Case Number: 1800163/2019
1800282/2019

EMPLOYMENT TRIBUNALS

Claimant		Respondent
1. Mr M Ibeziako	v	**1. Yorkare Homes Ltd**
2. Humberside24 Ltd		**2. Dutton Recruitment Ltd**

Heard at: **Hull** **On:** **1 July 2019**

Before: **Employment Judge Knowles**

Appearances:

For the Claimants: **Mr M Ibeziako**

For the First Respondent: **Mr Campion (Counsel)**

For the Second Respondent: **Mrs Fowler (Solicitor)**

RESERVED JUDGMENT

1. Settlement having been reached with the assistance of an ACAS conciliation officer, the Employment Tribunal no longer has jurisdiction to hear the Claimants' claims.

2. The Claimants' claims against the Respondents are therefore dismissed.

RESERVED REASONS

Issues

1. This matter was listed for a preliminary hearing to determine issues as are set out in a case management order made at a preliminary hearing by Employment Judge Jones on 8 March 2019.
2. At the beginning of the hearing, the Second Respondent submitted that a binding settlement had been reached between the parties through ACAS.
3. The Claimants dispute this.
4. I determined that the issue required resolution before further matters in the complaint could be considered given that if the Second Respondent's

submissions are correct, this would mean that the Claimants' claims would be at an end.

Evidence

5. The Respondent produced a bundle of documents (56 pages). The Respondent produced two case law authorities (see below). The Second Respondent made submissions in support of their argument that a binding settlement has been reached in this matter.

6. The Claimants requested more time to prepare their answer to the Respondent's submission and if necessary, to produce any relevant documents which they consider have not been produced by the Second Respondent. The Claimant asked for 28 days and his request was granted.

7. The Second Claimant is the First Claimant's company through which he supplies work. They are, as the First Claimant reminds me, separate legal entities. However I note that the First Claimant describes the second in the claim form (section 13) as "my Limited Company".

8. On or around 25 July 2019 the Claimant sent to the tribunal and to the Respondents his submissions.

Findings of fact

9. On 20 December 2018 the Claimants submitted a claim for to the Employment Tribunal against Beverly Parklands Care Home and the Second Respondent. The claim type and details of claim are stated to be that the Claimants were discriminated against on the grounds of sex and race, harassment and victimisation (section 8.1 claim form). Those types of claim are reiterated in part 13 of the form, under the heading additional information. The Claimants attach 36 pages which contain further details of the complaint including internal grievance documentation from the Claimants' complaints to each of the Respondents.

10. The First Respondent entered a notice of appearance confirming that Beverly Parklands Care Home is owned by them and the title of the First Respondent was amended accordingly.

11. The Second Respondent entered a notice of appearance.

12. The Respondents dispute all of the Claimants' claims.

13. From the Respondents appearances it is clear that the First Claimant supplies his work through Second Claimant company to the Second Respondent, who are a recruitment agency, who in turn contract with the First Respondent. Aside of these legal identity issues, the First Claimant provides work personally at the First Respondent's care home. There is conflict between the parties as to when

the First Claimant began working for the Respondents. The First Respondent's records show work from December 2015 into early 2016, further shifts in 2017, followed by a period of work 3 March 2018 to 29 September 2018.

14. The matter came to a preliminary hearing for case management before Employment Judge Jones on 8 March 2019. In the time available to the Judge he was only able to identify one claim of sex discrimination so made orders for the Claimants to provide further particulars of his claim and listed a further preliminary hearing. The orders provided a timeline for conclusion of 16 May and listed a further hearing for 16 May although that has been postponed until today's hearing. The Claimants supplied further details of the complaint in a document dated 23 May 2019. The Claimants document claims of direct race discrimination, victimisation, and harassment. I will not go into the detail of those claims, but note that the essential headings of the complaints are the same as those raised originally in the claim form by the Claimants. The First and Second Respondents submitted further responses both dated 5 June 2019.

15. Whilst the proceedings are developing formally through the Employment Tribunal, the parties are engaging in discussion concerning settlement. In the First Respondent's bundle, I can see that the Second Respondent's representative emailed ACAS on 19 March 2019, copying in the First Respondent's representative and the First Claimant stating *"[The First Claimant] contacted me by phone this morning suggesting that he wanted to settle his ET claim. His proposal was that he and the Second Claimant would withdraw all their claims against both Respondents on the basis that all parties would bear their own costs of the proceedings".* The email requests ACAS support towards developing terms of agreement. The email states it is "*subject to terms being agreed between the parties*". The First Claimant replies confirming his intention to settle.

16. On 25 March 2019 the First Respondent's representatives sent proposed terms of settlement to ACAS (pages 1-4), which are said to have been drafted jointly by the Respondents. A 9 paragraph draft COT3 agreement is attached. The draft provides (in summary) for the Respondents agreeing not to pursue costs against the Claimants, the withdrawal of the Claimants' claims, an agreement not to pursue further claims, a personal injuries exclusion and confidentiality provisions. The draft is not in an uncommon format for a proposed COT3 settlement where they are drafted by solicitors rather than by ACAS, and might be described as somewhat 'long form' given the simple heads of terms of agreement which had been reached.

17. ACAS send the proposed terms to the Claimants, although there is no copy of this in the bundle. The Claimants respond 25 March 2019 (page 5), objecting to the proposed terms calling them "oppressive". He states words to the effect of only being prepared to settle on the terms he agreed to sent to ACAS originally, i.e. 19 March 2019. There is however no meeting of minds at this point as the original offer was "*subject to terms being agreed between the parties*".

18. On 27 March 2019 ACAS email the First Respondent (page 6) stating that the Claimant has just emailed them as follows:

    "*The COT3 wording that I and my company will agree is shown below*

    That this matter is withdrawn without any cost liability to any party and this means that all parties have to bear their own costs".

19. On 3 April 2019 the First Respondent emails the Claimants (page 9), copied to the other Respondent and ACAS, explaining each of the 9 paragraphs in the COT3 sent on 25 March 2019. The email appears to be an attempt to persuade the Claimants to settle on those written terms.

20. The Claimant responds at length, 3 April 2019 (page 13), rejecting their "*so called drafted agreement*". He concludes "*If after this email and the two respondents views has not change on a more positive way of settlement, which is to withdraw this matter without any clause attach from it as I have stated in my email to ACAS I will have no option other than to stop this talk in other to protect myself and my company as well*".

21. On 10 April 2019 the First Respondent emails the Claimants (page 17), copied to ACAS and the Second Respondent, with another draft COT3 agreement in shorter form retaining three of the nine paragraphs from the 25 March draft.

22. On the same day the Claimants email to refuse the revised draft terms (page 24). The First Respondent replies asking why the Claimants will not agree (page 28). The Claimants respond the same day (page 33) concluding "*can I ask that you both (two respondents) stop sending me emails regarding settlement if you both are not willing to use my text…*".

23. On 11 April 2019 the Second Respondent attempts settlement again settlement on further reduced text (page 38).

24. On the same day the Claimants respond (page 40) "*Let me make it clear once again that the only wording that I will accept in that text is the original text that I mentioned and nothing else will be attached to it*".

25. On 17 April 2019 the Second Respondent emails the Claimants, the First Respondent and ACAS to accept the Claimants' offer (page 43). On the same day, the First Respondent emails everyone to accept the Claimants' offer (page 45). On the same date the Claimants email to say they will send the wording for the settlement in due course (page 52).

26. On 24 April 2019 the Claimants send different wording to ACAS, changing "costs" for "loss". On 30 April 2019 a revision is sent back to the parties by ACAS but by 8 May 2019 the Claimants have not responded and ACAS contact

them, and again on 15 May 201, but neither party or ACAS hears back from the Claimants.

Submissions

27. The First Respondent submits that agreement was reached on 17 April 2019 when each Respondent accepted the wording which had been put forwards by the Claimants on 27 March 2019. The correspondence after that date is not relevant, the claims have already settled. For the purposes of Alma and Gilbert, and agreement has been reached, there is no question that the agreement is void, oral acceptance is sufficient and there are no more formal requirements. The fact that the Claimants have changed their mind is not relevant and Allma can be distinguished because there was disagreement on the wording.

28. The Second Respondent added that the Claimant had written to the tribunal requesting more time to file his further particulars of claim because the parties were in the process of entering with a settlement.

29. The Claimants submitted that the Respondents had only shown me the documents they wanted me to see. He refers to threatening emails concerning threats to strike out his claims. He stated he wanted to provide full disclosure with written submissions. He stated it was clear there was a dispute. He referred to having submitted a proposal on 14 June 2019 that the Respondents pay him £15,000 each then he will withdraw his claims.

30. It appeared that the Claimants were taken by surprise having only had a day of notice that the Respondent would be submitting that there had been a settlement of the claims.

31. The Claimant was given 28 days to submit his additional documents and written submissions.

32. The Employment Tribunal was sent written submissions by the Claimants in the form of a witness statement (13 pages) and bundle of documents (38 pages). I have considered the Claimants' witness statement and documents fully and summarise here those submissions for the purposes of this decision. This summary is not intended to be comprehensive and I note that the Claimants state that they spent 240 hours compiling their submissions.

    32.1. That there is an email which was not produce to me by the Respondents dated 30 April 2019 from ACAS which sends COT3 wording (C7-8). Therefore, as at 30 April 2019 no settlement has been reached.
    32.2. ACAS have not confirmed settlement has been reached.
    32.3. ACAS provided wording including that they would notify the tribunal of settlement; they have not.
    32.4. The Respondent insisted on a formal agreement and ACAS notifying the tribunal from the outset.

32.5. The Respondents' responses sent on 1 May 2019 did not indicate that the Claimants had reached and an agreement.

32.6. The Second Respondent emailed the parties on 15 May 2019 asking the Claimants if they were in a position to agree the COT3 wording.

32.7. That the Respondents failed to produce this evidence to the tribunal.

32.8. That Judge Keevash asked the parties on 30 April 2019 to provide an update on negotiations, yet the Respondents first raised settlement at the hearing on 1 July 2019.

32.9. In relying on 1 May 2019 the Respondents put forward a position concerning strike out and deposit orders but did not mention settlement.

32.10. The Claimant emailed the tribunal on 24 April 2019 (C3) seeking more time to allow for settlement to be concluded.

32.11. That the Respondents urged the Claimants to agree that settlement had been reached before the tribunal hearing on 1 July 2019.

32.12. That the Respondents have increased the costs in relation to this matter through raising this settlement issue and this has caused the Claimants stress and pressure.

32.13. On 5 and 7 June 2019 the Respondents served amended responses, which suggests no settlement had been reached by that date.

32.14. That the Respondent wrote to the tribunal on 6 June 2019 asking for a retrospective extension of time without mentioning that there had been a settlement.

32.15. On 14 June 2019 the Respondents acknowledged to the tribunal that they did not object to an extension of time.

32.16. In this present case parties agreed that any agreement that will be reached with the help of ACAS must be in Cot3 wording format, agreed by parties and signed and that upon reaching that agreement that the employment tribunal must be informed to treat the matter as withdrawn.

The Law

33. Section 144 of the Equality Act 2010 provides as follows:

Contracting out

(1) A term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act.

(2) A relevant non-contractual term (as defined by section 142) is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act, in so far as the provision relates to disability.

(3) This section does not apply to a contract which settles a claim within section 114.

(4) This section does not apply to a contract which settles a complaint within section 120 if the contract—

(a) *is made with the assistance of a conciliation officer, or*

(b) *is a qualifying settlement agreement .*

34. In **Gilbert v Kembridge Fibres, [1984] I.C.R. 188 (1983)** it was held, dismissing the appeal, that an oral agreement between parties to settle a dispute with the assistance of a conciliation officer acting under section 134 of the Act of 1978, was enforceable without being put into writing; and that, accordingly, the industrial tribunal's decision that a concluded settlement had been reached notwithstanding that the official document, form COT3, had not been signed by the parties was correct.

35. In **Allma Construction Ltd v Bonner, 2010 WL 3807971 (2010)** it was held that the Employment Tribunal had erred in holding that no binding settlement reached where it found as fact that employers' agent had offered to settle the claim at £1,000 and that offer had been accepted by the claimant's solicitor. The belief of the ACAS officer involved to the effect that the settlement was not binding because he had not spoken directly to both parties was irrelevant, as was the finding that a COT3 settlement would “normally” contain other provisions as well, as were the findings in fact about what passed between the Claimant's solicitor and the employers' agent subsequently, after the Claimant had changed his mind as to the acceptability of the offer.

Conclusions

36. In my conclusion the Claimants received an offer to settle his claims in the form of a draft COT3 agreement but they refused and made a counter-offer to ACAS, which ACAS sent to the other parties to the proceedings on 27 March 2019.

37. The Claimants reiterated the counter-offer for a second time on 3 April 2019 through ACAS.

38. The Claimants reiterated the counter-offer for a third time on 11 April 2019.

39. Both Respondents accepted the offer on 17 April 2019.

40. There is no question in this matter of the Claimants email being an invitation to treat. He was explicit in making the counter-offer.

41. The counter-offer is completely unambiguous. Indeed, it is the Claimants who object to the long and medium format COT3 proposed by the Respondents; the Claimant’s insist that the agreement contains nothing other than what was originally agreed on 19 March 2019.

42. The Claimant reiterated his counter-offer three further times during exchanges of correspondence undertook through the assistance of ACAS.

43. A legally binding agreement was reached on 17 April 2019 when both of the Respondents agreed without caveat the Claimants' counter-offer.

44. I do not find that the Respondents have, as suggested by the Claimants, attempted to mislead me by omitting communications after 17 April 2019. Counsel for the First Respondent, who made most of the submissions relating to the matter, made it quite clear that the matter had not been raised beforehand because the Respondents had not been aware an agreement had been reached until Counsel considered the papers in readiness for the preliminary hearing.

45. I do not find that the absence of communications between the parties, ACAS and the tribunal after 17 April 2019 was an attempt to conceal evidence that there was not an agreement on that date. Counsel made it clear that it is their submission that matters occurring afterwards are not relevant because a binding agreement had already been reached.

46. I concur. **Allma** applied.

47. The Claimants submissions are based upon matters occurring after 17 April 2019. Those matters are not relevant. It does not matter whether or not ACAS, the tribunal or the parties to the complaint were aware a legally binding agreement had been reached. Whether or not one had been reached is a matter for me to determine having considered the evidence and submissions from both parties.

48. I conclude without doubt that there was a binding agreement to withdraw the claim with each party bearing their own costs.

49. There is clear consideration from the Respondents, who are accepting that in withdrawing the claims the Claimants will not be pursued for their legal costs.

50. The First Claimant put the counter-offer forwards on behalf of himself and the Second Claimant. He did so expressly. There is no argument put forwards by him that he did not have the authority to do so on behalf of the Second Respondent. I find that he had such authority in relation to his company and exercised that authority.

51. A contract was formed on 17 April 2019 between the parties. It does not matter that the Claimant changed his mind after the agreement had been reached. None of the subsequent communications (which all appear to me misconceived) void the agreement which had been reached.

52. The Claimants' complaints are all made under the Equality Act 2010. The Claimants are claiming that Part 5 of the Equality Act (discrimination at work) has been breached and therefore the tribunal has jurisdiction to hear the complaints for the purposes of Section 120. This complaint does fall within

Section 120. A complaint under Section 120 can be contracted out provided the contract is made with the assistance of a conciliation officer.

53. The contract reached between the parties to this case was clearly reached with the assistance of an ACAS conciliation officer.

54. A legally binding settlement having been reached, the Employment Tribunal no longer has jurisdiction to hear the Claimants complaints against the Respondents.

55. The Claimants' complaints are dismissed.

Employment Judge Knowles

Date 24 September 2019

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.