



# EMPLOYMENT TRIBUNALS

## PUBLIC PRELIMINARY HEARING

**Claimant:** Mr M Stephenson

**Respondent:** Next Retail Limited

**Heard at:** North Shields Hearing Centre      **On:** Monday 22 October 2018

**Before:** Employment Judge Johnson (sitting alone)

***Representation:***

**Claimant:** In Person

**Respondent:** Miss J Uppal, solicitor

### JUDGMENT ON PRELIMINARY ISSUES

- 1) The claimant having entered into a binding conciliation contract via ACAS and dated 17 April 2018, the Employment Tribunal does not have jurisdiction to hear the claimants claims of unfair dismissal and unlawful disability discrimination. Those claims are struck out and dismissed.

### REASONS

- 1) This matter came before me this morning by way of a Public Preliminary Hearing to consider whether the claimants complaints of unfair dismissal and unlawful disability discrimination should be struck out and dismissed on the grounds that the claimant had entered into a binding conciliation contract via ACAS on or about 17 April 2018 "in full and final settlement of all and any claims arising from his employment by the respondent or the termination thereof."
- 2) The claimant attended in person and was supported by his wife. The claimant gave evidence under oath and asked questions of Mr Tovey, the ACAS conciliator. The respondent was represented by its solicitor Miss Uppal. Miss Uppal had asked the Employment Tribunal to secure the attendance of Mr Tovey under the terms of a Witness Order dated 12 September 2018. Miss Uppal did not call any other evidence for or on behalf of the respondent. Miss

Uppal had kindly prepared a bundle of documents marked R1, comprising an A4 ring binder containing 32 pages of documents. Both the claimant and Mr Tovey had prepared typed and signed witness statements which were taken as read, subject to cross examination.

- 3) The claimant's employment with the respondent began on 12 March 2004 and ended when he was dismissed on 10 March 2018. The claimant had been employed by the respondent as a loss prevention officer. The claimant sustained an injury at work on 11 July 2017, which has left him with a significant injury to his right ankle. The claimant today confirmed that he was absent from work as a result of that injury from 11 July 2017 until he was dismissed on 10 March 2018. The claimant today told me that he holds the respondent responsible for his injuries. He has taken legal advice and has instructed solicitors to pursue the respondent for damages for personal injury.
- 4) On 28 March 2018 the claimant received what he understood to be his last payslip from the respondent and realised that he had been underpaid by approximately 150 hours for sick pay, in the sum of £1,428.44. The claimant made strenuous efforts to clarify the position with the respondent on 28 March and 10 April 2018. The claimant was unable to obtain a meaningful response from the respondent about his unpaid wages.
- 5) The claimant then commenced the ACAS early conciliation procedure, which is a prerequisite to commencing proceedings in the Employment Tribunal. Mr Tovey from ACAS was appointed to be the conciliator between the claimant and the respondent. Mr Tovey appeared today under the terms of a Witness Order dated 12 September 2018.
- 6) Mr Tovey prepared and signed a witness statement which confirms that he was appointed as the conciliator in the case on 9 April 2018. He first contacted Mr Ian Blackwell, the solicitor for the respondent, explaining his role as the ACAS conciliator and setting out the claimant's position about the unpaid wages. Mr Blackwell indicated that the respondent may be prepared to make an offer in settlement, once the claimant was able to fully quantify his claim. Mr Tovey contacted the claimant on 16 April at 14.32pm and was told by the claimant that he required the sum of £1,428.44, which was his calculation of the unpaid wages. Mr Tovey then spoke to Mr Blackwell again and Mr Blackwell confirmed that the respondent would pay the sum of £1,428.44, less any statutory deductions for income tax and national insurance contributions. Mr Blackwell confirmed that he would prepare a draft wording for a settlement agreement in form COT3 and send it to Mr Tovey for onward transmission to the claimant. The draft COT3 was sent by Mr Blackwell to Mr Tovey at 15.24pm on 16 April.
- 7) Mr Tovey's evidence to the Tribunal was that he then contacted the claimant by telephone at 15.49pm on 16 April and read to him in full the draft COT3 agreement. Mr Tovey's evidence was that at the end of this call, the claimant confirmed that he would accept the offer and its terms. Mr Tovey then explained to the claimant that he would send the draft wording of the COT3

agreement to him by e-mail, so that the claimant could read it and then confirm to Mr Tovey that he accepted the terms. Mr Tovey then sent the draft COT3 agreement by e-mail at 15.54pm. The e-mail read as follows:-

“Dear Mr Stephenson,

Further to our last conversation, please find attached draft terms of settlement from the respondent`s representative for your consideration. If you are not sure of any of the terms of agreement, please give me a call and I will talk you through them, but you may wish to seek independent legal advice. Please let me know if the wording is acceptable. If you would like to discuss any changes to it, please give me call. Please note that you do not need to sign this at this stage as it is a draft agreement. A final version of this wording will be sent to you on an ACAS agreement form COT3, once both parties have come to an agreement on the terms and at which point the four step ACAS COT3 procedure is as follows:-

- (i) Two paper copies of the agreement are sent in the post by ACAS along with a letter explaining the signing process to you (the claimant) for signature.
- (ii) You (the claimant) forward the two signed copies to the respondent`s representative.
- (iii) The respondent`s representative signs the two copies, retaining one copy and sends the other back to you (the claimant).

I look forward to hearing from you.

Andrew Tovey.”

- 8) At 16.04pm the same afternoon Mr Tovey received an e-mail from the claimant which read:-

“I accept the terms of the agreement”  
Mark Stephenson

- 9) The following day at 9.44am, Mr Tovey contacted the respondent and said, that as the claimant had accepted the terms of settlement, the agreement would now be legally binding and that Mr Tovey would be issuing form COT3. At 9.55am the COT3 agreement and COT3 cover letter were both e-mailed to the claimant.
- 10) In his evidence to the Tribunal today, Mr Tovey confirmed that he had no recollection of Mr Stephenson asking him if he could claim any further money or compensation for the delay by the respondent in paying Mr Stephenson his wages. Mr Tovey`s evidence was that, had such a discussion taken place, he was likely to have remembered it and made a note of it. Mr Tovey confirmed that he had no such note. Mr Tovey confirmed under cross examination from Mr Stephenson that he had read the entire agreement to Mr Stephenson over the telephone. Mr Tovey said, “I am one hundred per cent certain I read the

entire agreement to Mr Stephenson". Mr Tovey said in evidence that he particularly remembered this COT3 agreement, because it was unusual for the respondent's representative to prepare and send a COT3 agreement at the same as it made its offer. Mr Tovey specifically confirmed that the claimant never raised in any conversation the possibility of him bringing any other claims for either unfair dismissal or unlawful disability discrimination, against the respondent. Mr Tovey confirmed that, had the claimant done so, then he would have told the claimant that no further claims could be brought except any relating to damages for personal injury or relating to his pension. Mr Tovey confirmed that after the COT3 was sent to the claimant to sign, he did not contact Mr Tovey again to challenge any part of it or ask for any further explanations.

- 11) Mr Stephenson's evidence to the Tribunal was that he could not recall Mr Tovey reading the document to him over the telephone. Mr Stephenson said in evidence that he understood the COT3 agreement to mean that he was settling only the claims relating to his unpaid wages. Mr Stephenson said that that the time he signed the COT3 agreement, he did not even know that he could bring a claim for either unfair dismissal or unlawful disability discrimination. He only found out about the possibility of such claims on or about 17 April 2018 when he visited a local Job Centre.
- 12) Mr Stephenson confirmed that he had first taken legal advice about his personal injury claim in or about November 2017 and that his claim was ongoing via the respondent's insurers. Mr Stephenson said that, had he known that he may have been able to bring a claim for either unfair dismissal or unlawful disability discrimination, then he would not have signed the COT3 agreement.
- 13) Mr Stephenson confirmed that he accepted that, should he succeed in his personal injury, claim then he is likely to receive from the respondent compensation for loss of earnings and general damages for pain, suffering and inconvenience.
- 14) Mr Stephenson accepted that conversations with Mr Tovey had been fairly brief and that when the COT3 document had been sent to him he had "only skimmed through it" before sending it back, some eight minutes after he had received it.
- 15) The claimant's case, put simply, that he was not properly advised by Mr Tovey as to the consequences of him signing the COT3 agreement. Mr Stephenson's case before me today was that Mr Tovey should have advised him that by signing the COT3 agreement, he would be prevented from bringing any further claims against the respondent, including claims for unfair dismissal and unlawful disability discrimination. In other words, it is not what Mr Tovey said to him, but what Mr Tovey did not say to him.
- 16) It was clear from his evidence, that Mr Tovey had made accurate notes of the various telephone discussions between himself, Mr Stephenson and Mr Blackwell. These conversations were noted with regard to their precise time,

together with a summary of what was said. The Tribunal found that Mr Tovey's version of these discussions was more likely to be correct.

- 17) The Tribunal enquired of Mr Stephenson as to what had been his role when he was employed by the respondent. Mr Stephenson confirmed that his role as loss prevention officer involved the prevention of theft from the store. This would include observing and apprehending shop-lifters and potential shop-lifters and in some circumstances assisting in the arrest of offenders and the processing of complaints to the Courts. Mr Stephenson confirmed that this role would involve an element of understanding and completing paperwork. I am satisfied that Mr Stephenson was capable of understanding the wording of the COT3 agreement which was both read to him by Mr Tovey and then sent to him for consideration. The wording of the COT3 agreement is not particularly detailed or complex. The document clearly states that the sum of £1,428.44 was being paid "in full and final settlement of all and any claims arising from his employment by the respondent or the termination thereof." Mr Stephenson was unable to provide an explanation as to why that extract was in any way misleading or difficult to understand.
- 18) I am satisfied that the claimant was not misled by anything said or done by Mr Tovey or by anything said or done by the respondent.
- 19) Section 18 A of the Employment Tribunals Act 1996 states that the conciliation officer shall during the prescribed period endeavour to promote a settlement between the persons who are the parties to the proceedings. Section 18 (7) states that anything communicated to a conciliation officer in connection with the performance of his functions shall not be admissible in evidence in any proceedings before an Employment Tribunal except with the consent of the person who communicated to that office.
- 20) The Employment Appeal Tribunal in **Clark and others -v- Redcar and Cleveland Borough Council (2006 ICI897)** applied the following principles from a number of cases relating to ACAS conciliation officers and settlements:-
  - (i) ACAS officers have no responsibility to see that the terms of an agreement are fair on the employee.
  - (ii) The expression "promote a settlement" demands a liberal construction covering whatever action by way of such promotion is applicable in the circumstances of the particular case.
  - (iii) ACAS officers must never advise as to the merits of the case.
  - (iv) It is not for the Tribunal to consider whether the ACAS officer correctly interpreted his or her duties – it is enough that the officer intended and purported to act under Section 18
  - (v) If an officer was to act in bad faith or adopt unfair methods when promoting a settlement, the agreement **might** be set aside and might not operate as a bar to proceedings.
- 21) Mr Stephenson's case is that the terms of the agreement are unfair upon him, because they prevent him from advancing further claims for unfair dismissal

and unlawful disability discrimination. Mr Stephenson asserts that Mr Tovey should have advised him that he had the right to bring such claims and that by signing the COT3 agreement he would be prevented from doing so.

- 22) The Tribunal was not persuaded by Mr Stephenson's submissions on these points. The principles set out above, when applied to the facts of the claimant's case, are sufficient to persuade me that Mr Tovey has acted entirely fairly and appropriately in his dealings with both the claimant and the respondent. It was not his role to see that the terms of agreement were fair on Mr Stephenson, nor was it his role to advise the claimant as to the merits of his case. The claimant had already obtained legal advice relating to another set of proceedings between himself and the respondent and the Tribunal is satisfied that it was up to the claimant to obtain such advice as he deemed appropriate with regard to his Employment Tribunal claim.
- 23) The Tribunal is satisfied the COT3 agreement signed by the claimant on 17 April is binding upon him. In those circumstances, the claimant has settled all claims with the respondent arising out of his employment and his termination. The Employment Tribunal does not have jurisdiction to hear the claimant's complaints of unfair dismissal and unlawful disability discrimination. Those claims are dismissed.

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**Employment Judge Johnson**

**Date 29 October 2018**

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