



EMPLOYMENT TRIBUNALS

Claimant: Ms K Steele

Respondent: Salford Royal NHS Foundation Trust

Heard at: Manchester

On: 29 August 2019

Before: Regional Employment Judge Parkin

REPRESENTATION:

Claimant: In person

Respondent: Mr J Boyd, Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that this Tribunal no longer has jurisdiction over the claims pursued in these proceedings since a binding settlement was reached in respect of all claims on 8 July 2019, when the settlement was communicated to the respondent by the ACAS conciliator, Mr Simon Ball.

REASONS

The claim and response

1. By her claim presented on 13 April 2019, the claimant claimed variously unfair dismissal, protected disclosure detriment and disability discrimination in respect of her employment as an Operating Department Practitioner with the respondent which terminated on 6 November 2018. The respondent resisted all those claims in its ET3 response presented on 4 June 2019, although it wrongly sought to pursue a counterclaim (or Employer's Contract Claim) since there was initially no employee's breach of contract claim.

2. Prior to commencement of proceedings there had been early conciliation, with notification by the claimant to ACAS on 18 January 2019 and an EC certificate provided on 4 March 2019.

The Preliminary Issues

3. As a result of the content of the response, actively contending that all claims were out of time, the case management preliminary hearing originally listed was converted to a public preliminary hearing to consider whether the Tribunal had jurisdiction to deal with the complaints having regard to the relevant time limits. Close to the date of hearing, by a letter from the Tribunal dated 28 August 2019, the Regional Judge directed that an additional issue relating to the Tribunal's jurisdiction to hear the claims be considered as well. That resulted from the respondent's letter dated 6 August 2019, copied to the claimant, whereby the respondent contended that a binding settlement had been reached following discussions via ACAS such that the claims could no longer proceed. The Regional Judge directed that the notice of the hearing for the additional issue be shortened, since the claimant had been aware of the application by the respondent for some weeks.

The Preliminary Hearing

4. At the hearing, the respondent was represented by counsel and provided a detailed bundle of documents, with a supporting skeleton argument and first instance decision in Case No 2401706/2017.

5. The claimant represented herself and provided additional documents which were added to the bundle, namely a copy of the email she received from the ACAS conciliator, Mr Ball, on 3 July 2019, together with her reply by email to him that same day (76A) and the further email from Mr Ball to her dated 5 August 2019 relating to detailed terms of settlement for a COT3 agreement (83A). She expanded upon her mental health difficulties and likely diagnosis of Autism Spectrum Disorder. During the hearing, since she was distressed at times the Tribunal took breaks and gave her the opportunity to speak with her stepfather who was in attendance and to settle herself for the task and ordeal of presenting her case to the Tribunal. Having been given the opportunity to give evidence orally, the claimant elected to do so such that the Tribunal had first-hand evidence especially as to the circumstances of her communications with the ACAS conciliator on 3 July 2019. Later in the hearing, the judgment having been announced, the claimant left the hearing room during the delivery of reasons but her stepfather remained to hear them.

The facts

6. From the oral and documentary evidence, the Tribunal made the following key findings of fact.

7. After early conciliation before the commencement of proceedings, there was significant input from the same ACAS conciliator, Mr Simon Ball and again after the commencement of proceedings. With the conciliator's involvement there was accordingly a sequence of offer and counter-offer and revised offer between the

parties, and prior to July 2018 it was an element of the settlement discussions that a senior representative from the respondent Trust be made available for a one-to-one meeting with the claimant.

8. The Tribunal accepted that the claimant has experienced mental health issues over a period of time and has a potential diagnosis that she is on the autism spectrum with an autistic spectrum disorder. Albeit she has obtained further agency work since termination of employment with the respondent, she established that on a number of occasions she needed to decline engagements through her own short-term ill health.

9. Whilst in May 2019 an element within the proposed settlements included a meeting with Mr Sumner, a senior Financial Manager removed from the line managers who had dealt with the claimant during her employment, the respondent's representative in an email to the conciliator, Mr Ball, dated 2 July 2019 (75) made what was described as:

“...an improved and final settlement proposal...The Trust are prepared to write off all debt owed by Ms Steele, following termination of her employment (comprising approximately £2,700 as discussed previously) in return for Ms Steele withdrawing her Tribunal claim.

In respect of the other aspects of the previous agreement, Mr Sumner is about to leave the Trust's employment so it will now be very difficult to arrange for a meeting and I don't think that can be offered anymore as part of the deal.

Could you take claimant's instructions on this improved settlement proposal?”

10. In essence, the respondent was foregoing a demand for repayment of just over £1,000 in respect of damage to a lease car it contended the claimant owed, but was seeking to remove the meeting with the senior manager from the proposed terms.

11. On 3 July 2019 Mr Ball conveyed the revised offer to the claimant at 9.20am in these terms (76A):

“The respondent has informed that they expect your claims to be struck out due to being out of time. They however want to make the following offer, please note that there is no longer any provision for a meeting between yourself and Trust management.

The Trust are prepared to write off all debt owed by Ms Steele, following termination of her employment (comprising approx. £2,700, as discussed previously) in return for Ms Steele withdrawing her Tribunal claim.”

12. The claimant replied to Mr Ball very promptly on 3 July 2019 at 11.19am (76A):

“I’ll accept that Simon. I just want to be done with it all now. It’s still affecting my mental health and I need to do what is best for me at this time. I know I will possibly regret not following through with this and fighting ‘goliath’ but I’ve had enough now. Thank you for all your help and advice.”

13. Mr Ball then emailed the respondent on 8 July 2019 at 9.53am:

“The claimant accepts your offer. Please send me a COT3.” (77)

14. The respondent provided the conciliator, Mr Ball, with copies of a fully itemised draft COT3 agreement by email dated 10 July 2019 and followed up with the conciliator by email dated 22 July 2019:

“Could you let me know where we are up to with concluding this settlement?”

15. The respondent’s representative himself contacted the claimant on 26 July 2019 at 2.42pm receiving a reply from the claimant at 8.24pm, and the conciliator, Mr Ball, provided these to the claimant by email dated 5 August 2019 (83A):

“Please review the attached proposal, if you accept the terms please confirm that you do so by replying to this email or phoning me. Should you do so the terms will be legally binding on both parties. You do not need to sign anything at this stage, the agreement will be sent to you from ACAS to sign and send to the employer.”

By this time, there were revised itemised terms of settlement being offered to the claimant as part of the COT3 documentation.

16. That resulted in an email dated 6 August 2019 from the conciliator to the respondent’s representative:

“The claimant now tells me she does not want to settle at all.” (83v).

Consequently, no COT3 documentation was ever signed.

The parties’ cases

17. The respondent’s submissions are fully set out in its skeleton argument, with the addition that the respondent urged that the claimant’s own evidence could not establish that she lacked legal capacity to reach an agreement. It was contended that her email back to the conciliator, Mr Ball, on 3 July 2019 demonstrated insight into her own position.

18. The claimant did not make additional representations but her oral evidence enabled her case to be fully understood by the Tribunal. She suggested that firstly she was not in a proper mental condition or frame of mind to consider legal documents and agreements on 3 July when she was off sick from work, and furthermore that she understood from the conciliator’s email dated 5 August 2019 that a legally binding agreement would only be reached if she agreed to the terms of settlement being proposed at that stage.

The Law

19. To those facts as found by the Tribunal, it applies the statutory provisions under section 203 of the Employment Rights Act 1996, in respect of the unfair dismissal and protected disclosure claims, and section 144 of the Equality Act 2010 in respect of the disability discrimination claims. The Tribunal considered and applied the guidance in *Allma Construction Ltd v Bonner* Appeal No. UKEATS/0060/09/BI, which deals with Section 203 ERA.

20. Insofar as there is a difference in terminology between the Acts since the 1996 Act allows an exception to the restriction on contracting out from contractual provisions excluding the operation of employment protections “where a conciliation officer has taken action”, in contrast to the 2010 Act equivalent provision which makes an exception where a contract which settles a complaint is made with the assistance of a conciliation officer, the Tribunal applied the wording of the 2010 Act. In essence, this is a distinction without a difference since the Tribunal would not deny a claimant the opportunity of pursuing a claim unless it was satisfied that there had been a binding contract of settlement reached between the parties.

21. As to legal capacity, which was specifically raised by the claimant at the hearing, for the Tribunal to determine that a party lacked legal capacity it would need to have compelling evidence, possibly including strong medical evidence, as to the party’s lack of mental capacity at the time. The Tribunal considers that it is entitled to have regard of the full context and surrounding circumstances in order to determine whether a party has sufficient capacity to recognise the issues and weigh things up so as to make reasoned decision.

Conclusion

22. The Tribunal stood back and reached its objective decision in these circumstances which are highly emotive for the claimant. It was satisfied fully on the balance of probabilities that the parties reached a binding agreement on 8 July 2019 when the ACAS conciliator, Mr Ball, reported back to the respondent’s representative the claimant’s acceptance of the respondent’s revised offer. The Tribunal found that Mr Ball had accurately summarised that revised offer in his email dated 3 July 2019 to the claimant, which expressly included the note that there was no longer any provision for a meeting between the claimant and Trust management. The revised offer included an improvement so far as the claimant was concerned in writing off an additional £1,000 from what had earlier been discussed. It is important to consider fully the claimant’s response, set within the context of the claimant’s absence from work that day which enabled her to deal very promptly with the ACAS email.

“I’ll accept that Simon. I just want to be done with it all now. It’s still affecting my mental health and I need to do what is best for me at this time. I know I will possibly regret not following through with this and fighting ‘goliath’ but I’ve had enough now.”

23. The claimant’s email shows considerable insight and, more than that, in the light of what happened afterwards, very considerable foresight. It does not betray

any lack of understanding on her part but a very clear understanding of the mental health difficulties she recounted to the Tribunal which she attributes to or at least blames exacerbation of upon the respondent. The email sets out a very clear stance which is not uncommonly set out to the Tribunal where parties, especially claimants, seek to withdraw from engagement with Tribunal proceedings to protect themselves and their mental health. The courteous conclusion to her email: "Thank you for all your help and advice" includes a finality of approach which does show and record an understanding of the binding nature of the agreement reached. As the EAT authority of **Allma** shows, the agreement does not need to set out all the minutiae of the terms of settlement, but to record the core basis that the parties have agreed a resolution.

24. Whilst the Tribunal has great sympathy for the claimant, bearing in mind her situation and understandable concern for her mental health wellbeing, it nonetheless concludes that she acted carefully and rationally in accepting the revised offer and informing the conciliator of this, even though (after quite a period of time) she expressed second thoughts about this. In her oral evidence she used the expression "having reflected on it, days, weeks down the line..." which shows that the retraction from the point of agreement took time and much fuller consideration. That might indeed have resulted in a variation of the agreement or to the final detailed terms of settlement, but did not undermine the fact of agreement already achieved.

25. In all the circumstances, the ACAS conciliator having fully completed his statutory duties successfully in these proceedings, the Tribunal concludes that it simply lacks jurisdiction to proceed with each of the claims made in the claimant's ET1 claim form. Those claims are dismissed for lack of jurisdiction.

Regional Employment Judge Parkin

Date: 2 September 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

17 September 2019

FOR THE TRIBUNAL OFFICE

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