Appeal No. UKEAT/0013/20/RN
Appeal No. UKEATPA/0393/15/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 27 February 2020
Judgment handed down on 19 June 2020

Before

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

MS MINA PATEL — APPELLANT

CITY OF WOLVERHAMPTON COLLEGE — RESPONDENT

Transcript of Proceedings

JUDGMENT

PRELIMINARY HEARING – ALL PARTIES
APPEAL FROM REGISTRAR'S ORDER

APPEARANCES

For the Appellant	MS NABILA MALLICK (of Counsel) Appearing under the Employment Law Appeal Advice Scheme UKEAT/0013/20/RN
The Appellant in Person	MS MINA PATEL UKEATPA/0393/15/RN
For the Respondent	DR EDWARD MORGAN (of Counsel) Instructed by: DAC Beachcroft LLP 3 Hardman Street Manchester M3 3HF

SUMMARY

PRACTICE AND PROCEDURE

The Employment Appeal Tribunal declined to extend time for the presentation of a Notice of Appeal against one Judgment of the Employment Tribunal and dismissed a validly presented Appeal against a second Judgment which refused the Claimant's request for reconsideration of the first. After the Employment Tribunal's Judgments had been promulgated, and after the presentation of the Appeals, the Claimant and the Respondent had entered into a settlement agreement, following ACAS conciliation, which had compromised all the causes of action relied on by the Claimant before the Employment Tribunal. The Claimant subsequently sought to pursue both of the Appeals before the Employment Appeal Tribunal and contended that the conciliated agreement should be set aside.

The Employment Appeal Tribunal held that the agreement between the parties resulted in the Appeals against the Employment Tribunal's earlier Judgments being academic and that there was no sufficient reason for either of them to proceed to a Full Hearing in those circumstances. It also held, applying **Freeman v Sovereign Chicken** [1991] ICR 853, that it was not open to the Claimant to seek to set aside the conciliated agreement as part of the appeal proceedings.

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. In this judgment, I shall refer to the parties as they were before the Employment Tribunal, that is as "the Claimant" and "the Respondent".

2. This is my judgment on preliminary matters arising in two Appeals brought by the Claimant, by which she seeks to challenge decisions of the Employment Tribunal which resulted in the striking out of part of her claim against the Respondent and the refusal of her applications to adjourn a Preliminary Hearing and the Full Hearing of the claim in the Employment Tribunal.

3. One of the Appeals was filed outside the time limit; the Registrar refused to extend time and the Claimant has appealed that decision. The second Appeal was filed in time and has been referred for a Preliminary Hearing.

4. Before me, the Claimant was represented by Ms Nabila Mallick of Counsel, acting under the Employment Law Appeal Advice Scheme (ELAAS). The Respondent was represented by Dr Edward Morgan of Counsel, who had represented the Respondent in the proceedings before the Employment Tribunal. I am grateful to both Counsel for their assistance, and in particular to Ms Mallick for having appeared before this Tribunal *pro bono*.

Background to the Appeals

5. The history of these Appeals is unusual; that is perhaps reflected in the amount of material that was provided to me even at this preliminary stage. The hearing bundle was 282 pages. The Respondent filed a supplemental bundle containing 10 further pages. The Claimant

filed a supplemental bundle containing a further 727 pages. I shall not lengthen this judgment by digressing on the appropriateness of submitting such an amount of documentation to this Tribunal. Although I was provided with more than 1,000 pages of material (excluding authorities) for a hearing which lasted a little over three hours, the background to these Appeals can be relatively shortly set out.

6. The Claimant was employed by the Respondent as a lecturer between 14 January 2003 and 31 March 2014. She taught courses in the Respondent's beauty division. In January 2014, the Respondent announced a proposed restructure of that department. The Claimant and others were put at risk of redundancy. Following a process of consultation and selection, the Claimant was not offered a role in the restructured department and was dismissed with effect from 31 March 2014, the reason given by the Respondent being redundancy. The Claimant appealed against the decision to dismiss her. Her appeal was dismissed by the Respondent's Principal on 22 May 2014.

7. On 20 July 2014, following an unsuccessful conciliation period, the Claimant filed an ET1 Claim Form at the Birmingham Employment Tribunal. She contended that had been unfairly dismissed and also that her dismissal was directly or indirectly discriminatory on the ground of her race. She further alleged that she had been automatically unfair dismissed and subjected to other detriments as a result of whistleblowing complaints that she had previously made to the Respondent's HR department and management. The Claimant made other claims, including of unlawful deductions from wages and breach of contract. It was stated in section 11 of the ET1 form that the Claimant was represented by Mr Tufail Hussain of Hilton Brady. The name of that firm appears at the bottom of the Particulars of Claim that were appended to the

ET1. Although it was not stated on the face of the ET1, Hilton Brady was in fact a trading name of UK Employment Law Adviceline Ltd, a company controlled by Mr Hussain.

8. In an ET3 Response Form filed in September 2014, the Respondent denied all the Claimant's claims and alleged that several of them had been insufficiently particularised in the ET1. There was then a case management Preliminary Hearing before Employment Judge Tucker on 1 October 2014 at which the case was listed for a 13-day Full Hearing, starting on 14 April 2015. It was anticipated that more than 20 witnesses would be called to give evidence. It was not, however, possible to define the issues for the Full Hearing because of a lack of information from the Claimant. Judge Tucker ordered the Claimant to provide a Scott Schedule by 6 January 2015, giving further details of her claim.

9. There was a further Preliminary Hearing on 30 January 2015 before Employment Judge Perry. At that hearing, the Claimant was represented by Mr Hussain and the Respondent was represented by Dr Morgan. The Claimant was also present. The Claimant's claims of indirect discrimination and of less favourable treatment as a part-time worker were dismissed on withdrawal. Employment Judge Perry found that certain of the Claimant's claims of race discrimination had been made outside the statutory time limit and that it was not just and equitable to extend time. Judge Perry also considered that the Schedule produced by the Claimant in accordance with Judge Tucker's earlier Order had failed to identify necessary elements of the alleged protected disclosures or the basis on which the claims for unpaid sums were being advanced. A further Preliminary Hearing was therefore listed for 18-19 March 2015 to consider whether to strike out all part of the Claimant's whistleblowing claim and her claims relating to unpaid wages and holiday pay, or whether to order the Claimant to pay a deposit in respect of any of those claims. The Claimant was also ordered by Judge Perry to provide the

necessary full details of those claims. Ms Mallick told me during the course of her submissions that despite being represented by Mr Hussain, the Claimant was dissatisfied during the hearing with the way in which her case was being advanced (specifically, what she saw as Mr Hussain's inability to answer the Judge's questions) and that as a result the Claimant addressed the Judge for 30 minutes at the hearing. Judge Perry's Judgment, case management Orders and summary were sent to the parties on 11 February 2015.

10. Following the hearing on 30 January 2015, the Claimant's relationship with Mr Hussain was terminated. On 13 February 2015, Mr Hussain sent an email to the Employment Tribunal confirming that he was no longer acting for the Claimant. On 16 February 2015, the Claimant (then acting as a litigant in person) sent an email to the Employment Tribunal requesting an adjournment of the 13-day Full Hearing and reconsideration of the Orders that had been made on 30 January 2015. On 18 February 2015, those applications were refused by Employment Judge Perry.

11. On 6 March 2015, the Respondent's Solicitors applied for an 'unless' order. The Claimant had failed to comply with several of the case management directions that had been made by the Employment Tribunal. In particular, she had failed to comply with an order for the disclosure of relevant documents by 15 December 2014 that had been made by Judge Tucker, and had failed to comply with an order that she provide her witness statement for the Full Hearing by 20 February 2015 that had been made by Judge Perry. She had also not responded to the Respondent's proposed list of issues, chronology or bundle index for the Full Hearing. It is apparent that the Claimant considers that her failure to comply with those Orders was the fault of her former representative, Mr Hussain.

12. During the week commencing 9 March 2015, the Claimant instructed new representatives, Gordon Lutton Solicitors. Her case was dealt with by a Consultant Solicitor, Ms Sarah Pugh. On 13 March, Ms Pugh wrote to the Employment Tribunal. She stated that her firm had only had a very limited opportunity to review the papers and receive instructions. She considered that it was clear that the claim that had been submitted was "not well drafted" and contended that the Claimant's previous representative had "failed [her] at every juncture during this case". Ms Pugh went on to state that the Claimant ought not to be blamed for the failure of her previous representative and that she should be allowed further time to properly define and prepare her claim for the final hearing. She stated that the Claimant's health had collapsed and that she was no longer well enough to participate in the Employment Tribunal proceedings. She requested a postponement of both the Preliminary Hearing listed for 18-19 March 2015 and of the 13-day Full Hearing listed to start on 14 April 2015. Ms Pugh suggested that the case should be postponed for two or three months. Ms Pugh further contended that it was not appropriate or in accordance with the Overriding Objective to hold a Preliminary Hearing to consider striking out part of the claim so close to the Full Hearing and that the hearing on 18-19 March should, in any event, be vacated. She opposed the Respondent's application for an 'unless' order, contending that one was not appropriate given the circumstances set out in her letter.

13. On 16 March 2015, the Respondent's Solicitors responded to Ms Pugh's letter of 13 March. They contended that the Claimant's case been conducted unreasonably and that the Preliminary Hearing and the Full Hearing should both go ahead as listed.

14. It does not appear that any decision was made by the Employment Tribunal on the Claimant's application of 13 March 2015 prior to the commencement of the Preliminary Hearing that had been listed for 18-19 March. That Preliminary Hearing took place before

Employment Judge Dimbylow. The Claimant was represented by Mr Bruce Frew of Counsel. The Respondent was represented by Dr Morgan. Mr Frew was instructed to make an application to adjourn the Preliminary Hearing and the Full Hearing. That application was refused by the Employment Judge. Mr Frew had no further instructions and withdrew from the hearing, which then proceeded without the Claimant being either present or represented. Employment Judge Dimbylow struck out the Claimant's whistleblowing claims and the claims for unpaid wages and holiday pay on the basis that they had no reasonable prospect of success. A Judgment to that effect was sent to the parties on 20 March 2015, together with additional case management Orders. Written reasons were requested and were sent to the parties on 8 April 2015.

15. On 2 April 2015, Employment Judge Dimbylow dealt with the Respondent's application for an 'unless' order. He considered that the Claimant had failed to comply with the orders previously made by the Employment Tribunal and made an Order that unless by 4 pm on 9 April 2015 the Claimant complied with the terms of the case management Orders that had been made on 11 February and 20 March, her claim would stand dismissed ("the Unless Order").

16. Shortly before midnight on the evening of 2 April 2015, Ms Pugh sent an email to the Employment Tribunal requesting reconsideration of the Judgment that had been sent to the parties on 20 March 2015 which refused the Claimant's application to adjourn the Preliminary Hearing and the Full Hearing and which struck out parts of her claim. Ms Pugh appended emails that she had been sent earlier on the evening of 2 April 2015 by the Claimant's General Practitioner in which the Employment Tribunal proceedings were referred to and it was stated that it would not be appropriate for the Claimant to attend "any legal hearing". The doctor considered that the Claimant needed time to undergo counselling and was unable to give a

definite time by which the Claimant would be well enough to attend a hearing, stating that it might take several sessions of counselling and a change of medication.

17. The Claimant's application for reconsideration of the Judgment sent to the parties on 20 March 2015 was refused by Employment Judge Dimbylow on 9 April, on the basis that there was no reasonable prospect of the original decision made at the hearing on 18-19 March being varied or revoked and that the matters raised ought to be pursued on appeal.

18. Also on 9 April 2015, Employment Judge Dimbylow extended time for compliance with the Unless Order to 11 am on 13 April 2015. He listed a further Preliminary Hearing for 11 am on 13 April to consider outstanding applications and issues, including whether there should be a stay of proceedings or an adjournment of the Full Hearing that was still listed to commence on 14 April. The Claimant was directed to bring to that hearing all medical notes and records relied on in support of her application to adjourn the Full Hearing.

19. At the Preliminary Hearing on 13 April 2015, which was before Employment Judge Dimbylow, the Claimant was represented by Mr Jonathan Gidney of Counsel and the Respondent was represented by Dr Morgan. Mr Gidney accepted that the Unless Order made on 2 April 2015, as subsequently varied, had not been complied with. He submitted that relief from the sanction contained in the Unless Order should be granted, principally on the basis of the medical evidence that had been supplied. Judge Dimbylow refused to grant relief from sanction, concluding as follows:

> **"20. Having made my findings on the material facts I went on to make my decision, and looked at the combination or totality of events. There were 3 main strands. Firstly, the claimant had engaged in a prolonged failure to comply with orders of the tribunal going back as far as those of Judge Tucker. Secondly, the claimant blamed her representative, when on the information before me it was she who was stopping compliance with the orders. Thirdly, there is paucity in the quality of the medical evidence produced by the claimant. I concluded there was no good explanation for the failure to comply with significant orders. When I looked at all these things, I concluded that it was just, fair and proportionate to refuse the**

application for relief from sanction; therefore the Unless Order remained effective and the claim remained dismissed.

21. With the agreement of the parties, I then fixed the date for the hearing of, and made some agreed directions for, the respondent's claim for costs."

The Employment Judge's reference to information before him showing that the Claimant had herself been responsible for non-compliance with Orders appears to have been to the content of an email sent to the Employment Tribunal by Mr Hussain, who had been given the opportunity to attend the hearing on 13 April 2015 because the Respondent had indicated that an application for wasted costs might be made. Mr Hussain did not attend the hearing but sent an email to the Employment Tribunal in which he stated that the Claimant had not wished to disclose any documents to the Respondent, something he described as a "very serious issue" which had caused him "significant difficulties". Mr Hussain stated that the Claimant had been dissatisfied with the outcome of the hearing before Judge Perry on 30 January 2015 (albeit he said that the Claimant's criticisms of him were not justified) and that in any event he did not feel able to continue representing her.

20. The situation as it stood following the hearing before Employment Judge Dimbylow on 13 April 2015 was that the entirety of the Claimant's claim had been dismissed. The only remaining issue before the Employment Tribunal at that point was the Respondent's application for costs against the Claimant. That was listed to be heard on 28 July 2015.

21. On 5 May 2015, Gordon Lutton Solicitors ceased to act for the Claimant. On 6 May, the Claimant wrote an eight-page letter to the Employment Tribunal in which she waived any and all privilege in her communications with her former representative, Mr Hussain. She contended that Mr Hussain should be held accountable for any costs award. She alleged that he had been

dishonest and had provided false information to the Employment Tribunal and had made false allegations against her. She contended that he had acted negligently.

22. At 3:54 pm on 20 May 2015, the Claimant wrote an email to this Tribunal requesting an extension of time for lodging a Notice of Appeal on the basis that during the course of that day she had suffered a blackout which had prevented her from completing the papers necessary to lodge an appeal and that she would file the Appeal by 9:00 am the following morning. By emails sent at 10:44 pm and 11:11 pm on 20 May 2015, the Claimant filed her Notice of Appeal in this Tribunal; due to the time at which these emails were sent, the Notice of Appeal was formally received by this Tribunal on the following day, 21 May 2015. The Notice of Appeal that was filed in this Tribunal was against the Judgment of 20 March 2015, issued after the Preliminary Hearing on 18-19 March 2015, and also against the Judgment of 9 April 2015 which refused to reconsider that Judgment. The Grounds of Appeal contended that an adjournment of the Full Hearing should have been granted and that the striking out of the whistleblowing claims, in particular, was too severe and was perverse. Reference was again made to the alleged negligence of Mr Hussain having resulted in the Claimant not being given an adequate opportunity to advance her case before the Employment Tribunal and resulting in biased and perverse judgments. Criticism was also made of the Respondent's conduct of the case before the Employment Tribunal as being vexatious.

23. At 8:32 am on 21 May 2015, the Claimant sent a further letter to this Tribunal accompanied by copies of her medical records. The letter stated that she had suffered a blackout lasting over an hour and that when she had recovered she was very disorientated and confused. The Claimant said that she had then suffered a severe panic attack as she believed that she had

missed the deadline for lodging her Appeal. She stated that she suffered blackouts on a fairly frequent basis and referred to the medical information enclosed with the letter.

24. On the afternoon of 20 May 2015, the Respondent's Solicitors sent an email marked 'Without Prejudice Save as to Costs' to the Claimant, in the following terms:

> **"I refer to the costs hearing in the above matter and the matter of costs generally. As you are aware, your claims against my client were struck-out in their entirety and my client is now directed to inform the Tribunal as to the basis of the cost application against you.**
>
> **However, I noted from your recent discussion with me that your intention is for the parties to pursue Mr Tufail Hussain for the costs in the matter, and that you would not have the capacity to repay my client's costs if the Tribunal orders that you do so.**
>
> **In view of this information, I have taken my client's instructions and propose the following settlement of the matter:**
>
> - **A "drop hands" offer - each party would bear their own losses in terms of costs;**
> - **My client will agree not to pursue you in relation to their legal costs incurred to date;**
> - **You will agree not to pursue any action against my client…"**

The Respondent's Solicitors requested a response by 27 May 2015. On 1 June, the Claimant wrote stating that she had been unable to reach an informed decision due to her state of health.

25. It is apparent that the Employment Tribunal wrote to Mr Hussain on 22 May 2015 to raise the issue of whether he should be added as a party for the purpose of the Respondent's costs application. On 28 May, Mr Hussain responded to the Tribunal stating that this would not be appropriate. He refuted the allegations made against him by the Claimant. The Claimant responded to that letter on 2 June, contending that what Mr Hussain had said in his letter was false and that he had acted negligently in conducting her case.

26. On 4 June 2015, Employment Judge Dimbylow issued a Judgment on the Claimant's application for reconsideration of his Judgment of 13 April 2015. The application for reconsideration was refused on the basis that there was no reasonable prospect of the original decision being varied or revoked.

27. On 5 June 2015, the Respondent's Solicitors wrote to the Employment Tribunal setting out the basis of the Respondent's costs application. It was contended that the Claimant had acted unreasonably in bringing the proceedings in the first place and that they had been conducted in an unreasonable manner. It was noted that the Claimant had breached numerous case management orders and had placed the Respondent in a position where it had been required to participate in two detailed Preliminary Hearings and to prepare for a 13-day Full Hearing.

28. On 30 June 2015, the Claimant and the Respondent reached an agreement ("the ACAS Agreement") whose terms were similar to the proposal that had been made by the Respondent in the email of 20 May. The ACAS Agreement was reached as a result of conciliation action undertaken by ACAS. I was provided with a copy of the written record of the agreement, which was signed by the Claimant on 3 July and by the Respondent's Solicitors on 8 July. The material terms of the ACAS Agreement were as follows:

> **"Ms Mina Patel ("the claimant") and City of Wolverhampton College ("the respondent") hereby agree to accept the terms set out below without any admission as to liability in full and final settlement of:**
>
> **1. the claimant's claims under case number 1304501/2014 ("the Claim"); and**
>
> **2. all and any other claims howsoever arising which the claimant may have against the respondent or its officers, agents and employees arising from or in connection with the claimant's employment including the termination thereof. For the avoidance of doubt without prejudice to the generality of the foregoing this includes claims for unfair dismissal, wrongful dismissal, a statutory redundancy payment, breach of contract, unpaid wages, race, religion or belief and part-time workers discrimination, detriment on grounds of having made a public interest**

disclosure or any claims arising under the Employment Rights Act 1996, the Working Time Regulations 1998 and the Equality Act 2010.

3. This settlement does not affect any rights to [sic] the claimant may have in relation to accrued pension rights.

4. The terms of this Agreement are as follows:

…

4.4 The respondent agrees to pay the claimant the sum of £1.00 (One Pound) ("the Settlement Sum") within 21 days of receipt by DAC Beachcroft LLP, solicitors for the respondent, of the Agreement signed by the claimant…

…

4.6 The respondent has incurred circa £42,620.00 of costs in defending the Claim ("the Costs"). The respondent considers that it has a strong case to recover the Costs in respect of the claimant's handling of the litigation under the Claim. The respondent agrees that:

4.6.1 It will not continue with its application for costs against the claimant in respect of the Costs; and

4.6.2 It will write to the Employment Tribunal within 48 hours of the completion of this Agreement to withdraw its application for costs in respect of the Costs; and

4.6.3 It will make no further application for costs in or relating to the Claim subject to clause 4.8.

…

4.8 The claimant shall not make any adverse or derogatory comment about the respondent to any third party… which shall, or may, bring the respondent, their directors or employees into disrepute. She further agrees that if she makes an adverse or derogatory comment about the respondent as described within this clause and/or pursues a claim in any court of law arising from the same set of facts and/or circumstances as case number 1304501/2014, save for any claim for personal injury in the civil courts, after the date of this Agreement she will reimburse the respondent in relation to the Costs and/or further and in the alternative the respondent reserves the right to pursue an application for the Costs in the employment tribunal or civil court in the event of a breach of this clause by the claimant…"

29. The Claimant received legal advice in connection with the ACAS Agreement from Mr Chris Hadrill, a Solicitor at Redmans Solicitors. Mr Hadrill appears to have had no prior involvement with the Claimant's case. On 8 July 2015, the Respondent's Solicitors issued a cheque for the settlement sum of £1.00 to the Claimant.

30. Simultaneously, the Claimant was in negotiations with Mr Hussain regarding his firm's alleged negligence in conducting her case prior to the termination of their relationship. On 11 June 2015, the Claimant wrote to Mr Hussain that the proposed agreement between them was "linked to my proposal to the respondent to walk away and cut my losses with them in the whole". On 15 June, she wrote to Mr Hussain that she could not proceed to enter into an agreement with the Respondent until their agreement was finalised. On 30 June, there was further negotiation by email between the Claimant and Mr Hussain about the precise wording of their agreement.

31. On 1 July 2015, the Claimant and Mr Hussain both signed the agreement which had been negotiated between them, by which UK Employment Law Adviceline Ltd agreed to pay the Claimant the sum of £20,000 by 20 December 2015 in seven instalments, without admission of liability. Mr Hussain also entered into a personal guarantee for the payment of that sum. The Claimant agreed to compromise all claims, including claims for professional negligence, that she had or might have against the company or any of its officers, including Mr Hussain. In due course, neither the company nor Mr Hussain paid the £20,000 to the Claimant that was due under the agreement by 20 December 2015. It appears from the extensive subsequent correspondence provided to me by the Claimant that Mr Hussain has made some part payments in later years, but that the full amount due under that agreement has still not been paid.

32. On 21 July 2015, the Claimant's Appeals, which had been received by this Tribunal on 21 May, were struck out for non-payment of the fee then applicable to the lodging of appeals in this Tribunal, which had not been paid by the Claimant. However, following the decision in **R (on the application of UNISON) v Lord Chancellor** [2017] UKSC 51, [2017] ICR 1037, in

which the secondary legislation making provision for fees was held to be unlawful, the Appeals were reinstated. As is apparent, the Claimant now wishes to pursue both Appeals.

33. In December 2018, the Appeals were considered on the papers at the sift stage by Choudhury J. He noted that the Appeal in respect of the Employment Tribunal's Judgment of 20 March 2015 was out of time and so could not proceed. He directed that the Notice of Appeal against the Judgment of 9 April 2015, refusing the application for reconsideration of that Judgment, should not proceed as there were no reasonable grounds for bringing the Appeal. On 7 January 2019, the Claimant sought a hearing under Rule 3(10) of the Employment Appeal Tribunal Rules. That hearing was due to take place on 26 June 2019 but was adjourned on the Claimant's application.

34. On 1 May 2019, the Registrar made an Order refusing to extend time to present the Notice of Appeal against the 20 March 2015 Judgment. The Registrar gave full reasons for refusing to extend time, but it is not necessary to set them out in any detail here. The Claimant has appealed against the Registrar's Order refusing to extend time.

35. On 7 May 2019, the Claimant wrote an email to the Respondent's Solicitors purporting to rescind the ACAS Agreement. She contended that her former representative, Mr Hussain, had:

> "**… pressured, coerced and tricked me into entering 2 ACAS Agreements, one with his companies [sic] and the other with your clients, he has not honoured the ACAS Agreement and has kept me trapped in these agreements since August 2015, preventing related legal issues from being resolved for closure.**"

The Claimant's email concluded with a request for confirmation that the Respondent was "agreeable" to rescinding the ACAS Agreement. On 19 May 2019, the Respondent's Solicitors replied. They stated that the relations between the Claimant and her former advisers were not a

matter for the Respondent. With reference to the rescission of the ACAS Agreement, the Respondent's solicitors stated:

> **"We note that you also queried whether our client is agreeable to 'rescinding' the ACAS Agreement. It is our understanding that this is a reference to the COT3 agreement which the parties signed on 3 and 8 July 2015 after the parties reached settlement (with the assistance of ACAS) on 30 June 2015 in connection with the Tribunal case number of 1304501/2014 (the "Agreement"). Our client does not agree to this Agreement being rescinded. Chris Hadrill of Redmans Solicitors advised you in relation to the Agreement. You therefore not only had the benefit of independent legal advice but the settlement was also facilitated through ACAS (an independent organisation with a neutral and objective conciliator). The Agreement is therefore legally binding and validly waives your claims against our client."**

The Respondent maintained this position in further email correspondence between the parties regarding the ACAS Agreement in December 2019 and January 2020. In that correspondence, the Claimant contended that the ACAS Agreement could be rescinded by her because "it is concealing Fraud, Perjury, Perverting the Course of Justice and a Miscarriage of Justice in my Case."

36. On 23 October 2019, His Honour Judge Auerbach directed that given the close relationship between the two Appeals, instead of a hearing under Rule 3(10) there should be an all parties Preliminary Hearing in the Appeal against the 9 April 2015 reconsideration Judgment and that it should be listed together with the appeal against the Registrar's Order on extending time for the Appeal against the 20 March 2015 Judgment.

The Law

37. Section 21 of the Employment Tribunals Act 1996 provides that an appeal lies to this Tribunal on any question of law arising from any decision of, or arising in any proceedings before, an Employment Tribunal under or by virtue of certain enactments, including the Employment Rights Act 1996.

38. The Employment Appeal Tribunal Rules 1993 ("the EAT Rules") are made pursuant to power conferred on the Lord Chancellor by section 30 of the Employment Tribunals Act 1996. Rule 3 of the EAT Rules sets out the time limits applicable to filing a Notice of Appeal. It provides, so far as is material:

> **"(3) The period within which an appeal to the Appeal Tribunal may be instituted is–**
>
> **(a) in the case of an appeal from a judgment of the employment tribunal–**
>
> **(i) where the written reasons for the judgment subject to appeal–**
>
> **(aa) were requested orally at the hearing before the employment tribunal or in writing within 14 days of the date on which the written record of the judgment was sent to the parties; or**
>
> **(bb) were reserved and given in writing by the employment tribunal 42 days from the date on which the written reasons were sent to the parties…"**

39. Rule 37 of the EAT Rules provides, so far as is material:

> **"(1) The time prescribed by these Rules or by order of the Appeal Tribunal for doing any act may be extended (whether it has already expired or not) or abridged, and the date appointed for any purpose may be altered, by order of the Tribunal.**
>
> **(1A) Where an act is required to be done on or before a particular day it shall be done by 4 pm on that day.**
>
> **…**
>
> **(3) An application for an extension of the time prescribed for the doing of an act, including the institution of an appeal under rule 3, shall be heard and determined as an interim application under rule 20.**
>
> **…"**

40. Rule 20(1) of the EAT Rules provides:

> **"Every interim application made to the Appeal Tribunal shall be considered in the first place by the Registrar who shall have regard to rule 2A (the overriding objective) and, where applicable, to rule 23(5)."**

41. Rule 21(1) of the EAT Rules provides, so far as is material:

> **"Where an application is disposed of by the Registrar in pursuance of rule 20(2) any party aggrieved by his decision may appeal to a judge…"**

42. Although formally an appeal against the order made by the Registrar, it is for me to reach my own decision on the application to extend time. I was referred to the decision of the Court of Appeal in **Jurkowska v Hlmad Ltd** [2008] EWCA Civ 231, [2008] ICR 841, which discusses the principles applicable to an extension of time for an appeal to this Tribunal and considers the earlier leading authority of **United Arab Emirates v Abdelghafar** [1995] ICR 65. Those decisions make clear that the grant or refusal of an extension of time is a matter of discretion, to be exercised in a principled manner in accordance with reason and justice. It requires a weighing and balancing of all relevant factors. In appeals to this Tribunal, the time limit will only be relaxed in rare and exceptional cases where there is a reason which justifies departure from the time limit. There should be a full and honest explanation of the reasons for non-compliance. Other factors may come into play in the exercise of the discretion. The merits of the appeal may be relevant but are usually of little weight.

43. In **J v K (Equality and Human Rights Commission intervening)** [2019] EWCA Civ 5, [2019] ICR 815, the Court of Appeal held at [33] that where mental ill-health or other disability has contributed to a would-be appellant failing to institute an appeal in time, that will be an important consideration in the exercise of the discretion. At [38], it was held that a serious episode of mental ill-health may be a very relevant consideration in the exercise of the discretion even if it does not amount to a disability as defined by section 6 of the Equality Act 2010. At [39], it was held that if the failure to institute the appeal in time was, wholly or in substantial part, the result of mental ill-health, justice will usually require the grant of an extension.

Discussion

The Parties' Submissions

44. For the Claimant, Ms Mallick submitted that there is a good reason to extend time in the Appeal against the 20 March 2015 Judgment, as a result of the explanation given by the Claimant, and that both Appeals have a reasonable prospect of success and should proceed to a Full Hearing. She submitted, in response to points raised by Dr Morgan on behalf of the Respondent, that the ACAS Agreement was irrelevant to the Appeals because it had not compromised the appeal proceedings; it was relevant only to the Respondent's application for costs in the Employment Tribunal. She further submitted that it was in any event open to the Claimant to pursue her Appeals notwithstanding the existence of the ACAS Agreement, because it was liable to be rescinded for the reasons given by the Claimant and also because, even if they were academic, the Appeals raised issues of general importance. Ms Mallick informed me that the Claimant has, and that she had during the course of the Employment Tribunal proceedings, serious mental illness including long-term Post-Traumatic Stress Disorder. She contended that the Claimant's illness had not been properly taken into account by the Employment Tribunal throughout the course of the proceedings below.

45. On behalf of the Respondent, Dr Morgan submitted that the Appeals were entirely academic because of the terms of the ACAS Agreement. He contended that it was not open to the Claimant to seek to set aside the ACAS Agreement in appellate proceedings before this Tribunal. Dr Morgan submitted that if the Appeals were academic then they raised no issues which would justify their proceeding to a Full Hearing before this Tribunal. Dr Morgan also submitted that the Appeals otherwise lacked substantive merit.

The Appeal Against the Registrar's Order

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46. It is convenient to deal first of all with the appeal against the Registrar's Order refusing to extend time for the presentation of the Notice of Appeal in respect of the Judgment issued on 20 March 2015. The Notice of Appeal was filed one day out of time. Dr Morgan, on behalf of the Respondent, did not seek to challenge the veracity of the Claimant's explanation for having filed the Appeal late. That was, as set out above, because she had suffered a blackout whilst preparing the papers on the final day for lodging the Appeal and then had a panic attack when she feared that she would be unable to file the Appeal on time. The extensive medical evidence which I have seen indicates that the Claimant has a history of blackouts and panic attacks going back many years and is supportive of her account. I proceed on the basis that her account of what happened to her is true. On that basis, her failure to institute the Appeal in time was, in substantial part, the result of ill-health; and I bear very much in mind what the Court of Appeal said in this regard at [39] of **J v K**.

47. Nonetheless, Rule 37(1) of the EAT Rules gives me a discretion to extend time. Even if the Claimant's explanation is accepted and even if it is treated as a good explanation for the failure to file the Appeal in time, it is not automatic that an extension will be granted. I recognise that it has been said that the merits of the substantive Appeal will rarely be relevant to the exercise of the discretion to extend time. In my judgment, however, this is one of those rare cases where the merits of the Appeal are relevant to the issue of extending time. The merits are relevant not in the sense of the Grounds of Appeal against the Employment Tribunal's Judgment being either meritorious or unmeritorious; rather, the relevant factor in this case is that after the Judgment was promulgated and indeed after the Appeal was filed, on 30 June 2015 the Claimant and the Respondent entered into the ACAS Agreement. I reject Ms Mallick's submission that the ACAS Agreement is irrelevant to this Appeal because it only concerns the compromise of the Respondent's costs application before the Employment

Tribunal and also because it does not refer to the Appeal proceedings before this Tribunal. The agreement clearly compromises all the Claimant's causes of action against the Respondent which were relied on in the substantive proceedings before the Employment Tribunal.

48. I accept that this Tribunal is not deprived of jurisdiction to hear the Appeal simply because the ACAS Agreement has been entered into. There are instances where parties do reach an agreement between themselves to compromise proceedings, but judgments are nonetheless delivered or appeals entertained even though the issues are academic as between the parties. I was referred to **IMI Yorkshire Imperial Ltd v Olender & Others** [1982] ICR 69 as an example of this Tribunal considering whether or not it should hear an appeal which had become academic. Nonetheless, if either of the Appeals were to succeed there would be no basis for the matter to be remitted to the Employment Tribunal, because it is apparent from the provisions of the ACAS Agreement that the underlying causes of action that would be raised before the Employment Tribunal have been compromised. I do not consider that Ms Mallick is correct to submit that if the Appeal were to be allowed then the Claimant would be able to have a hearing of the merits of her claims in the Employment Tribunal. The ACAS Agreement compromises those very claims. Accordingly, in my judgment the Claimant's challenge to the Employment Tribunal's case management decisions, which struck out parts of her claim and refused to adjourn the Preliminary Hearing and the Full Hearing, are now academic. There is, given the existence of the ACAS Agreement, now no prospect of the Claimant obtaining a judgment in her favour on the merits of her claims in the Employment Tribunal.

49. The Claimant seeks to avoid that consequence by raising before this Tribunal the issue of whether the ACAS Agreement should be set aside. As I understand it, she does not dispute that the ACAS Agreement was entered into, that ACAS conciliation took place as required, and

that the agreement is on its face valid and binding as a compromise (subject to Ms Mallick's argument, which I have rejected, regarding its relevance). The Claimant seeks to set aside the ACAS Agreement on the basis that it was procured by some form of unfair or unlawful conduct on the part of Mr Hussain, and possibly on the part of the Respondent as well, although the basis of such alleged conduct or the precise legal basis upon which the Claimant seeks to set aside the ACAS Agreement is not clearly particularised. The Claimant seeks in this regard to rely on evidence recently obtained from another former client of Mr Hussain's firm, which she contends supports her arguments regarding his alleged negligent conduct of Employment Tribunal proceedings.

50. Dr Morgan submitted that this Tribunal could not entertain such an argument because it was not open to the Claimant to invite this Tribunal to declare that the ACAS Agreement should be set aside for these reasons. He referred me to authority, **Freeman v Sovereign Chicken** [1991] ICR 853, in support of that submission. At page 860C-G of the report, this Tribunal set out a number of principles derived from its consideration of the authorities dealing with settlement agreements. This Tribunal considered that it was open to a litigant to raise in tribunal proceedings the question of whether an agreement apparently compromising the proceedings had been entered into with her authority, because that went to the issue of whether there was an agreement at all. However, relying on the judgments of this Tribunal in **Eden v Humphries & Glasgow Ltd** [1981] ICR 183, **Times Newspapers Ltd v Fitt** [1981] ICR 637 and **Larkfield of Chepstow Ltd v Milne** [1988] ICR 1, it was also there held that the setting aside of an agreement on common law or equitable grounds was required to be undertaken by way of separate action in the High Court or a County Court, and was not something that could be done by this Tribunal in the exercise of its statutory jurisdiction to determine appeals on issues of law. The **Freeman** case and the earlier authorities to which it refers establish that the

Claimant's Appeal cannot proceed on the basis that it is open to her to invite this Tribunal to set aside the ACAS Agreement during the course of the statutory appeal proceedings against the Employment Tribunal's Judgments. There is no dispute that the ACAS Agreement between the Claimant and the Respondent was entered into or that it is, on its face, a valid agreement. In my judgment, **Freeman** establishes that it is not for this Tribunal to adjudicate on the Claimant's claim that she is entitled to rescind or otherwise to set aside the ACAS Agreement. I also note that the ACAS Agreement was entered into some time after both the Judgments now challenged by the Claimant were promulgated and indeed after the Notice of Appeal was filed; it has never, therefore, been the subject of any consideration by the Employment Tribunal and no issue regarding it arises from the terms of either of the Judgments that are challenged in these Appeals.

51. The result of this analysis, which reflects the primary submissions made to me by Dr Morgan, is that if I were to extend time for the presentation of the Notice of Appeal then it would be to enable the Claimant to pursue an academic Appeal against the striking out of part of her claim before the Employment Tribunal and the refusal to adjourn the hearings.

52. I decline to exercise my discretion to extend time for the presentation of the Notice of Appeal in the circumstances. In my judgment, the Notice of Appeal does not raise any argument of law which would justify permitting an otherwise academic Appeal to proceed. Complaint is made that the sanction of striking out the whistleblowing claim was too severe or perverse, that the interests of justice required an adjournment of the hearings in the Employment Tribunal given the state of the Claimant's health as set out in the medical evidence, and that the Judgments resulted from Mr Hussain's alleged negligence whilst representing the Claimant. These are all arguments which give rise to no point of general

A importance or principle, and which turn on the particular circumstances of the case. There is nothing here which justifies permitting an academic Appeal to proceed.

B 53. My reason for declining to extend time is, therefore, straightforward. Even accepting the Claimant's explanation for the delay, taking the Claimant's case at its highest and making every possible allowance in her favour, the Appeal against the Judgment of 20 March 2015 is academic and could not result in her case proceeding any further before the Employment C Tribunal even if the Claimant were to establish that there had been an error of law. All the causes of action giving rise to the claims that were made to the Employment Tribunal by the Claimant were compromised in the ACAS Agreement. That agreement is, on its face, a valid and binding compromise of those claims. It is not open to this Tribunal to set aside the ACAS D Agreement during the course of these appeal proceedings on the basis that is relied on by the Claimant. There is no sufficient reason to permit an academic Appeal to proceed in this case.

E 54. For those reasons, I decline to extend time for the presentation of the Notice of Appeal against the Judgment of 20 March 2015.

The Preliminary Hearing

F 55. The Appeal against the Employment Tribunal's Judgment of 9 April 2015, by which reconsideration of the Judgment of 20 March 2015 was refused, was filed in time. However, I consider that it has no reasonable prospect of success, for the reasons given above in relation to the Appeal against the first Judgment. The Appeal is advanced on a similar basis to the Appeal G against the initial Judgment. It is also academic, for the same reasons. There is, similarly, no sufficient reason to permit it to proceed to a Full Hearing in all the circumstances.

H **Conclusion**

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56. I refuse to extend time for the presentation of the Claimant's Appeal against the Judgment sent to the parties on 20 March 2015. I also dismiss the Appeal that was validly filed by the Claimant against the Judgment that was sent to the parties on 9 April 2015.

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57. The reason why the Claimant's arguments have failed is that on 30 June 2015, after the institution of these Appeals, she entered into the ACAS Agreement with the Respondent that compromised all the causes of action that she had sought to pursue before the Employment

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Tribunal. In my judgment, and despite the considerable efforts of Ms Mallick to persuade me otherwise, the existence of the ACAS Agreement is an insuperable obstacle, in the circumstances, to either of these Appeals proceeding any further. Authority establishes that this

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Tribunal is not able to set aside the ACAS Agreement in these appeal proceedings on the grounds that are now relied on by the Claimant. In neither instance, therefore, is there any reasonable prospect of this Tribunal allowing an appeal against the decision of the Employment

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Tribunal that is challenged. There is, in my judgment, no sufficient basis for this Tribunal to proceed to determine the issues of law raised by either Appeal, which are now academic because of the existence of the ACAS Agreement.

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58. Finally, I should record that at the conclusion of the submissions of both Counsel, the Claimant also addressed me briefly. During her submissions, she sought to rely on a document drafted by her dated 27 February 2020 in which she submitted that Mr Hussain should be

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referred by this Tribunal to the police and to relevant regulatory bodies, and that the Respondent's Solicitors should be referred to the Solicitors Regulation Authority. She also submitted that there should be reference to the Secretary of State for Justice so that a Public Inquiry could be undertaken into the conduct of Mr Hussain. The hearing before me was

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however to determine the limited issues set out above regarding whether the Claimant's

Appeals to this Tribunal should proceed. Its purpose was not to undertake an inquiry into the conduct of Mr Hussain, who was neither present nor represented before me, nor into the conduct of the Respondent's Solicitors. It is not, therefore, appropriate for me to make any such references as the Claimant requested.