



THE EMPLOYMENT TRIBUNALS

Claimant: Miss M Jones

Respondent: Cygnet (DH) Limited

Heard at: Newcastle CFCTC (by CVP)

On: 21 October 2020

Before: Employment Judge Arullendran

Representation:

Claimant: Mr G Price (counsel)

Respondent: Mr A Tinnion (counsel)

RESERVED JUDGMENT ON PRELIMINARY ISSUE

The Judgment of the Employment Tribunal is that the Claimant's claims are not struck out and shall proceed to a full merits hearing.

REASONS

1. The issues to be determined at this public preliminary hearing was set out in the case management order made by Employment Judge Sweeney on 6 March 2020 and were agreed by the parties today as being the following:
 - a. Is the claimant bound by the COT3?
 - b. If so, did the COT3 agreement operates to settle the claims which have been brought in these proceedings?
2. I was provided with an electronic joint bundle of documents consisting of over 102 pages. Page 99A of the bundle was missing and a copy of it was provided at the close of the hearing by the Respondent. A further three documents were added to the bundle by the Claimant which consists of 2 WhatsApp messages dated 6 January and 24 January 2020 and an email between the Claimant and her trade union representative dated 6 January 2020. The Respondent raised objections to the late disclosure of the additional documents by the Claimant on the grounds that Employment Judge Sweeney ordered the Claimant to disclose the documents she proposed to refer to at this hearing and any other documents

which are relevant to the issues to be sent to the Respondent by 24 April 2020 and that such piecemeal disclosure places the Respondent at a substantial disadvantage. Upon considering the explanation from the Claimant's representative for the latest disclosure of these documents, i.e. that it was an oversight by the instructing solicitors rather than by the Claimant, and having regard to the relevance of the content of these documents to the issues to be determined today, I decided that it was in the interests of justice to allow the claimant to adduce the three extra documents at this hearing and that the potential injustice to the Claimant in not allowing the documents into evidence outweighed the potential hardship to the Respondent, which could be overcome by allowing extra time to the Respondent to obtain instructions.

3. The joint bundle of documents contains a number of without prejudice correspondence between the parties which has been redacted by the Respondent. The Claimant objected to the redaction of these documents and produced a separate bundle containing the unredacted without prejudice correspondence which I did not look at. I heard arguments from both sides as to whether this Tribunal should have sight of the unredacted correspondence. Both parties made submissions with reference to written skeleton arguments and, although I have not reproduced those arguments in this decision, I have considered the skeleton arguments and oral submissions in their entirety. I decided that the without prejudice communication would not be admitted into evidence because the general rule is that any communication regarding negotiations should not be admissible in evidence and there are very strong public policy reasons for the parties to be free to settle a genuine dispute which has arisen between them without fear of anything they either say or write in negotiations being used in evidence, particularly in a public hearing such as this one. I considered carefully paragraphs 54 to 58 in the case of Briggs and Ors v Alexander Clay and Ors [2019] EWHC 102 (Ch), as requested by Mr Price, however I agree with Mr Tinnion's submission that none of the exceptions to the without prejudice rule are satisfied in this case. This is not a case where there are any allegations of unambiguous impropriety, nor is it alleged that the specific without prejudice correspondence between the Claimant solicitor and the Respondent led to a binding agreement. In this case, the fact of the correspondence is not in dispute and it is not in dispute between the parties that those negotiations did not lead to the COT3 agreement in question. In such circumstances, as I find that none of the exceptions to the without prejudice rule apply, my decision is that the without prejudice correspondence should not be admitted in full and that it should only be considered in the redacted form as it appears in the joint bundle.
4. I heard witness evidence from the Claimant and Alex Russell (HR business partner). As a result of my decision regarding the without prejudice correspondence, above, the Claimant submitted a redacted witness statement which she adopted as her evidence and Mr Russell adopted his witness statement as his evidence in chief.
5. It was apparent from the papers that the Claimant has significant mental health issues. I asked the Claimant whether she required the Tribunal to make any reasonable adjustments to assist with this hearing, however she indicated that no

adjustments were required. I asked the Claimant to tell me straightaway should she require a break or if she felt unwell in any way. The hearing proceeded without incident and the Claimant did not require any extra breaks. It should have been apparent to Mr Tinnion from my exchange with the Claimant about her mental health that I regarded her as a vulnerable witness, however Mr Price had cause to raise objections about Mr Tinnion interrupting the Claimant and cutting off her answers throughout the cross examination.

The relevant facts

6. The Claimants worked for the Respondent as a healthcare assistant and was based at Whorlton Hall hospital in Durham. It is common ground that the Respondent undertook a redundancy exercise in or around May and June 2019 and that the Claimant attended a redundancy consultation meeting with Mr Russell on 5 June 2019.
7. As part of the collective consultation exercise for the redundancy, the Claimant signed a nomination form nominating Sheila Wilson of Unison as her employee representative. A copy of the nomination form can be seen at page 45 of the bundle. It is common ground that the Respondent undertook both collective and individual consultation as part of the redundancy exercise and employees were represented by either a fellow colleague or a trade union representative during consultation meetings.
8. The Claimant's uncontested evidence is that she asked to be represented by her solicitor at the individual consultation meetings. However, the Respondent did not allow this as the Claimant was only entitled to be represented by either her trade union or a work colleague. In the circumstances, the Claimant attended all of her consultation meetings with her trade union representative which was Sheila Wilson and, after Ms Wilson retired, Tony Martin.
9. The Claimant attended a final consultation meeting with Mr Russell on 8 July 2019 and a copy of the minutes from that meeting can be seen in the bundle at pages 63 to 74. Mr Russell's evidence is that, as he did not have a note taker present, it was agreed that the meeting would be recorded and the minutes which appear in the bundle are a transcript of that recording. At the bottom of page 72 and the top of page 73 of the bundle it is noted that the Claimant told Mr Russell that *"... You will be hearing from my solicitor because I'm not going to have this at all, the effect that it has had on us not just because of the process and what happened because you know everything that happened in there. Good carers don't just fling it off and go oh well. It has had a massive effect on us"*. The transcript also shows that Sheila Wilson told Mr Russell, at page 73 of the bundle, *"... There is still stuff in dispute and I will be pursuing that and then whatever information I get I will pass on"*.
10. It is common ground that the Claimant was given notice of redundancy as a result of the consultation and that the Claimant appealed against the decision to make her redundant. It is also common ground that the letter from the Respondent inviting the Claimant to the appeal hearing informed her that she could be accompanied by a fellow worker or a trade union representative and,

therefore, the Claimant could not be represented by her solicitor. Tony Martin represented the Claimant at her appeal hearing.

11. The minutes from the Claimant's appeal hearing, dated 6 August 2019, are reproduced at pages 79 to 81 of the bundle. In the middle of page 80 it clearly states that the Claimant told the appeal officer that "*I'm in talks with a solicitor ...*". It is common ground that the Claimant's appeal was not successful. The Claimant's evidence is that she informed Tony Martin immediately after the appeal hearing, whilst in the car park of the hospital where the appeal hearing had taken place, that she no longer required any help from him or the union. She has also told the Tribunal today that she received a telephone call from Tony Martin secretary and that she informed her that she did not want the union to act for her any more. Mr Tinnion has suggested that the Claimant had made this evidence up as it does not appear in her witness statement, however, after aggressive cross examination by Mr Tinnion during which the Claimant did not alter her evidence in any way, I prefer the evidence of the claimant that she did inform Mr Martin and his secretary that she did not want the union to act for her as this is entirely consistent with the fact that she instructed her own solicitors to act for her who are not trade union solicitors and do not act on behalf of Unison. This is also consistent with the minutes produced in the bundle from the consultation and appeal hearings which clearly indicates that the Claimant told the Respondent that she had instructed solicitors and that they would be hearing from the solicitor. I judged the Claimant to be a credible witness under aggressive cross examination, particularly given her poor mental health, as her evidence remained consistent throughout the entirety of the hearing. I do not accept Mr Russell's evidence that he thought the Claimant's solicitor would be acting with Unison as there is no evidence in front of me to indicate such a thing was common practice where an employee is represented by a trade union.
12. It is common ground that the Claimant solicitor entered into without prejudice correspondence with the Respondent on 12 September 2019. A copy of an email from the Claimant solicitor to William Dobson of the Respondent organisation dated 12 September 2019, with the heading "without prejudice, save as to costs" appears at page 83A to 803F of the bundle. Thereafter, there is correspondence between William Dobson and the Claimant solicitor and between Adam Harris (the appeals officer) of the Respondent company and the Claimant's solicitor which can be seen at pages 83G to 83J of the bundle. This correspondence is dated between 23rd September and 8 October 2019. It is clear from the documents produced in the bundle that the Respondent's solicitor was included in the without prejudice correspondence from 26 September 2019 until 29 October 2019 and copies of this correspondence is produced at pages 83J to 83M of the bundle.
13. On 5 November 2019 Alex Russell received an email from Glendene Husbands of ACAS, a copy of which can be seen at pages 91 to 92 of the bundle, advising him that group early conciliation had been initiated against the Respondent. Mr Russell replied by asking for the names of the employees in the group and this was provided by ACAS on 8 November 2019, as can be seen at page 88 of the bundle. It is common ground that the Claimant's name was included in the group. A number of emails were exchanged between Mr Russell and ACAS and an

agreement was reached whereby the Respondent would settle each of the claims for the sum of £750. A copy of the agreed wording for the COT3 agreement can be seen at pages 94A to C of the bundle. It is common ground that the wording of the COT3 agreement purports to settle all potential claims and that the payment would be in full and final settlement of all such claims. The COT3 agreement was signed by Tony Martin of Unison on behalf of the relevant claimants on 23 December 2019 and it is common ground that Mr Russell asked Unison to provide bank details for the claimants who were party to that COT3 agreement so that the settlement monies could be paid to them.

14. The Claimant's uncontested evidence is that she did not know that Unison had commenced early conciliation through ACAS on 24 October 2019 and she was absent from the UK on holiday in Spain over the Christmas and New Year period and had no knowledge of the COT3 agreement being signed on her behalf. Nor did she ever provide bank details for any settlement monies to be paid to her. It is common ground that the £750 settlement payment has never been paid by the Respondent to the claimant.
15. The Claimant's uncontested evidence is that her solicitor spoke to the Respondent's solicitor several times between 18 October and 30 October 2019. The Claimant's solicitor commenced early conciliation through ACAS against the Respondent on 29 October 2019 under the reference number R588617/19/05, which is entirely separate to and different from the early conciliation commenced by Unison on 24 October 2019 under the reference number R178242/19. The Claimant's solicitor was issued with an early conciliation certificate by ACAS on 21 November 2019 and a copy of that certificate was also sent to the Respondent.
16. It is common ground that the Claimant's solicitor issued Tribunal proceedings (i.e. these proceedings) on 20 December 2019. The Claimant's evidence is that the first time she learnt about the COT3 agreement signed by Unison on her behalf was in the Respondent's response to this claim on the ET3 form. The Claimant contacted Tony Martin by WhatsApp on 24 January 2020. A copy of the message has been produced at this hearing today and it states "*can you call me immediately!! I have had my solicitor on the phone telling me that you have gone ahead and made a claim on my behalf, without my permission as I have repeatedly told you I had a solicitor, and I did not want you to represent me! This has all been done without any sort of paperwork or signature on my behalf. I would like you to explain!*". It is common ground that the Claimant contacted ACAS asked her name to be removed from the group COT3 agreement and ACAS notified Mr Russell of this in an email dated 10 January 2020, a copy of which can be seen at page 101 of the bundle.
17. Mr Russell's evidence to this Tribunal was that he deliberately did not speak to the appeals officer, Adam Harris, who was also a HR business partner, after he had concluded his redundancy consultation with the Claimant. Mr Russell did not check with anybody within the HR Department whether the Respondent organisation had received any communication from either the Claimant or from anyone acting on her behalf in relation to her employment dispute arising from her redundancy at any time before or after entering into the COT3 agreement.

18. The Claimant made submissions by reference to a written skeleton argument, the contents of which are not reproduced here but have been considered in their entirety. The Claimant submits that Unison did not have actual authority to act on her behalf to enter into negotiations or settle her claim with the Respondent by way of a COT3 agreement. Further, the Claimant submits that Unison did not have ostensible authority to act on her behalf as she had made it clear to the Respondent that she had instructed her own solicitor to act on her behalf and her solicitors had clearly entered into without prejudice negotiations with both the Respondent and the Respondent's solicitors. In such circumstances, without actual or apparent authority, the union were not the Claimant's agent at the time Mr Martin entered into the COT3 agreement and, therefore, the Claimant is not bound by the terms of the agreement.
19. The Respondent made submissions by reference to a written skeleton argument, the contents of which are not reproduced here but have been considered in their entirety. The Respondent submits that Unison have authority to act on behalf of the Claimant given that the claimant was represented by the union during the redundancy consultation and appeal. The Respondent submits that the Claimant gave express authority to the union to act on her behalf and that there was implied and ostensible authority for the union to act on the Claimant's behalf. In such circumstances, the Respondent submits that the requirements for showing a specific agency relationship have been satisfied. The Respondent submits that there is no evidence that the Claimant or her solicitor told the Respondent that they should not communicate with Unison about her case and that there is no inconsistency with both a solicitor and a union acting in relation to a specific matter. The Respondent also submits that by the time the Claimant asked for her details to be withdrawn from the COT3 settlement, it had already been validly executed and that the Claimant was bound by it and could not withdraw without the Respondent consent, which was not given. Therefore, the Respondent submits that the Claimant's claims have been settled by the COT3 agreement and the Tribunal does not have jurisdiction to consider the Claimants claims.

The law

20. There will be a binding legal agreement in the form the 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 an agreement.
21. The Employment Tribunals Act 1996 makes provision for conciliation by ACAS. Section 18A sets out the requirement for a prospective Claimants 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 have 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.”

22. 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 would be subject to privilege.

23. A party to litigation is entitled to rely on the ostensible authority of the other party 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: 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 (in this case, Unison) to act for the Claimant. If ostensible authority is established in that way, there is no need to consider actual authority.

24. In the case of Freeman v Sovereign Chicken Ltd [1991] ICR 853 a citizen's advice bureau adviser was found to have the ostensible authority of the Claimant where the Claimant had named the adviser in proceedings. This case was distinguished in Gloystarne.

Conclusion

25. Applying the relevant law to the facts I find that the COT3 agreement, a copy of which can be seen at pages 94A to C of the bundle, is a valid agreement as it satisfies the requirements of section 203 of the Employment Rights Act 1996 and section 18 of the Employment Tribunals Act 1996. The question is therefore whether Unison had actual or ostensible authority to settle the claims on behalf of the Claimant and if such claims have been effectively compromised.

26. I am satisfied that the Claimant told the union on two separate occasions, via Tony Martin and his secretary, that she did not want Unison to act on her behalf after she had attended the appeal hearing. I am also satisfied that the Claimant informed the Respondent during the redundancy consultation and the subsequent appeal that she had instructed her own solicitors to act on her behalf, that she had requested they represent her at the consultation and appeal hearings (which had been refused by the Respondent) and that she informed the Respondent that her solicitor would be in touch with them, which is clearly minuted. In such circumstances, I am satisfied that Unison did not have actual authority to act on behalf of the Claimant in respect of any settlement negotiations and they did not have actual authority to enter into and sign the COT3 agreement on the Claimant's behalf.

27. I am not satisfied that Unison had ostensible authority to negotiate on behalf of the Claimant or settle her claim via a COT3 agreement through ACAS because

the Claimant had made it clear on several occasions in her discussions with the Respondent during the consultation and appeal process that she was instructing her own solicitor to act on her behalf who would be in touch with the organisation and without prejudice discussions and correspondence did indeed take place between the Claimant's solicitor and that the Respondent and the Respondent's solicitor upon conclusion of the internal appeal. The fact that Mr Russell did not check with the HR Department or any of his colleagues prior to entering into discussions with the ACAS conciliation officer for concluding the COT3 agreement does not mean that the Respondent organisation itself was not on notice that the Claimant was no longer represented by the union and had instructed her own solicitors. Mr Russell's evidence was that he deliberately did not communicate with the appeal officer, Adam Harris, once his own involvement with the redundancy consultation had come to an end. In such circumstances, it cannot be right that the ignorance of one individual who has deliberately set out not to communicate with his HR colleagues about a particular employee's ongoing employment dispute with the Respondent organisation, is sufficient to establish in law that the trade union has ostensible authority to bind an employee in a settlement agreement which she knows nothing about. The Claimant's actions and those of her solicitors throughout September and October 2019 clearly demonstrates that the Claimant's solicitors were not acting in tandem with Unison and that the Claimant was seeking to resolve her employment dispute with the Respondent through without prejudice negotiations which were all conducted by the Claimant's solicitor. The Respondent received notification of the early conciliation certificate requested by the Claimant's solicitor from ACAS prior to the signing of the COT3 agreement. Applying the guidance in Gloystarne, I find that all the above matters should have placed the Respondent on notice that the trade union did not have ostensible authority to act as an agent on behalf of the Claimant.

28. In the circumstances, I find that the COT3 agreement entered into by Unison and Mr Russell of the Respondent organisation does not operate so as to settle the claims which have been brought by the Claimant under the case number 2504354/2019. Therefore, the Claimant's claim is not struck out and the Employment Tribunal has jurisdiction to hear all her claims.

EMPLOYMENT JUDGE ARULLENDRAN

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 3 November 2020**

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