EMPLOYMENT TRIBUNALS

Claimant: Miss G Alampo

Respondent: Salford Royal NHS Foundation Trust

HELD AT: Manchester **ON:** 5 December 2017

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Ms L Gould, Counsel

JUDGMENT

The Tribunal ceased to have jurisdiction over the complaints pursued in these proceedings at 11.15am on 10 October 2017 when the parties entered into a binding agreement, reached after a conciliation officer had taken action under section 18C Employment Tribunals Act 1996 and with the assistance of that conciliation officer, in which the claimant agreed to refrain from continuing these proceedings. The claim is dismissed and the final hearing previously listed for 9-12 January 2018 is cancelled.

REASONS

Introduction

1. This was a preliminary hearing convened to determine the respondent's application based on the proposition that the parties had reached a binding agreement to resolve the proceedings and therefore that the Employment Tribunal had no jurisdiction over them.

2. The respondent was represented by Ms Gould of counsel. Helpfully Ms Gould had prepared a written skeleton argument accompanied by copies of the relevant authorities. The respondent had also prepared a bundle of documents which ran to 99 pages. Any reference to page numbers in that bundle will be preceded by the letter "R".

3. The claimant represented herself. She had made her position on this issue clear in an email to the Tribunal of 23 October 2017. She also prepared a written summary dated 5 December 2017. In addition the claimant had prepared her own bundle of documents which ran to over 100 pages. Any references to documents from the claimant's bundle will be prefaced by the letter "C".

4. There was no dispute between the parties as to the material facts. They were evident from the emails produced by each side. No oral evidence was taken. In particular, the respondent's bundle contained copies of all the emails passing between the two representatives at the relevant time. I asked the claimant to indicate if she considered there were any communications missing from that bundle, but she did not identify any. Her own bundle was concerned primarily with communications between herself and her representative.

The Proceedings So Far

5. Following a period of early conciliation between 19 January and 5 March 2017, the claimant began these proceedings by presenting her claim form on 24 March 2017. In brief, the claim form said that she was employed by the respondent as a staff nurse and that she had raised a number of concerns about health and safety issues which had been ignored, and which had resulted in detrimental treatment of her. She claimed that these amounted to protected disclosures under Part IVA Employment Rights Act 1996 ("the ERA"), and that she had been subjected to a number of detriments by reason of those disclosures contrary to section 47B ERA. In addition she complained that she was a disabled person by reason of anxiety and depression, and brought complaints of direct disability discrimination, discrimination arising from disability and of a breach of the duty to make reasonable adjustments contrary to the Equality Act 2010 ("the EQA").

6. The response form of 27 April 2017 defended the proceedings, denying any unlawful treatment of the claimant. The respondent did not admit that any protected disclosures had been made or that the claimant had been treated detrimentally as a consequence of any such disclosures. It denied that she was a disabled person or that there had been any contravention of the EQA.

7. The case was considered by Employment Judge Porter at a preliminary hearing conducted by way of telephone conference call on 2 June 2017. She approved a draft List of Issues prepared by the representatives. The case was listed for a final hearing to deal with liability only between 9 and 12 January 2018.

8. On 26 September 2017 the respondent conceded that the claimant had been a disabled person at the material time by reason of anxiety and depression.

9. On 18 October 2017 the claimant's representative, Mr Doyle of the Royal College of Nursing ("RCN") wrote to the Tribunal to indicate that he was no longer representing the claimant.

10. On 19 October 2017 the respondent wrote to the Tribunal to say that a legally binding agreement to settle the case had been reached, leading to this preliminary hearing being listed.

Relevant Facts

11. Based on the documents provided by both parties the undisputed relevant facts can be summarised as follows.

Representation

12. When the claimant presented her claim form she identified Mr Doyle of the RCN as her representative in box 12. Mr Doyle engaged in all correspondence with the Tribunal and the respondent in relation to the case until he ceased to represent the claimant on 18 October 2017. He represented the claimant at the preliminary hearing by telephone before Employment Judge Porter on 2 June 2017.

13. The respondent was represented by its solicitors, Law By Design Ltd. Mr Upton was identified as the representative in box 8 of the response form. He conducted the correspondence with the Tribunal and with Mr Doyle. His colleague, Mr Mellor, represented the respondent at the telephone preliminary hearing on 2 June 2017.

September 2017

14. There were "without prejudice" discussions about a possible settlement of the case between Mr Doyle and Mr Upton in late September 2017. Any settlement was to be without admission of liability by the respondent. There were discussions about a payment of compensation and wording for a letter of apology. The discussions were conducted partly by telephone call but by email as well. The emails were all marked "without prejudice".

15. At 4.37pm on 26 September 2017 (page R63) Mr Doyle emailed Mr Upton to say that the claimant had confirmed she would accept £1500 as part of the deal and had no issue in relation to the format. He invited the respondent to provide the wording for the ACAS COT3 form. His email asked whether Mr Upton would contact ACAS.

ACAS Involvement 27 September 2017

16. Mr Upton rang the ACAS conciliator the following day. His file note appeared at page R99. He informed the conciliator that the parties had reached agreement in principle, having agreed a figure and a letter of apology. They were asking ACAS to help them conclude the terms of settlement. Mr Upton told ACAS he would prepare an initial draft of the COT3 wording and circulate it to ACAS and Mr Doyle for comments. According to his file note the conciliation officer was happy with that course of action.

3 October 2017

17. The suggested COT3 wording was emailed by Mr Upton on 3 October 2017 (page R68). This and all subsequent emails were copied to ACAS. The draft terms of settlement with the letter of apology attached appeared at pages R69-R71. Mr Doyle took instructions from the claimant that day. Mr Doyle's file note appeared at pages C47-C48.

4 October 2017

18. On 4 October 2017 the claimant emailed Mr Doyle (pages C49-C50) to express some concerns about the confidentiality provision in the draft COT3. She said that the settlement "on the whole…looks ok" but she needed clarification about the scope of the restrictions on what she could say about the case. She and Mr Doyle discussed those concerns later than day (page C51).

19. Mr Doyle then responded to the draft wording by email to Mr Upton (page R73). He raised four points. He asked Mr Upton to take instructions. Mr Doyle and Mr Upton discussed those four points in a telephone conversation (page R75).

20. Mr Upton responded in relation to those four points at the end of the working day (page R77). He confirmed the position of the respondent on each point and asked Mr Doyle to confirm whether there was now agreement on the terms of the COT3.

5 October 2017

21. There were further discussions between the claimant and Mr Doyle on 5 October 2017 recorded at pages C52 and C54.

6 October 2017

22. Mr Doyle provided some advice to the claimant on 6 October 2017 at 09:01 (page C57). He enclosed with his email the amended COT3 wording.

23. At 11.40am the claimant emailed Mr Doyle to say:

> **"Following our phone conversation and advice and looking at the COT3 document I have agreed to the terms."**

24. Ten minutes later, at 11.50am, Mr Doyle emailed Mr Upton. His email was marked "without prejudice". Its text read as follows:

> **"I have a couple of slight amendments to clause 6 which I hope are not too controversial. If these amendments can be agreed I can confirm the claimant's agreement to this draft.**
>
> **I look forward to hearing from you."**

25. That email appeared at page R79. The attached COT3 wording and apology appeared at pages R80-R82. Clause 6 had been amended as follows, with the words added by Mr Doyle underlined:

> **"In the event that the claimant is asked about the <u>outcome of her</u> Claim or the <u>outcome of her</u> grievance, by a colleague or any third party, the claimant may reply by stating…'my dispute with the Trust was resolved to my satisfaction…'."**

9 October 2017

26. On 9 October 2017 there was a further exchange of emails about who would sign the form of apology.

10 October 2017

27. On 10 October 2017 at 11.15am Mr Upton emailed Mr Doyle (page R85) in the following terms:

> **"I can confirm your latest changes are agreed by my client. I have changed just 2 very minor things –**
>
> **2(b) – I have inserted the word 'have' on the first line.**
>
> **5(c) – I have closed the bracket at the end of the paragraph.**
>
> **I attach final version for your consideration. If you are ok with that then I think we have an agreement. I will wait for your confirmation."**

28. The two changes made were simply matters of grammar. Clause 2(b) referred to claims which the claimant "has or may against the respondent…" The word "have" had plainly been inadvertently omitted. Clause 5(c) had a section in brackets where the brackets had not been closed at the end of the clause. These changes made no difference to the meaning of the agreement.

29. Mr Doyle responded at 12.34pm on 10 October 2017 (page R89). His email said:

> **"My client has asked if she can have some further time to consider her position. I expect to hear from her by the end of next week. I will confirm my instructions as soon as I have heard from my client."**

30. About 15 minutes later Mr Upton responded (page R90). He expressed concerns about the timescale. The respondent needed to hear from the claimant significantly earlier than 20 October 2017.

31. With an hour and a half Mr Upton had changed his position. He sent an email at 2.19pm on 10 October 2017 at page R93. His position was summarised as follows:

> **"I have considered this issue further and looked back at the chain of emails. On reflection, I think we have, strictly speaking, already agreed the terms for this settlement and my view would be that, as a matter of contract law, there already exists a settlement which is binding on both parties. Accordingly, I don't think it is open to your client to further consider her position."**

32. In the alternative his email went on to say that if there was no binding agreement already, the two typographical changes he proposed were withdrawn, and therefore the respondent by his email was accepting the claimant's offer to settle on the terms attached to the email of 6 October 2017 from Mr Doyle.

33. There was a further exchange of emails that afternoon. On behalf of the claimant Mr Doyle maintained that no settlement had been reached; Mr Upton disagreed.

34. That debate continued until the respondent's application of 19 October 2017. The COT3 wording was never signed. ACAS did not inform the Tribunal that there had been a settlement agreed.

Relevant Legal Framework

35. The legal principles to be applied in this situation can be summarised as follows.

Contract

36. There will be a binding legal agreement in the form of a contract if there is an offer made by one party which is accepted by the other, where each party gives some "consideration" or benefit to the other in return for that agreement, and where both sides intend to create a legally binding relationship. The terms of the offer and acceptance must be sufficiently clear to mean that the Tribunal can be satisfied that there is indeed agreement.

37. Importantly, whether agreement of this kind has been reached is to be assessed on an objective basis looking at the communications between the two parties. That principle is summarised in the following terms in paragraph 1-017 of the leading text *Chitty on Contracts (32nd Edition)* as follows:

> **"The existence of an agreement is not an issue merely of fact, to be found by a psychological investigation of the parties at the time of its alleged origin: English law takes an 'objective' rather than a 'subjective' view of the existence of agreement and so its starting point is the manifestation of mutual assent by two or more persons to one another…"**

Agreements not to pursue Employment Tribunal claims

38. In general terms agreements by which individuals agree not to pursue Employment Tribunal complaints are unenforceable. Legislation provides for certain exceptions.

39. The complaint of protected disclosure detriment was brought under the ERA. Section 203(1)(b) makes clear that any provision in an agreement is void in so far as it purports to preclude a person from bringing proceedings in an Employment Tribunal. However, section 203(2)(e) makes it clear that this principle:

> **"Does not apply to any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under any of sections 18A to 18C of the Employment Tribunals Act 1996."**

40. For discrimination complaints under the EQA, section 120 is the provision which gives Employment Tribunals jurisdiction over discrimination at work. Section 144(1) sets out the general rule that contracts preventing such complaints being pursued are unenforceable, and section 144(4) makes it clear that that section does not apply:

> **"To a contract which settles a complaint within section 120 if the contract…is made with the assistance of a conciliation officer…"**

ACAS Conciliation

41. The Employment Tribunals Act 1996 makes provision for conciliation by ACAS. Section 18A sets out the requirement for a prospective claimant to contact

ACAS before instituting proceedings (i.e. early conciliation). Section 18C deals with conciliation after institution of proceedings. Subsection (1) provides as follows:

> **"Where an application instituting relevant proceedings has been presented to an Employment Tribunal, and a copy of it has been sent to a conciliation officer, the conciliation officer shall endeavour to promote a settlement –**
>
> **(a) if requested to do so by the person by whom and the person against whom the proceedings are brought, or**
>
> **(b) if, in the absence of any such request, the conciliation officer considers that the officer could act under this section with a reasonable prospect of success."**

42. The meaning of the words in section 203(2)(e) "where a conciliation officer has taken action" was considered by the Employment Appeal Tribunal in **Allma Construction Ltd v Bonner [2011] IRLR 204**, a decision of Lady Smith in May 2010. The claimant in that case instructed his solicitor that an offer of £1,000 was acceptable to settle the claim, and his solicitor telephoned ACAS to convey that message. An ACAS officer telephoned the employer's solicitor and left a message informing him that the offer had been accepted. Three days later the claimant changed his mind and sought a higher figure. The employer maintained that the case had already been settled. The Employment Tribunal found that there had been no binding settlement. It took into account the evidence from the ACAS officer that he did not consider a binding settlement agreement had been reached. The claim was not dismissed. The respondent appealed and the Employment Appeal Tribunal allowed the appeal. In paragraph 41 Lady Smith addressed the question of whether the actions of ACAS fell within section 203. She said:

> **"All that was required was that an ACAS officer had 'taken action' under section 18 of the Employment Tribunals Act 1996, namely, that he had, in some way, endeavoured to promote settlement of the claim. The Tribunal's finding that [the ACAS officer] had communicated the claimant's acceptance was enough to satisfy that requirement. It mattered not that a COT3 agreement might also, thereafter, have been entered into with the assistance of ACAS. The [conciliation officer's] views were, in all the circumstances, whilst no doubt held in good faith, irrelevant to the issue of law that the Tribunal Judge had to determine."**

43. Accordingly the EAT substituted a finding that the claim having settled, it was dismissed.

Authority to settle

44. Whether a representative of a party has actual authority to settle a case depends upon consideration of the material passing between that party and her representative. In the normal course of events such material will be subject to privilege.

45. However, a party to litigation is also entitled to rely on the ostensible authority of the other party's representative. Ostensible authority arises not out of what a representative says or does, but out of what the party (in this case, the claimant) says or does (see **Gloystarne & Co Ltd v Martin [2001] IRLR 15**). There has to be a statement by the claimant, by words or conduct, to the respondent which

ostensibly authorises the representative to act for the claimant. If ostensible authority is established in that way there is no need to consider actual authority.

46. The question of ostensible authority arose in **Freeman v Sovereign Chicken Ltd [1991] ICR 853**. A Citizens Advice Bureau ("CAB") adviser was found to have the ostensible authority of the claimant. The Employment Appeal Tribunal agreed completely (page 861D) with what the Industrial Tribunal (as it then was) had said in paragraph 43 of its decision:

> **"But it seems to us that where the CAB advisers, named as representatives by a party to the proceedings, hold themselves out as having authority to negotiate, and to reach a settlement, on behalf of a client, the other party to the proceedings is entitled, in the absence of any notice to the contrary, to assume that the CAB adviser does in fact have such authority, and to enter into an agreement with the CAB adviser on that basis. That is what is meant by ostensible authority."**

Discussion and Conclusions: Was there a Binding Agreement?

47. I indicated to the parties at the outset of the hearing that I would decide firstly whether there had been a binding agreement which effectively settled the claims, and only then go on to consider the question of authority if appropriate.

Submissions

48. The submissions for the respondent were found in the written skeleton argument of Ms Gould. Her primary position was that agreement was reached at 11.15am on 10 October 2017 when Mr Upton accepted the changes proposed by Mr Doyle in his email of 6 October 2017. The two typographical amendments were of no consequence and the reality of the situation, whatever the wording of Mr Upton's email, was that agreement had been reached.

49. If I was against her on that, Ms Gould submitted that the claimant's offer of 6 October was never withdrawn, and therefore that it was accepted by Mr Upton at 2.19pm on 10 October 2017 when he withdrew the two typographical amendments and made clear that the proposal was accepted.

50. Ms Gould submitted that ACAS had taken action in this case even after early conciliation ended. Mr Upton had spoken to ACAS on 27 September 2017 and the conciliation officer had agreed to assist in finalising the terms of the COT3. The conciliator had been copied into every email about the terms of the COT3 from 3 October 2017 onwards. Even though she was not called upon to finalise the settlement and get a signature from both sides, she had endeavoured to promote a settlement by lending her assistance to the ongoing negotiations.

51. I explained to the claimant the position the respondent took. The claimant's position was that there had been no binding agreement reached. She said that ACAS had not considered that any settlement had been reached.

52. Further, she did not feel that matters had been properly explained to her by the RCN and she had told Mr Doyle on 14 October 2017 that she wanted to withdraw.

Decision

53. Having heard those submissions I considered the matter. It seemed to me that the email of 6 October 2017 from Mr Doyle was a clear offer to settle. His email said that if the amendments proposed were agreed he could confirm the claimant's agreement to the draft. Those amendments were not in themselves significant in any event. The terms of the offer were therefore clear and certain. The wording of the letter of apology had been agreed.

54. The key question was whether the response of 10 October 2017 at 11.15am was an acceptance of that offer. I noted that Mr Upton ended his email by saying:

> **"If you are ok with that, then I think we have an agreement. I will wait for your confirmation."**

55. It seemed to me that reflected professional courtesy rather than any substantial difference between the parties. The two typographical changes were minor and had no impact on the sense of the agreement. In reality the changes proposed by the claimant were agreed, as the opening line of the email confirmed. It would have been entirely in order for Mr Upton simply to have accepted the offer, and then pointed out the typographical changes later (perhaps through ACAS). They could not have been controversial.

56. I concluded that at that point all the ingredients for a binding contract were in place. The claimant had made an offer on clear terms by email of 6 October 2017 from Mr Doyle, and the respondent had accepted it. Both sides were giving something in return for what they gained from the agreement. The respondent was paying the claimant money in return for the dispute being brought to a close. There were other terms of the type commonly found in such agreements. Both representatives intended to create a legally binding agreement by these dealings between them.

57. Applying **Allma**, I was also satisfied that this agreement met the requirements of section 203 ERA and section 144 EQA. ACAS had taken action endeavouring to promote a settlement. The conciliator had discussed the position with Mr Upton on 27 September 2017 and agreed to assist in finalising the COT3 wording. She had also been copied in to the exchanges of emails. Her involvement had been requested by both parties as section 18C(1)(a) envisages, since it was Mr Doyle who suggested in his email of 26 September 2017 at page R63 that Mr Upton contact ACAS. ACAS had provided assistance by agreeing to help finalise the terms of the COT3.

58. I should add for the sake of completeness that had I concluded that there was no binding agreement that morning, I would not have found that a binding agreement had been concluded at 2.10pm on 10 October 2017 when Mr Upton withdrew the typographical amendments. Mr Doyle's email of 12.34pm on 10 October 2017 saying that the claimant wanted some further time to consider her position could not objectively be interpreted as a response on the two typographical changes. It only made sense as a suspension of the negotiations overall. From that moment the original offer of 6 October 2017 was no longer on the table. However, that point did

not assist the claimant because there was already a binding agreement before that email was sent.

Discussion and Conclusions – Ostensible Authority

59. I was satisfied that Mr Doyle had the ostensible authority to negotiate for the claimant and to conclude a settlement on her behalf. She named him on her claim form as her representative. He appeared for her at the telephone preliminary hearing on 2 June 2017. He conducted all the correspondence with the respondent and the Tribunal. At no stage did the claimant contact the respondent or the Tribunal direct to say that he was no longer representing her. The position was effectively the same as the position of the CAB adviser in **Freeman**. That was enough to mean that the settlement agreement was binding upon the claimant.

60. In any event, had it been necessary to decide the position I would have concluded that Mr Doyle had the actual authority of the claimant. At page C57 she emailed him at 11.40am on 6 October 2017 to say that following his advice and looking at the COT3 agreement she had agreed to its terms. This triggered his email ten minutes later to Mr Upton which formed the claimant's offer to settle. He was plainly authorised to make that offer, whatever reservations the claimant had about the merits of the agreement which had been under consideration.

61. Nothing in this judgment and reasons should be taken as any comment on whether the claimant might have cause for complaint about how Mr Doyle handled her case. That is not a matter I need to decide.

Form of Judgment

62. Ms Gould suggested that it would be possible for the Tribunal to strike out the complaint on the basis that there was now no reasonable prospect of success given that the Tribunal did not have jurisdiction over it. On balance I did not consider that the appropriate course of action, but I preferred to adopt the course taken by the EAT in **Allma**, namely to dismiss the claim because it had been settled by agreement.

63. I should record that at no stage has the claimant withdrawn her complaint. It comes to an end only by this judicial decision.

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Employment Judge Franey

8 December 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
14 December 2017

FOR THE TRIBUNAL OFFICE