his solicitor that he accepted it, at 1:30pm, but did not discuss the terms of any agreement with his solicitor; indeed he was not sent the wording of the agreement until later that day. The solicitor then signed, what was a comprehensively worded COT3 form, on the Claimant's behalf, and it was signed by the Respondent's solicitors on its behalf.

9. Acutely, the Claimant contended that his discussion with his solicitor had been that the agreement would include a commitment to provide a positive reference, which was not included; that it contained errors; and did not include protections for himself, which had been included for the Respondent.

10. The Claimant's email of 11 April 2023 was placed before Employment Judge Brace, who directed that a letter be sent to the parties, noting that, following the withdrawal of the claim it was at an end, but that she had directed that a judgment dismissing the claim should not be issued, because she believed that it would not be in the interests of justice due to the fact that the Claimant had written in disputing the legality of the COT3 form. That letter was sent on 13 April 2023.

11. In relation to the withdrawal of claims and judgments dismissing claims when withdrawn, Rules 51 and 52 provide as follows.

"***51 End of claim***

Where a claimant informs the Tribunal, either in writing or in the course of the hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.

*"**52 Dismissal following withdrawal***

Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless –

(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or

(b) *the Tribunal believes that to issue such a judgment would not be in the interests of justice.*"

12. Further correspondence was then received from both parties, the Claimant by now understandably representing himself. On 18 April 2023, the Respondent's representatives asked for reconsideration of the decision not to issue a dismissal judgment, noting that a valid settlement was entered into between the parties, that the Respondent had complied with its obligations within that agreement, and therefore was entitled to the benefit of the Claimant's obligations, which included the agreement that the claims be withdrawn, and that any issues between the Claimant and his solicitors were not relevant as to the validity of the COT3 and should be addressed elsewhere.

13. The Claimant sent in further letters, broadly repeating the content of his letter of 12 April 2023, but, in addition, noting that the clauses of the agreement were heavily weighted in favour of the Respondent, and included clauses which were against his and his family's human rights. It subsequently transpired that he was referring to the right of freedom of expression in that regard, in light of confidentiality provisions and a clause in which the Claimant confirmed that he would not make disparaging or derogatory comments or statements about the Respondent or its employees.

14. A preliminary hearing was then arranged for 4 July 2023, with notice of it being sent to the parties on 8 June 2023. The wording of the notice was the standard wording used by the Tribunal in relation to case management, i.e. that the claim and response would be discussed, and that orders would be made to prepare the claim for a hearing and to fix a date for that hearing.

15. The Respondent's representatives wrote in, observing that the standard wording had been used, and seeking clarity as to the matters to be discussed at this hearing. An email was then sent to the parties by the Tribunal on 27 June 2023, at the direction of Employment Judge Moore,

noting that the issue regarding the COT3 settlement would be discussed at this hearing, and that any appropriate case management orders would be made along with a listing of any appropriate hearing to determine the issues as clarified. Judge Moore also put forward a preliminary view, which she confirmed did not bind any future judge, that Judge Brace's decision not to issue a judgment dismissing the claim on withdrawal could not be the subject of a reconsideration application because it was not a judgment for the purposes of the Rules.

Preliminary hearing

16. In advance of the hearing I received hearing bundles from both sides, largely containing the COT3 agreement and subsequent correspondence on the Respondent's side, with the Claimant's bundle additionally containing his email communications with Ms Fernandez.

17. During the hearing, the Claimant's wife, as his representative, and also the Claimant himself, put forward arguments as to why they considered that the COT3 agreement was invalid and should effectively be set aside. The essence of the contentions advanced was that Ms Fernandez had not had the authority to agree to the wording used in the COT3 agreement. The Claimant and his wife noted that he had been given little time, i.e. less than two hours, to consider the agreement, and no mention of specific clauses had been made in his discussion with his solicitor. Also, the Claimant noted that he had been clear that he wanted a reference to be provided to him as part of the negotiations, and the COT3 agreement did not include that. It was noted that the Claimant did not understand why the Claimant had not been involved in the negotiations, and that he had not been told that the agreement would be concluded without his approval.

18. It was also contended by the Claimant that the terms of the COT3 agreement were unconscionable, as it made it difficult for the Claimant to talk about the matters leading to the termination of his employment, for example at an interview for a new job. The agreement also put restrictions on what the Claimant's immediate family could say about matters.

19. Ms Connelly, on behalf of the Respondent, noted that the scope of Rule 51 was to bring an end to proceedings once withdrawn by a claimant. She noted that the limited authorities in respect of the setting aside of a COT3 agreement did not involve cases such as this, where claims had been brought to a complete end, but involved stays in proceedings or decisions which impacted on the ability of a claimant to pursue a further claim. She confirmed, however, that the issue underpinning the validity of the COT3 agreement was that of ostensible authority.

20. I explored with the parties, the prospect of considering the matter at this hearing, notwithstanding the wording of the notice of hearing and the wording of the email sent under Judge Moore's direction, noting that it did not appear to me that either side would have anything further to say about the matter at any subsequent hearing. Both parties agreed and I therefore proceeded to consider the matter. I was satisfied that the notice requirements in relation to preliminary hearings set out in Rule 54 did not

apply to the consideration of whether to issue a judgment confirming dismissal on withdrawal.

21. I also noted that my view was the same as Judge Moore's regarding Judge Brace's decision not to issue a judgment dismissing the case on withdrawal, i.e. that it was not capable of being revisited by way of a reconsideration application as reconsiderations under rule 70 are only able to be made in respect of judgments, and Judge Brace's decision did not fall within the definition of judgment set out in the Rules. I therefore approached the hearing on the basis that Judge Brace's order should be viewed as a case management order. Such orders are susceptible of variation, suspension, or of being set aside under Rule 29, which provides that that may happen where it is necessary in the interests of justice, in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made, which had been the case in this case.

22. I noted that Judge Brace's decision had been made when she had very limited information, in fact only the very brief email from the Claimant of 11 April 2023, noting that he wished to dispute the legality of the COT3 form.

23. I took into account the guidance provided by HHJ Hand QC in Serco Limited v Wells (UKEAT/0330/15), that it would only be in the interests of justice to vary, suspend or set aside an earlier case management order where was either a material change of circumstances or a material omission or misstatement or some other substantial reason. In this case, I considered that the significantly expanded explanation from the Claimant, and the correspondence from the Respondent objecting to the decision not to issue a Rule 52 judgment, amounted to a material change of circumstances to those considered by Judge Brace. I therefore concluded that it was appropriate for me to look at the question again and to consider whether or not to issue judgment on withdrawal.

Law

24. The question of ostensible authority, in circumstances. where it was contended that a party's representative lacked authority to enter into an agreement on their behalf, was considered by the Employment Appeal Tribunal ("EAT") in Freeman v Sovereign Chicken Limited [1991] ICR 853. That was in the context of a claimant having been formally represented by an adviser from the Citizens Advice Bureau, who signed the COT3 settlement document on the claimant's behalf, and where the claimant had appealed against the Tribunal's decision to refuse to remove a stay on proceedings, imposed because of the existence of an ostensibly binding agreement not to pursue proceedings.

25. In that case, following a summary of previous cases, Wood J noted, with regard to the question of whether the claimant's representative had had authority to enter into the agreement, the following principles:

(1) Where an agreement is or is alleged to have been entered into prior to the issue of proceedings it is open to a Tribunal to investigate facts relevant to whether a binding settlement agreement existed.

(2) Once an order of the court has been made by consent that type of investigation is no longer relevant.

(3) Once made, in order of the court can only be set aside if the agreement upon which it was based is set aside also, and that can only be done on common law or equitable grounds by separate action in the High Court or a county court.

26. It was noted in that case that the Tribunal had decided that it was not precluded from investigating the authority of the adviser, and the EAT agreed, adding only that it is of vital importance that there should be an end to litigation, and that where a barrister or solicitor is involved, the likelihood of disproving ostensible authority is slim indeed. The EAT then agreed with the Tribunal's reasoning that a solicitor acting for the employee would certainly have had authority to enter into an agreement on their behalf.

27. The Claimant's wife referred me to the EAT decision of Cole v Elders' Voice (UKEAT/0251/19). However, whilst that case confirmed that the validity of a COT3 agreement can be challenged, on the same basis as any other agreement in common law or equity, it dealt with arguments that a COT3 should not be relied on due to arguments about misrepresentation and estoppel arising from alleged misrepresentations by the Respondent in that case; it did not deal with the issue of ostensible authority.

28. In this case, there was no suggestion by, on behalf of, the Claimant that misrepresentations had arisen from the Respondent. It did not seem to me therefore that the Cole case took the Claimant any further in circumstances such as applied in this case, where there was nothing to suggest that the Claimant's solicitor had anything other than complete authority to enter into negotiations with the Respondent via ACAS on his behalf, and then to enter into a COT3 agreement to confirm those arrangements on his behalf.

29. In the circumstances, I concluded that the Claimant's solicitors had ostensible authority to enter into the COT3 agreement, which included an acceptance that the claim would then be dismissed on withdrawal. I therefore concluded that it would be in the interests of justice to issue a judgment dismissing the claims on withdrawal, following the email sent by the Claimant's solicitor, with his ostensible authority, noting that he consented to that. Whilst I appreciate that the Claimant has issues with the representation he received from his solicitor, those are not matters capable of being addressed in the Employment Tribunal, and he will need to pursue them via other means.

Employment Judge S Jenkins
Date: 7 July 2023

JUDGMENT SENT TO THE PARTIES ON 10 July 2023

FOR THE TRIBUNAL OFFICE Mr N Roche