



EMPLOYMENT TRIBUNALS

PUBLIC PRELIMINARY HEARING

Claimant: Mr M Shabir

Respondent: P&B Kennedy Holdings Limited

HELD by CVP **ON:** 28 February 2022 and 9 June 2022

BEFORE: Employment Judge J M Wade

REPRESENTATION:

Claimant: In person

Respondent: Mr John Kennedy

JUDGMENT

The claimant withdrew his claim following a binding ACAS conciliated settlement; accordingly, the claim is dismissed.

REASONS

Introduction

1. The matter before me today, adjourned from 28 February is to decide whether a binding settlement agreement was reached through ACAS between these parties and, in any event, whether the claimant withdrew his claims.
2. In determining this case, I have adopted the following principles of law (see Cole v Elders' Voice [2020] 11 WLUK 432 Griffiths J) :
 - i. Where a dispute arises as to the validity of an ACAS COT 3 agreement, the Tribunal can decide it;
 - ii. An ACAS COT 3 can be challenged on the same basis as any other contract (duress, misrepresentation and so on);
 - iii. In deciding such disputes, the Tribunal is entitled to have regard to otherwise privileged and without prejudice discussions.

3. The claimant had originally presented complaints of unfair and wrongful dismissal, represented by solicitors. He did not have a file of documents prepared for the hearing on 28 February other than the Tribunal file, but I was provided with exchanges between the parties and ACAS. I also heard oral evidence from the claimant himself and from Mr Kennedy on behalf of the respondent.
4. I adjourned the February hearing in circumstances where the claimant alleged he had not agreed to settlement during a conversation with ACAS on 12 January 2022. That was in direct conflict with an email that the ACAS officer had sent to Mr Kennedy. I considered it in the interests of justice to have further information from the ACAS officer and considered with the parties whether an Order for information from a third party would suffice. The claimant made representations to apply for the ACAS officer to be the subject of a Witness Order. He had been told by the ACAS manager handling his complaint that the ACAS officer would not attend this hearing unless ordered to do so. It would have been helpful had he applied for the ACAS officer to attend on 28 February, but out of an abundance of caution I decided to adjourn the hearing for the purpose of hearing from the ACAS officer, and issued a witness order accordingly. Today was that adjourned hearing.
5. The claimant had sent in, at the last minute yesterday, a number of documents on which he wished to rely today. Most were not relevant to the questions I have to decide (relating to the underlying disputes) but he did provide transcripts of two calls with the ACAS officer. When I enquired how he had come to have such transcripts (which, had they been available or been made known earlier may have resulted in the ACAS officer attendance being unnecessary). He explained that some time ago an arrangement was put in place for all telephone calls to his house to be recorded because of his mental health. He could therefore obtain transcripts of those calls. Neither the ACAS officer, nor the respondent, objected to those transcripts being before me. The ACAS officer was happy to accept them as accurate, save for those matters where they were noted as unclear. She had not remembered, nor noted in her contemporaneous case notes, all parts of the calls, but she conceded events were, as the transcripts relayed.
6. These findings are made on the basis of the evidence heard on the last occasion, and today from the ACAS officer and the transcripts. As for the claimant's dealings with his solicitor, where these are corroborated by ACAS or otherwise I have made findings about them; where matters are asserted on the basis of the claimant's oral evidence alone, I have proceeded on the basis that they are true. The claimant may pursue matters in regards to his solicitor's conduct in a different way, and as I have not had any balancing evidence, for example the solicitor's file notes and so on, I have described these matters as allegations (albeit for these purposes I accept them as true). All findings as to the time of email communications are subject to a margin of error due to delays in email send/receive functions – but the time when emails have been received is not in doubt.
7. It is clear that today and in February, the claimant feels a profound sense of having been wronged, which he set out again in an email at 7.07 am this morning which I reproduce in full below so that I can address the points he makes:

“Dear Judge In Case

I am writing this letter regarding the appeal to look at the employment tribunal case today to see if a agreement was reached unfairly.

I have spoken yesterday with someone called Lisa and explained that there was some paperwork I would like the Court to consider in the decision making today of the case.

This paperwork has been submitted through already.

It confirms that I was not aware of no agreements being made until one day before my hearing.

I was being forced to accept a out of Court offer and things were left for me to consider.

The acas representative had confirmed that the Court was closed and she will speak to the Employment Tribunal the following morning to see if the case was still proceed or not.

She helped draft the email that I explained was set to send in my drafts.

This email had been sent in error.

Previous emails were to stop the solicitor trying to have the money paid directly to him as this was not out agreement.

I was forced to except the offer or attend Court myself.

I decided to consider my options and however did express this to the Court about being blackmailed and cohearsed im to excepting the out of Court settlement.

The Court refused to adjourn my case on the 12th of Janurary 2022 for the hearing on the 13th Janurary 2022.

This left me further vunerable as everything was explained to the Court.

Furthermore on the 13th Janurary in the morning I was clear that I would still attend the hearing and did so however no other party attended the live Hearing and I was told the hearing was not going ahead.

Acas has failed me throughout, they havnt kept me informed of the discussions between the employer and them and my Solicitor.

I had always wanted a fair hearing to take place and have never asked for offers to be put forward for a out of Court settlement.

I have not been kept informed and involved as I should have done which has led to this situation with my case.

I have suffered with mental health throughout, i have been left without any income and havnt been able to sorce employment as of a result of the mistreatment suffered by my employer.

The employer has never provided me with a fair investigation as promised throughout and the reference proposed out of Court is not truthfull.

Nor does the evidence submitted to the court in form of statements truthfull at all regarding me personally or what had been expressed to the Judge on the previous hearing.

A copy has been sent for you to view.

I would appreciate that the case be allowed to follow a fair process and for my claim to be heard as fair as possible in the near future.

8. To summarise the claimant's position, he says:
 - i. The Cot 3 agreement should be set aside because it was arrived at unfairly, and by duress at the time;
 - ii. The withdrawal was a mistake;
 - iii. His solicitor was not acting on his instructions, nor communicating with him, and he did not seek settlement;
 - iv. ACAS has failed him by not informing him of discussions;
 - v. The Tribunal should have postponed the case (and this was part of the duress);
9. The respondent's position was that an agreement had been reached, and the claimant had accepted that agreement, twice.

Findings of fact

10. The claimant commenced ACAS conciliation on 16 July 2021 and was issued a certificate on 25 August 2021. The claimant was then represented by a firm of solicitors. His pleading alleged that he was dismissed with immediate effect on 25 March 2021, but by reason of the notification of dismissal going to him by email he had not in fact seen it until 7 July 2021. There was a preliminary issue of fact in the case as to the effective date of termination and, consequently, whether the claim was presented in time. The claimant had not commenced ACAS conciliation within the three month time limit in respect of his unfair and wrongful dismissal claims. His claim was presented on 17 September 2021 by solicitors acting for him and it was provided with standard Orders and a one day hearing was arranged to take place by CVP on **Friday 13 January 2022**.
11. In accordance with the standard Orders the claimant's solicitor had served a schedule of loss soon after commencement. The parties had then undertaken disclosure and exchanged witness statements. On 11 January 2022 the claimant's solicitor served an updated schedule of loss in preparation for the hearing. Discussions took place with the ACAS officer, the claimant's solicitor and Mr Kennedy, on or around Monday 9 January to Thursday 12 January - a typical course of discussions in which negotiating parties had both sought to agree a figure agreeable to each of them through ACAS.
12. The claimant alleged that on 12 February his solicitor telephoned him to tell him that a settlement agreement had been reached. He alleged that before that, his solicitor had not informed him that any settlement discussions were taking place. He alleged that his solicitor informed him of the terms of the settlement agreement and said that if he did not want to go ahead with the settlement, the solicitor would not represent him.

13. An email to the ACAS officer from the claimant's solicitor recorded that the solicitor had spoken to his client and terms could be agreed at £7500 plus a reference. The claimant said the call with his solicitor that took place around lunchtime on 12 January 2022 and that reflects the timing of the solicitor's communication to ACAS.
14. The cover email explained that the settlement monies were to be paid to the solicitor's account. The claimant, when he became aware, objected to this. He had fallen into dispute with his solicitor because he had wanted to submit a further witness statement in the case challenging the respondent's case, and his solicitor, he alleges, advised him it would not be accepted by the Tribunal. He contacted the Tribunal the same day and sought a postponement on that basis. The claimant said this in an email at 15:27:

"I have had the paperwork served with the Christmas and New Year period from the employers. I have urgently needed to provide more paperwork in return regarding my claim for a fair employment claim to proceed.

The solicitor I have used is stating that you will not expect more paperwork in time for tomorrow. I have also been told by the solicitor he is not prepared to represent me tomorrow and wants to forcibly make me accept an offer put through the employers. If I don't accept the offer he has stated he will not represent me tomorrow. I have sought another solicitor for this matter as this behaviour is unacceptable to be happening and for me to be somewhat blackmailed in accepting an offer one day before by force.

I would appreciate a short adjournment could be allowed so that the relevant paperwork could be supplied to form a fair hearing to go forward in light of this matter ... I am deeply concerned that this would be a great injustice to the case if still proceeded with tomorrow."

15. That email was not copied to the respondent by the claimant.
16. Pausing there, it is not uncommon in client retainer agreements for solicitors to provide that if a client chooses not to take the solicitor's advice on any matter, the solicitor can terminate the retainer. It is also not unusual for solicitors or other advisers to secure a settlement offer which the client chooses to reject, resulting in the retainer being ended. A party will then appear subsequently as a litigant in person at the hearing. It is highly undesirable that such discussions and terminations happen the day before a hearing is due to take place, but it is not entirely unknown.
17. At around 15.30 the ACAS officer sent to the respondent, marked Without Prejudice and subject to agreed terms, a draft COT3 settlement agreement instructing that it was a draft only and she sought the wording to be used for the reference. The ACAS officer said that once she had both parties' agreement on the terms to confirm the COT3 to be binding, then she would send out a version for signature. She said "**the COT3 does not need to be signed to be legally binding.**"
18. Mr Kennedy confirmed his happiness with the terms at 16:07 and attached an agreed reference in the following terms and sent that to ACAS:

"To whom it may concern

Mohammed Shabir was employed as a night healthcare worker from 15 October 2016 to 25 March 2021. He was a reliable member of the care team and left due to personal reasons."

19. At 16:34 the claimant sent an email to the ACAS officer and to the respondent which was not marked without prejudice or otherwise as follows:

"I am writing this email to confirm acceptance of the offer made today of £7,500 in settlement for the Employment Tribunal claim listed tomorrow. I have copied in ACAS to this email also as well as Hearncliffe Care Home and Leeds Employment Tribunal. Please can the payment be raised directly to MYSELF ONLY as per my acceptance of this offer regarding my claim. Please pay me as below".

20. This email was not sent in error and the claimant did not say it was. He does say that it was sent, in effect, under duress – the strain of having to attend a hearing having fallen out with this solicitor. The claimant went on to set out his address and bank details. Then he said:

"Please can you also forward me a reference as promised. If you require any further assistance please email me or alternatively contact me."

21. At around 16.35 the claimant rang the ACAS officer, explained the dispute with his solicitor and the ACAS officer sought written confirmation that she could deal direct with the claimant. The transcript is as follows:

"Mohammed Shabir: Send this line to you now, just to confirm this.

Gosha Jagielska: Yeah. I need to know, because now I've received a confirmation from employment tribunal that there has [been some communications with them]. Now what is it that you have sent to them?

Mohammed Shabir: Basically, I sent, you know I were telling you that the employers sent some statement and things like that, basically before Christmas. Do you know, as part of the claim? They produced statement and some evidence.

Gosha Jagielska: Yeah, they have. Yeah.

Mohammed Shabir: Do you know that evidence and that statement, I disagreed with a lot of what [John Kennedy] put on that statement and I had done a statement with regards to his statement, in response. Because of Christmas and New Year, I was unable to speak to the solicitor I appointed, and I only managed to speak to him today. He was saying, well the employment tribunal won't accept that statement now, or any further paperwork.

So, all I did is, I asked if the employment tribunal case could be adjourned and if it could have been adjourned then fine, but they are saying they couldn't adjourn it, so that's why they looked at me with just, oh well, I've accepted the offer what they put forward.

Gosha Jagielska: Okay, so when you wrote to the employment tribunal, did you say that your solicitor is no longer representing you? [

Mohammed Shabir: Yeah, I basically told them that he won't be dealing with it anymore because the thing is, he refused to send that paperwork and I expressed that to them, that obviously if I don't have the paperwork, it jeopardises me then. So basically...

Gosha Jagielska: So, you actually said to the – I need to know [straight] whether you actually said to the employment tribunal that your solicitor is no longer representing you.

Mohammed Shabir: Well, I didn't say he's not representing me, but I said that he's advised that he can't send any paperwork today and that the court won't accept it. So, I was saying to the court, based on what he's advised me, is it possible you can adjourn the case and they said, they would get a judge to consider it. But the judge has come back and said that, no, he won't consider an adjournment.

Gosha Jagielska: Yeah. So, Mohammed, have you spoken to your solicitor to tell them that they are no longer representing you [in this matter].

Mohammed Shabir: I have, yeah.

Gosha Jagielska: You have actually told them this?

Mohammed Shabir: I have, yeah.

Gosha Jagielska: Okay, do you have that in writing, that you've informed them?

Mohammed Shabir: Yes, I've got an email.

Gosha Jagielska: Okay, would you be able to send me an email, copying that email that you sent to your solicitor telling them that they no longer represent you, to me. So, I need – because I need to have confirmation that they no longer are dealing with this case on your behalf, because otherwise it's just not going to be agreed and the hearing is tomorrow. We've left everything to the very last minute, I'm not going to be able to get hold of the employment tribunal now to let them know that the hearing is not going ahead. So, we need to act very quickly now to have the result if you don't to go to court tomorrow.

Mohammed Shabir: Yeah, what's your email address, it's [unclear], isn't it?

Gosha Jagielska: Yes, so it's... Mohammed

Shabir: [Unclear].

Gosha Jagielska: Yeah. [Unclear] that you sent it then and you need to quote the reference number, which is 180...

Mohammed Shabir: 490321.

Gosha Jagielska: 0321. [Unclear] in the subject line, okay. So, I need a confirmation from you that your solicitor is no longer representing you.

Mohammed Shabir: Yeah, I've just sent it now. See if you've got it there. I've already drafted that one that you wanted me to send to the employment tribunal, but I hadn't your terms, so I didn't know when you were ready me to send it.

Gosha Jagielska: Don't send it just yet.

Mohammed Shabir: It's ready anyway. It's already written up.

Gosha Jagielska: Okay. That's good. Okay. So, can you – right, I need to wait for the email to come through, okay. As soon as I have that email, I will send you the details then of the agreement. But can you keep your phone on, because if there's any issues, I wanted to ring you,

is that okay? Because otherwise – what time was your hearing tomorrow, Mohammed, do you remember?

Mohammed Shabir: I think it was saying about 10:00, but again he never advised me anything because he decided to do it through the computer, I'm not that good in technology, so I'm going to get my brother to help me set it all up. But he said that they were meant to send a link from the tribunal, but then he was saying they still hadn't even sent the link today, right up until sort of now.

Gosha Jagielska: Okay. 10:00 tomorrow, right. Look the [unclear] might have some time in the morning, if this goes through tonight, I hope they will have some time in the morning to get this sorted before the hearing. Okay. All right. Well, let me see if this email has come through, okay. We'll see what that is and then I'll give you a call as soon as I have that. Is that okay?

Mohammed Shabir: Yeah, I have literally sent it through, it should be there. It's saying to me it's sent.

Gosha Jagielska: I know, but it takes a minute for...

Mohammed Shabir: Well, my phone's on anyway.

Gosha Jagielska: Okay, let me just have a – [unclear] – [reading email to self]. Okay. Right. Let me have a quick think about this, okay and I'll give you a call in the next five minutes or so.

Mohammed Shabir: No problem.

Gosha Jagielska: Okay.

Mohammed Shabir: Thank you, thanks.

Gosha Jagielska: Thanks.

Mohammed Shabir: Bye.”

22. The key parts of that conversation confirm that: 1) the claimant had explained to the ACAS officer the circumstances of him having accepted settlement terms – namely if the Tribunal had granted a postponement application, he may not have done; 2) that he had already drafted an email (in all likelihood, the withdrawal), but was not told not to send it yet; and 3) that the ACAS officer was trying to assist to have matters resolved before the hearing, but had said she would not be able to contact the Tribunal until the next day.

23. As to the claimant's postponement application, the Employment Judge had observed that as it appeared to contain privileged matters it would not therefore be copied to the respondent; but he directed that the hearing should go ahead and refused the application for postponement. That was communicated to the parties at 16.38 on 12 January, at the time when the claimant was speaking to the ACAS officer, and it features in their conversation.

24. At around 5.05 pm the claimant called the ACAS officer again:

“Gosha Jagielska: Good afternoon, Gosha, speaking.

Mohammed Shabir: Hiya, Gosha, [unclear] I've realised what – you've just got sent an email now to yourself and [unclear] and stuff, confirming that he's not acting himself.

Gosha Jagielska: Yeah. So, thanks for that. What I'll do now Mohammed, I'll send you for the agreement, okay. Read through it and I'll send you the [unclear], is that okay.

Mohammed Shabir: Yeah, but [unclear] I can look at the full version anytime, can't I?

Gosha Jagielska: **Well, no, because I need to have a confirmation that you're definitely agreeing before I send [unclear] today, because obviously of the hearing tomorrow.**

Mohammed Shabir: Yeah, but do I need to print it and sign it and scan it back, or do I just write an email back on this.

Gosha Jagielska: Well, you're just going to have to write me an email, actually agreeing – I'll do it now actually, while I have you on the phone.

Mohammed Shabir: Yeah, I can do it, because I've got my other phone there anyway, so I can do it whilst I'm on the phone.

Gosha Jagielska: Yeah, if you don't mind, yeah, that might be [unclear] if we know [unclear] receiving the [unclear]document...

Mohammed Shabir: Sorry, Gosha, anyway, but things have just been left last minute.

Gosha Jagielska: Yeah, no, that's okay, it's obviously [unclear]...

Mohammed Shabir: I think it's with Christmas and New Year as well, it hasn't helped.

Gosha Jagielska: It didn't help, no, because obviously there were times there that no one was actively doing things. So do you know the draft [terms]. Okay, let me put this in there. I don't know whether you wanted to read it and call me, or do you want me to go through it as we are on the phone.

Mohammed Shabir: No, that's fine, I'll just read it on here.

Gosha Jagielska: Yeah, okay. I can't find it, [unclear] everything, you can't find when you need, can you. Here we are. Sorry, I do need to send you a proper email as well, so you'll get that.

Mohammed Shabir: [Unclear].

Gosha Jagielska: [Unclear]. So, the attachment is going to you now. Okay, so you should...

Mohammed Shabir: [Unclear] now, [unclear]. Yeah, I've got it now. Okay.

Gosha Jagielska: I'll stay on the phone, so you have a look obviously.

Mohammed Shabir: [Unclear]. So, is it as an attachment, yeah, it is?

Gosha Jagielska: At the bottom, yeah.

Mohammed Shabir: [Unclear – reading document]. **Yeah, that's fine. So, is that just the reference, at the bottom?**

Gosha Jagielska: Yeah, yeah.

Mohammed Shabir: Very basic, isn't it, but yeah, it's fine. No problem.

Gosha Jagielska: Yeah, it is basic, but I think [unclear] and entails, doesn't it, really.

Mohammed Shabir: **Yeah, that's fine.** Will that be a separate reference, just to ask you because you know better, or will I always have to show this tribunal letter?

Gosha Jagielska: Only no, just the reference. So when you are contacting employers and you want to [unclear] reference, which is what they're going to see, there's not going to be mention of any agreements or anything whatsoever.

Mohammed Shabir: Right.

Gosha Jagielska: Just the reference that you've been employed by that...

Mohammed Shabir: Right. **Okay then, no problem.**

Gosha Jagielska: Yeah, okay. So, you have [unclear] [agree] on these terms.

Mohammed Shabir: **Yeah.**

Gosha Jagielska: **Okay.** What I'll do then, I'll send you a confirmation email that you have agreed to this, and I'll send the same email to the respondents, saying that everything has been agreed. I will then send you a final version of the agreement for you to sign and you can do that in the morning, tomorrow and you can sign it on your phone, and I'll send you instructions on how to do it, okay?

Mohammed Shabir: Right, okay. If not, my brother will print it off and I'll scan it back on.

Gosha Jagielska: Yeah, but you can sign it on the phone as well, so it's fairly straightforward to do it if you have a smartphone.

Mohammed Shabir: Yeah, [that's what I've got].

Gosha Jagielska: **I will write to the independent tribunal to tell them that it's withdrawn, I will get in contact with them tomorrow as well. I would need you to write to them straightaway now.**

Mohammed Shabir: I have got that in the draft, so do you want me to do...

Gosha Jagielska: Yeah.

Mohammed Shabir: ...that now?

Gosha Jagielska: Please do, yeah. If you can do that straightaway.

Mohammed Shabir: Then when they're already aware anyway, [John Kennedy and stuff], but could you remind them obviously how they're meant to be paying it.

Gosha Jagielska: Yes. So, now nothing is going to go [unclear], it's just going to go straight to you and, I will let John know that obviously [this is] where he needs to be paying the money.

Mohammed Shabir: Right, okay then. Yeah, I'll get that – this is, sorry, the draft – if you've got two minutes, so I could just – I've just put, dear sir/madam, this is confirmation for the Leeds Employment Tribunal that I am withdrawing my claim against my former employee P & B Kennedy Holdings Limited, listed for tomorrow, 13/01/2022. As we have agreed that they are paying me £7,500 to settle the claim as of today's offer, put forward by them. I have agreed and asked them to forward me the payment directly to my home or my bank account, as the details have been provided. Many thanks.
Mohammed Shabir. Claimant. At the bottom.

Gosha Jagielska: Yeah, they don't need to know that because of they claim, they're not going to be interested in how much they are paying you and what the details are. You just need to let them know that input your claim number, so put the 1804903 number in there, so they know which claim you're referring to as well.

Mohammed Shabir: So just take that bit out?

Gosha Jagielska: Yeah, take that bit out and just put, to let you know claim number blah, blah, blah, has been withdrawn or I'm withdrawing my claim [unclear]...

Mohammed Shabir: Should I just put, as we have agreed that they are paying me a settlement figure, is that better?

Gosha Jagielska: Yeah.

Mohammed Shabir: Good, all right. [Unclear]. Sorry for asking you to do this and [unclear], I just thought...

Gosha Jagielska: **I'd rather have you on the phone doing this, so we both know that everything is settled.**

Mohammed Shabir: I've edited that paragraph. I've just put, as we have agreed that they are paying me a settlement for the claim as of today's offer put forward by them. I have agreed and asked them to forward me the payment directly to my home...

Gosha Jagielska: Yeah, you can take that bit out as well, they're not going to need that. Yeah.

Mohammed Shabir: Right, okay. No problem. Right, so I've just left it, put forward by them. Many thanks. Mohammed Shabir and then claimant at the bottom.

Gosha Jagielska: Just the claim number.

Mohammed Shabir: Case number is in the reference, subject thing.

Gosha Jagielska: Lovely.

Mohammed Shabir: **So, shall I just put all three of you in that then, is that fine?**

Gosha Jagielska: Yeah, yeah.

Mohammed Shabir: Okay,.."

25. At 17:15, during the above call, the claimant's solicitor had sent to the Tribunal copied to the respondent litigant in person Mr Kennedy, an email confirming that he was no longer representing the claimant and that the link for the CVP hearing the next day should be sent to him direct. This forms part of the discussion above.
26. It is also clear, in that exchange, that the claimant had a withdrawal letter drafted in his drafts folder, and that he further discussed the wording with the ACAS officer and she gave him advice as to the matters to include (or not). It is also very clear, however, that the claimant agreed the terms and knew that he was sending a final withdrawal (which he had previously been asked not to send yet).
27. The COT 3 terms were sent to the claimant during that call under cover of an email which said as follows:

Without Prejudice and Subject to Agreed Terms

Hi Mohammed,

Please find attached a draft proposal for wording with a view to reaching a formal agreement via ACAS.

Please do not sign this version, it is a draft only. Acas settlements become legally binding when the terms are agreed by the parties, which is before the formal paperwork is sent out.

Please read the terms and let me know if you approve the wording. If you require amendments, please make them in a different colour font or by using track changes and return the document to me.

*Once we have both parties' agreement on the wording of the terms, I will confirm the COT3 to be legally binding and will issue the final version of the COT3 for signatures, this is only so that both parties have signed copies of what they have agreed. **The COT3 does not need to be signed to be legally binding.***

It is essential that you are entirely content with the terms before I make it binding as it cannot be changed after this point.

Feel free to call me if you need to discuss any of the above.

I look forward to hearing from you.

Kind Regards,

28. It was clear during the call that the ACAS officer said to the claimant that he needed to read them then, and not the next day, because his agreement was required before she could confirm settlement.

29. The attached terms were:

DRAFT COT3 TERMS

Shabir

-vs-

P&B Kennedy Holdings Limited

Employment Tribunal Case No. 1804903/21

Claimant: Mohammed Shabir

Respondent: P&B Kennedy Holdings Limited

We the undersigned hereby agree:

1. The Respondent agrees to pay and the Claimant agrees to accept the sum of £7,500 (seven thousand five hundred pounds only) ("The settlement sum"), free from deductions for tax and National Insurance, to be paid 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, under the case number of 1804903/21.
2. The above sum shall be paid no later than the 14th day following receipt by the Respondent or their representative of this agreement duly signed by or on behalf of the Claimant.
3. The Claimant will write to the Employment Tribunal withdrawing the Claimant's Employment Tribunal Claim against the Respondent under case number 1804903/21. The Claimant and the Respondent acknowledge that the proceedings covered by this settlement will be dismissed following its withdrawal by the Claimant in accordance with Rule 52 (Schedule 1) of the

Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

4. The Respondent agrees to provide the Claimant with a reference in the terms attached (**ATTACHEMENT 1**) and shall provide such a reference in respect of any written application. In the event of any verbal request, the Respondent undertakes to provide only such information as is contained in the agreed reference
5. This agreement does not affect any rights the Claimant may have in relation to industrial/personal injury claims or accrued pension rights.
6. The Claimant warrants that he is not aware as at the date of this settlement of any condition which could give rise to a claim for personal injury against the Respondent.

[Attachment 1: Reference wording]

To whom it may concern

Mohammed Shabir was employed as a Night Health Care Worker from 15th October 2016 to 25th March 2021. He was a reliable member of the care team and left due to personal reasons.

30. At 17.28 the Tribunal, ACAS and the respondent received the following email from the claimant:
*“Dear Sir/Madam
This is confirmation for the Leeds Employment Tribunal that I am withdrawing my claim against my former employer P.B Kennedy Holdings Limited listed for tomorrow 13th January 2022.
As we have agreed that they are paying me a settlement for the claim as of today’s offer put forward by them.”*
31. The ACAS officer then did contact the Employment Tribunal sending an email at 17:54 in the usual format with the subject heading Full Settlement at ACAS, the case number and the parties, jurisdiction, conciliator’s names and comments as follows:
“Case settled via ACAS COT3 agreement. Preliminary hearing was due on 13 January 2022 at 10am.”
32. In fact, it was a final hearing that was due to take place at 10am the next day but there was a preliminary time point to address.
33. She also contacted the respondent and provided the claimant’s payment details.

34. At 7.40am the next morning the claimant contacted the Tribunal and Mr Kennedy and ACAS to confirm that he would be attending the court hearing by video link without his solicitor again alleging blackmail and he said this:

"I am not happy with the settlement offered by the employer for £7,500 and withdraw from accepting the offer as I feel it is not enough for all I have suffered." He went on "I will be seeking a tribunal claim to be either considered for a short adjournment if possible if not I will proceed today if I have been refused adjournment. I have an alternative solicitor that is ready to act on my behalf."

35. That correspondence was referred to a judge. The claimant did join a CVP link at which a judge encouraged him to contact the administration because the case has been withdrawn and the respondent had not attended. The parties were told by letter that morning that the hearing listed for that day would not now proceed, the Employment Judge directing that the claim having been withdrawn the case comes to an end under Rule 51. The claimant had also telephoned the Tribunal that day and explained that he did not mean to send the withdrawal of the claim, that it was supposed to be in his draft box, and he gave the same explanation in an email at 11:27 that morning saying:

"I'm writing with regards to the email you received regarding withdrawal and acceptance of the claim about the claim out of court from my email address. This was email written by the support of ACAS on the phone and was saved in my drafts folder. It had been sent in error as acceptance after the court had closed. ACAS said they would be in touch with you this morning with regards to whether the case is still going to proceed. ACAS were aware I was suffering blackmail by a solicitor ..."

36. In his evidence in February the claimant also said he believed he had placed the email in his drafts email folder, because the ACAS officer had told him that she would not be able to contact the Tribunal to let the Tribunal know that the case had settled before this evening as it was already too late.

37. The claimant asked for the matter to be considered again. An Employment Judge then directed this preliminary hearing.

The Law

38. The Tribunal's rules relevantly provide:

39. "51 End of claim

Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim or part of it, is withdrawn, the claim or part comes to an end...

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 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 the withdrawal a wish to reserve the right to bring such further claim and the Tribunal is satisfied that there would be legitimate reason for doing so.."

40. It is a principle of law that a withdrawal must be clear, unequivocal and unambiguous. If it is not, a Tribunal can make enquiries to ensure that ending the proceedings was intended at the time.

41. Sections 18A to C of the Employment Tribunals Act provide for ACAS conciliation officers to promote settlements between parties in employment tribunals. Relevantly: (2) ...the conciliation officer may in particular...seek to promote agreement between them as to a sum by way of compensation to be paid by the employer to the complainant.. and (3) ...”settlement means a settlement that brings proceedings to an end without them being determined by an employment tribunal”.
42. Section 19A provides enforcement rights for ACAS conciliated agreements (Cot 3s) and for the provision by an ACAS officer of a certificate stating that settlement has been reached in the case ((1)(a)(ii)).
43. There are very limited obligations on ACAS officers in carrying out their duties under Section 18 A to C, and much less that the Tribunal can properly examine. For example, they are certainly not required to give advice on the merits of any proposed settlement, nor to ensure fairness to both sides.
44. The common law grounds for an agreement to be voidable (capable of being set aside) include a material misrepresentation, a mistake, a lack of capacity, or duress. Duress means, in effect, that there is no real alternative available.

Conclusions

45. In February I had found the claimant’s evidence confusing. I did not consider his interpretation of the chain of events, that there was no binding settlement or that he did not mean to send the withdrawal email at 17.28, likely. It was, though, out of an abundance of caution that I considered it was in the interests of justice that the ACAS officer be heard, in circumstances where the claimant said the sending of the withdrawal email was a mistake, the ACAS certificate was wrong, and there was no true agreement.
46. Today has confirmed my original impression. It is convenient to address the last two of the claimant’s points first.

His solicitor was not acting on his instructions, nor communicating with him, and he did not seek settlement; and ACAS has failed him by not informing him of discussions.

47. Whether the claimant’s solicitor acted improperly or negligently is not a matter for this Tribunal and I have not had sight of communications between the claimant and his solicitor. I do note orders had been observed on the claimant’s behalf, and the case was properly ready for hearing. The solicitor cannot be criticised in that respect. The claimant can pursue his complaints against his solicitor in another way, but others were entitled to take it as read that the solicitor was acting on his instructions and properly communicating with him. In any event, in relation to the matters before me, the events before his direct communications with ACAS are largely background and part of the factual matrix in which the final negotiations took place; they explain why the solicitor did not continue to act and why the claimant found himself concluding his own settlement so late in the day. It is instructive that the claimant did not say to ACAS, either in writing or in the two calls for which we have transcripts, that he did not want to settle his case.
48. As to whether an ACAS officer has any duty to check with litigants whether their advisers are acting properly or observing their duties to their clients, there is no such duty. Plainly, in this case, the ACAS officer acted entirely properly in seeking confirmation that the solicitor was no longer acting, before she communicated directly with the claimant. Once she had that, she acted promptly to conclude a conciliated settlement, but with due regard to the claimant’s new needs as a litigant in person. She held him off from sending a premature withdrawal, and she gave

advice and reassurance about the reference; she insisted that he read the agreement and confirmed his agreement, before agreement could be declared and certified by her. To the extent that the claimant says the agreement must be set aside because “ACAS failed him”, this is not sustainable on their exchanges before me today, having also heard from the officer. Equally, to say those two conversations amounted to duress from the ACAS officer, that is plainly wrong. The claimant had a real alternative, which was to say he did not wish to settle his case and would go ahead the next day.

49. I have no doubt, having heard from the officer, that had he said he was unsure, or wanted more time to think about matters, or believed his circumstances merited a higher sum in settlement, she would have discussed that with him. He did not give her those indications, but simply that he “had agreed” to settlement. He had also communicated that in writing prior to their conversation, and there was nothing about his communications with her to indicate he lacked capacity or was not acting freely.
50. There are also two more parts of the factual matrix in which the claimant placed great store. Firstly he is right that the ACAS officer told him in the first conversation that she would not be able to contact the Tribunal that afternoon, given how late it was. This, he said, supports his assertion that he had no intention of agreeing, or sending a withdrawal that day. There are two points: firstly, in that first conversation it is clear the claimant already knew about the need for a withdrawal letter – he must therefore have been forwarded an earlier version, or been told of the requirement, by his solicitor. So much for his solicitor not communicating with him.
51. Secondly, in the second conversation it is abundantly clear that the officer will try to contact the Tribunal that night, settlement having been agreed. In the first conversation she was expressing her legitimate fear and belief. She was quick to concede she had not remembered the first representation, but it was not a misrepresentation putting the claimant under duress; and it was superseded by the second conversation. She was also clear that the claimant needed to send his withdrawal there and then.

Whether the Tribunal’s decision not to postpone amounted to duress

52. The Tribunal’s decision gave the claimant the option of attending at the hearing and pursuing his case as a litigant in person, as the respondent did. The refusal of the application was not the decision he wanted, but it was clear he had a choice, to go ahead, knowing that there was an offer to settle his case. He could have chosen the former. This was not duress, in my judgment, such as to deprive the claimant of his will.

The Cot 3 agreement should be set aside because it was arrived at unfairly (and by duress);

The withdrawal was a mistake;

53. The claimant gave two different reasons for wanting to reinstate this case. The first is at 7:40am on 13 January when he explained he was not happy with the settlement offer and wished to withdraw from accepting it, because it was insufficient recompense. That suggests he knew he had accepted it but did not understand that his acceptance had bound him. Later, having spoken to Tribunal staff he set out the email expressing that the withdrawal of the claim was a mistake, having been saved in his drafts folder and sent in error. These two reasons are not consistent.

54. The claimant was unhappy with his solicitor because of the further evidence issue; and he was unhappy that the solicitor had directed payment to the solicitor's account, all the more so because he was unhappy with the advice received. He sought to change the payment arrangement, and he achieved that. He also communicated an unequivocal acceptance of all settlement terms before his solicitor had notified the Tribunal he was no longer acting, and before he had seen the reference. That communication was seen by the ACAS officer and she sought clarification. She also ensured that the wording of a reference was before the claimant before she confirmed his agreement to settle directly. I find that the sending of the withdrawal, after that agreement communicated by the claimant in the telephone call, was not a mistake. He had already confirmed his agreement and he knew that he must send it, indeed it is likely he pressed the send button while still talking to the ACAS officer. It adds nothing to the chain of events that he discussed the wording with her – he had already drafted it before the first call with her. That does not corroborate that the sending was a mistake. If the Tribunal was in any doubt, the call transcripts confirm that both he and the ACAS officer knew, at the end of the second call, that he would send the withdrawal and the case was at an end. There was no discussion of a pause, or a wish for a delay to think about things, quite the contrary – the claimant was clear he had accepted settlement, and that he would send the withdrawal.
55. In my judgment there was no mistake; rather, the next morning having slept on matters, or perhaps having spoken to others, the claimant had changed his mind and wished he had not settled; this is not unusual, and he has sought to undo that settlement. Over time, his reasons and reflections on matters have developed, and his sense of injustice at the original dismissal has expanded. In these circumstances that is not surprising, but the lens of hindsight is no reason or basis to criticise an ACAS officer doing their best, an employer negotiating in good faith, a solicitor who had no doubt done work on the case but had lost his fee, and an Employment Judge refusing a short notice postponement request for good reason.
56. His final point is overarching unfairness in settlement, or for me perhaps, that the interests of justice are not served by finding there was a settlement. The difficulty with fairness or unfairness in settlement is that it is entirely subjective and not a basis on which I, or anyone else, could interfere. Even if the claimant says that this settlement was agreed to by him in circumstances where he felt blackmailed and let down by his solicitor, and would have preferred a hearing, that is not necessarily unfair, and it is certainly not duress, misrepresentation, lack of capacity, or any other basis to set it aside. The claimant had a choice. It is clear that there was a financial offer maintained by the employer to settle the case with a reference, and that offer was accepted by the claimant and the contract concluded under the privilege of without prejudice communications. The agreement was communicated to the Tribunal and to the other party by the ACAS officer. The terms of that contract are set out in the written terms sent to both parties, which confirm that they do not need to be signed to be binding. It is also clear that his subsequent withdrawal is entirely consistent with their conversation. It is also clear to me that the claimant fully had his wits about him, his free will if you like, because he was able to arrange things such that payment would be made direct to his bank account, achieving his aim to deprive the solicitor, with whom he was dissatisfied, of a fee.
57. Having reviewed matters as I have, and understanding that the claimant's position is that even if these proceedings are at an end through withdrawal, he would wish to revive them for the reasons discussed, it is convenient if I also give judgment

dismissing the claims to bring finality for everyone. The Tribunal Rules provide that a dismissal on withdrawal judgment must be given unless the interests of justice are against it. An unequivocal withdrawal has been given. I am satisfied that at the time it was sent it was such an unequivocal withdrawal. There are no reasons in the interests of justice not to give a dismissal judgment. The claim must properly be dismissed given that any lack of clarity about the withdrawal has been resolved by these hearings. These proceedings are at an end.

58. I note that the claimant indicated he would seek to challenge this judgment when it was given extempore, and so I have endeavoured to provide the written reasons in full, and immediately, albeit corrected to include expressly the relevant law and the full texts of the transcripts. To the extent there are any errors or inelegance, on this occasion the parties are best served by speed.

Employment Judge JM Wade

Date 14 June 2022