EMPLOYMENT TRIBUNALS

Claimant: Mr P Hedlund

Respondent: London Borough of Lambeth

Heard at: **London South (Croydon)** **On:** **7 June 2017**

Before: **Employment Judge John Crosfill**

Representation
Claimant: No Appearance or representation
Respondent: Mr T Dracass of Counsel

JUDGMENT

1. The Claimant's claims have no reasonable prospects of success and are struck out.

REASONS

1. The notice of hearing sent to the parties identified the issues to be determined at this hearing as being:

   "whether there is an extant claim against the Respondent in the Tribunal and. If so,

   whether to strike out the claim under rule 37 of the Employment Tribunals Rules of Procedure 2013"

2. The Claimant had sent an e-mail to the Tribunal on the morning of the hearing indicating that he did not intend to make any appearance as he considered the matter to be straightforward in his favour. He indicated an intention to appeal if the matter was determined against him.

3. I determined these applications having made the following findings of facts from by reading the tribunal file and having regard to the documentary evidence placed before me. I heard no live evidence.

4. The Claimant had commenced employment with the Respondent on 1 September 2015. He was dismissed on 18 July 2016; the Respondent having concluded that he was guilty of gross misconduct.

5. The Claimant commenced the present proceedings on 26 July 2016. His application included an allegation that he had been unfairly dismissed for making a public interest disclosure. He also brought an application for interim relief seeking reinstatement pending the hearing of his claim.

6. Prior to any application for interim relief being heard the parties entered into an agreement recorded on a COT3 by ACAS and signed by the Claimant on 31 August 2016 and by the Respondent on 2 September 2016. That agreement was in the following terms:

"We the undersigned have agreed:

1. The Respondent agrees to reinstate Claimant to his role as Teacher at Lark Hall Primary School ("the School").

2. The Claimant agrees to resign from his position as Teacher at the School, immediately upon being reinstated to his role at the School, by the Respondent.

3. The Claimant agrees to withdraw his complaint to the Employment Tribunal under Case No: 2301396/2016 against the Respondent in consideration for which the Respondent and the School will pay, without any admission of liability, the Claimant salary for the month of August 2016, and a compensation payment in the sum of £17,500 in full and final settlement of the Claimant said claim and all of the claims that he has or may have against the respondent and the School or any of its officers or employees whether statutory, contractual at common law or otherwise in the UK or under EC law, arising out of his employment with the Respondent and the School or its termination, with the exception of any pension rights claims or personal injury claims not known to him at the date of signing this agreement. For the avoidance of doubt, the Claimant is not aware of any such personal injury claim as at the date of signing this agreement. both, the Respondent and the Claimant believes that the compensation payment falls within the provisions of Section 401(k) of the Income Tax (Earnings & Pensions) Act 2003 and will therefore be exempt from tax in relation to the first £30,000.

4. The Respondent agrees to make the compensation payment and the Claimant salary for the month of August, within 21 days of receipt of the COT3 form signed by the Claimant.

5. The Claimant agrees, not at any time, directly or indirectly, to divulge to any person (except required by law) or use any confidential information relating to the business of the Respondent or the School, or any of its Officers or elected Members which information may have come to his knowledge during his employment.

6. The Respondent agrees to provide its standard reference, in relation to the Claimant's employment with the school, to any prospective employer, upon request.

7. The parties agree there are no valid safeguarding issues in relation to the Claimant.

8. The parties agree that the claimant made a Public Interest Disclosure in relation to the School.

9. The parties agree not to make any statements oral or written touching upon or concerning the Claimant's relationship with the Respondent and the School which are critical, adverse, negative or derogatory, or which might be to detrimental to the interests of either party.

10. The parties agree that the terms of this agreement are confidential and that they will not, without the consent of the other party, disclosed terms of this settlement to any third party with the exception of the Claimant's immediate family members and representative and except as required by law."

7. I was told by the Respondent and accept that the Claimant was reinstated in accordance with the agreement and then resigned. He had been paid the sums set out in the settlement agreement and there had been no suggestion that he wished to return those monies. That is evidenced by a letter from the Respondent dated 2 November 2016 reinstating the Claimant and a letter of resignation signed on the same date.

8. On 12 November 2016 the Claimant issued a further set of proceedings in the employment tribunal, Case No: 2302383/2016. Those proceedings were issued against the Respondent in the present claim and the Governing Body of Lark Hall Primary School. The complaints set out in the ET1 are brought under Section 47B and 48 of the Employment Rights Act 1996 and complain of delay and/or the content of references provided by the Respondents. In his ET1 the Claimant said: *"In January 2016 I made a protected disclosure of abuse and neglect at Lark Hall Primary School…..the respondents withdrew the dismissal and admitted to certain terms, including acknowledging I made a protected disclosure".*

9. In their ET3 in Case No: 2302383/2016 the Respondents (who filed a joint ET3) make no admissions as to whether the Claimant made the protected disclosure relied upon in his ET3. In the light of that a preliminary hearing was held to determine, amongst other things, whether the Respondent was bound by the concession in the compromise agreement in the second set of proceedings. At a hearing on 6 March 2017 Employment Judge Baron determined that the Respondent was not bound by its concession made in the COT3 for the purposes of the second set of proceedings. The Claimant initially sought to "appeal" that decision to a more senior judge of the Employment Tribunal. It may be that he has now sought to appeal that decision to the Employment Appeal Tribunal.

10. On 14 March 2017 the Claimant wrote to the Employment Tribunal seeking to continue the present claim. Employment Judge Baron directed that there should be a preliminary hearing to determine the issues set out above and the matter was listed for 12 April 2017. That hearing was vacated when it appeared that the Claimant might be unavailable (despite him suggesting that he would not attend anyway) and then relisted before me.

11. It was and remains the Respondent's position that the claim has been validly compromised and that it can no longer be pursued by the Claimant. It seems that the Claimant's argument in response is that if the Respondent resiles from the contractual concession that he had made a protected disclosure then any agreement falls away and he is free to pursue his case.

12. A claim relating to statutory rights brought under the Employment Rights Act 1996 may only be compromised in the circumstances set out in Section 203. The material parts of that section are as follows:

"203 Restrictions on contracting out

(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—

(a) to exclude or limit the operation of any provision of this Act, or

(b) to preclude a person from bringing any proceedings under this Act before an employment tribunal.

(2) Subsection (1)—

(a) - (d) …

(e) 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…."

13. Section 18C of the Employment Tribunals Act 1996 reads as follows:

"18C Conciliation after institution of proceedings

(1) 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.

(2) Where a person who has presented a complaint to an employment tribunal under section 111 of the Employment Rights Act 1996 has ceased to be employed by the employer against whom the complaint was made, the conciliation officer may in particular—

(a) seek to promote the reinstatement or re-engagement of the complainant by the employer, or by a successor of the employer or by an associated employer, on terms appearing to the conciliation officer to be equitable, or

(b) where the complainant does not wish to be reinstated or re-engaged, or where reinstatement or re-engagement is not practicable, and the parties desire the conciliation officer to act, seek to promote agreement between them as to a sum by way of compensation to be paid by the employer to the complainant.

(3) In subsection (1) "settlement" means a settlement that brings proceedings to an end without their being determined by an employment tribunal."

14. It is possible to challenge the validity of an agreement arrived at through the actions of a conciliation officer to argue that the circumstances of an agreement purportedly arrived at with the assistance of ACAS fall outside of the exception found at Section 203(2(e). However, those circumstances are likely to be very rare indeed. The Claimant, having failed to attend, did not advance such arguments but I consider it fair to examine the matter.

15. In ***Moore v Duport Furniture Products Ltd*** **[1982] IRLR 31** the House of Lords took a broad and pragmatic view of the conduct of an ACAS officer which would be encompassed by the expression "endeavour to promote" in the earlier legislation. Lord Brandon said:

"*There remains for consideration what is the proper construction of the expression 'endeavour to promote' in the penultimate line of para. 26(2). What has to be considered in this connection is whether, in making the interventions which Mr Werrett did make, and in doing thereafter the acts which he did do, he was 'endeavouring to promote a settlement of the complaint without its being determined by an Industrial Tribunal' within the meaning of sub-paragraph (2). Here again it seems to me that the expression 'promote a settlement', as used in that sub-paragraph, must be given a liberal construction capable of covering whatever action by way of such promotion is applicable in the circumstances of the particular case."*

16. It seems to me that I can be satisfied that the ACAS Officer in this case at least took the steps of recording the agreement reached by the parties and entering it onto a COT3 before taking such practical steps as were necessary to have the parties sign that agreement. All that is required is that the ACAS Officer has "taken action". ***Moore v Duport*** provides authority for the proposition that it is sufficient that the Officer has recorded the terms of an agreement already made. That is sufficient for the purposes of Sub-section 203(2)(e). As such, if the agreement does act as a bar to proceedings it does not fall foul of the prohibition against contracting out set out in section 203 of the Employment Rights Act 1996. The matter has been considered more recently in ***Allma Construction Ltd v Bonner*** **[2011] IRLR 204** where Lady Stacy said:

"Thus, if parties agree to settle a claim in circumstances where an ACAS officer has 'taken action', the jurisdiction of the employment tribunal is ousted. Taking action is not further defined and so must be given its ordinary meaning so as to cover any action taken by an ACAS officer in relation to the claim. He does not require to broker the settlement nor does he require to record it. His statutory duty goes no further than that he is to endeavour to promote a settlement of the proceedings. How he does that will be a matter for him and will vary from case to case according to its particular circumstances. Whilst there is a practice of ACAS being involved in the recording of settlements in standard paperwork (forms COT3), that practice does not need to have been followed for the tribunal's jurisdiction to be ousted in a case which falls under s.18(2) of the Employment Tribunals Act 1996."

17. I note that Lady Stacy considered that a concluded agreement ousted the jurisdiction of the tribunal to consider the complaint. In the course of submissions I floated the idea that the better way of looking at a binding compromise (that does not breach the prohibition on contracting out contained in Section 203) is that it provides a defence rather than ousting jurisdiction per se. However, I note that the House of Lords referred to a compromise as a bar to proceedings and Lady Stacy refers expressly to the issue of jurisdiction. Whatever the answer my conclusions in this case would be the same.

18. The next issue is therefore if, as I have found, there is an agreement between the parties that satisfies the conditions in Section 203(2)(e) does that agreement remain binding if, as the Claimant says, the Respondent relies from a concession embodied in that agreement?

19. There are certain circumstances where as a result of the conduct of the parties, or one of them, a contract will be treated as if it has never been made. For example, if a party has been forced to enter a contract under duress, or where the parties acted under a mistake of fact or law. It has been recognised in a number of cases that if a compromise agreement could be attacked on such a basis then the claim ought to be permitted to continue see ***Industrious Ltd v Horizon Recruitment Ltd (in liquidation) and Vincent*** **[2010] IRLR 204**, and ***Glasgow City Council v Dahhan*** **UKEAT/0024/15**.

20. Whilst the common law recognises a number of factual circumstances which may entitle an employment tribunal to find that the agreement embodied in a COT3 is voidable and treat the agreement as if it had never been made the common law does not treat a contract as void or voidable just because one party is in breach. The remedy for the innocent party in those circumstances is to bring a claim for damages.

21. In the present case, I am prepared to assume for the purposes of this judgment that the Respondent is in breach of contract, in that it has withdrawn a concession made contractually that the Claimant made protected disclosures. If that is right, then it did so at a time where the Respondent had performed the its obligations in part having made all necessary payments under the contract and having reinstated the Claimant. The Claimant had performed one obligation namely to tender his resignation. He had failed to comply with his obligation to withdraw his complaint.

22. I consider that the matter is quite straightforward. The Claimant has offered no evidence or argument that would support a finding that the agreement embodied in the COT3 is void or voidable. In the circumstances, whether there is a breach or not, there was a binding compromise. I consider that the wording of paragraph 3 makes it clear that the Claimant intended to release the Respondent from the present claim. The fact that he has failed to comply with his obligation to withdraw his case does not alter that release. If the Claimant contends that the Respondent is in breach of contract, then his remedy is not in pursuing the original proceedings, but is limited to bringing another claim.

23. I therefore conclude that there is a binding compromise that satisfies the requirements of Section 203(2)(e) which has not been rendered void or

voidable by any act or omission of the Respondent. Whether that binding compromise goes to jurisdiction or is simply an absolute defence is therefore immaterial.

24. If I am wrong about my conclusions above I consider that there is a further matter which means that if I had found that the Claimant was able to pursue his claim I would have struck it out as having no reasonable prospects of success.

25. The Claimant's claim was that he had been dismissed in circumstances which were unlawful contrary to Sections 94 and 103A of the Employment Rights Act 1996. He relied upon a dismissal on 18 July 2016. The effect of the compromise agreement which was complied with was that the Claimant was reinstated with backpay. He then resigned. I would have found that he could no longer have relied upon the dismissal on 18 July 2016 because that had, by agreement, disappeared. There was no dismissal and in the circumstances any claim for unfair dismissal had no reasonable prospects of success.

26. I therefore conclude that the tribunal has no jurisdiction to entertain the Claimant's complaint as a binding compromise has been reached. The claim, having not been withdrawn, is therefore struck out pursuant to rule 37 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 because it has no reasonable prospects of success.

27. The Respondent made an application for costs. As the Claimant had not attended the hearing I took the view that, as no formal application had been made before the hearing and the notice of hearing was silent on the point then the Claimant had not had sufficient notice of the application for the purposes of rule 77 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. I have therefore made separate case management orders to deal with this application.

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Employment Judge John Crosfill

Date 19 June 2017