EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
MS C KIRCHHOF	**v**	**SUMITOMO MITSUI BANKING CORPORATION EUROPE LIMITED**

Heard at: London Central (by video - CVP) **On**: 21 July 2020

Before: Employment Judge E Burns

Representation

For the Claimant: In person

For the Respondent: Ms D Masters (counsel)

RESERVED JUDGMENT

The claimant's claim is dismissed because:

(a) it cannot be validly brought by virtue of the COT3 between the claimant and the respondent dated 30 November 2017; and/or

(b) it has been presented out of time.

REASONS

HEARING

1. The claimant is a former employee of the respondent. She was employed by the respondent from 7 October 2013 until 6 October 2017.

2. The claimant presented claims for disability discrimination and constructive unfair dismissal against the respondent in the Employment Tribunal in 2017 under case numbers 2206013/2017 and 2207175/2017. These claims were settled on 30 November 2017 following a judicial mediation. The parties entered into a COT3 agreement with the assistance of an ACAS conciliator.

3. By a claim form presented on 23 February 2020, following a period of early conciliation from 11 January 2020 to 11 February 2020, the claimant has brought a claim of victimisation under section 27 of the Equality Act 2010.

4. At a case management hearing held on 22 June 2020 it was agreed that a preliminary should be held in public to consider the following:

   4.1 Is the Claimant entitled to bring the current claim in light of s.120 Equality Act 2010, s.144(4)(a) Equality Act 2010, s.18C Employment Tribunals Act 1996 and clauses 13 to 14 of the COT3 agreement dated 30 November 2017?

   4.2 Alternatively, is the entire COT3 void by virtue of s.43J Employment Rights Act 1996 being incompatible with Clause 9 and / or Clause 17?

   4.3 Has the current claim been lodged within the applicable time limits?

5. During the course of the case management hearing held on 22 June 2020, a list of issues was discussed. It is relevant to the preliminary hearing to note that the claimant identified four detriments which form the basis of her victimisation claim:

   5.1 The inclusion of clause 9 in the COT3 agreement (paragraph 7 of the draft list of issues).

   5.2 The inclusion of clause 17 in the COT3 agreement (paragraph 10 of the draft list of issues).

   5.3 The omission of a clause in the COT3 agreement confirming the claimant's right to making a public interest disclosure as prescribed by the Financial Conduct Authority (FCA) (paragraphs 10 and 11 of the draft list of issues).

   5.4 The compensation paid under the COT3 agreement (paragraph 16 of the draft list of issues).

6. A further issue identified was whether the alleged detriments are capable of constituting detriments in a victimisation claim at all. I have not considered this question and therefore proceeded during this hearing on the basis that they could, without reaching a view.

7. The preliminary hearing to determine the preliminary issues was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties previously agreed to the hearing being conducted in this way.

8. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net and members of the public attended the

hearing accordingly. The participants were told that it is an offence to record the proceedings.

9. From a technical perspective, there was only one difficulty. One of the members of the public, a current employee of the respondent, was initially only able to join by telephone. She was able to hear the evidence being given by the claimant, but could not see her. I highlighted this concern to the parties and the individual involved. All parties agreed they wished to procced. The matter was resolved relatively quickly in any event as the individual was able to join with a working camera after the mid-morning break.

10. There was an agreed hearing bundle of documents of 274 pages. I read the evidence in the bundle to which I was referred. I refer below to the page numbers of key documents that I relied upon when reaching my decision.

11. Evidence was heard from the claimant herself. The tribunal ensured that she had access to unmarked copies of the relevant written materials. I was satisfied that she was alone while giving her evidence and was not being being coached or assisted by any unseen third party. She was specifically questioned about this by the respondent's counsel.

12. The respondent's counsel provided a written skeleton at the start of the hearing and made closing oral submissions. The claimant made oral submissions and relied on a letter that she had sent to the tribunal on 14 May 2020.

13. No requests were made by any member of the public to inspect the claimant's witness statement or to see any other written materials that were before the tribunal.

FINDINGS OF FACT

14. My findings of fact are set out below. Where there were disputed facts, I have made my finding on the balance of probabilities.

15. As noted above, the claimant is a former employee of the respondent. The respondent is regulated by the Financial Conduct Authority ("FCA").

16. The COT3 agreement referred to above was entered into on 30 November 2017 at a judicial mediation. Both the respondent and the claimant had legal representation at the judicial mediation. The claimant signed the COT3 agreement herself. It was signed by an employee of the respondent against whom the claimant had made allegations of discrimination.

17. The agreement was "signed off" by an ACAS conciliation officer. It is accepted that he had no involvement in the negotiation of the terms of the agreement, but did confirm that the parties were both legally represented.

18. The terms of the agreement include the following:

"*9. The Claimant will within 7 days deliver to Michelle Landy all R Relevant Documents relating to the Tribunal Claims under case numbers 2206013/2017 and 2207175/2017 (save for letters exchanged between the Claimant and the Claimant's lawyers). The Claimant will forthwith instruct her solicitors to retain one copy of all documents in their possession relating to the Tribunal Claims under case numbers 2206013/2017 and 2207175/2017 solely for the purpose of archiving the same and bleak or as required by law or professional rules and for no other purpose. The Claimant will instruct her solicitors to destroy any additional copies of such documents and provide written confirmation to Simmons & Simmons LLP marked for the attention of Joanna Lindley*" (54)

"13. *The arrangements set out in this Agreement are in full and final settlement of all or any claims, costs, expenses or rights of action of any kind whatsoever or howsoever arising (whether arising under common law, statute or otherwise and whether arising in the United Kingdom or in any other country in the world or any claims arising under any directive or other legislation applicable in the United Kingdom by virtue of the United Kingdom's membership of the European Union) which the Claimant has or may have against the Respondent or against any Third Party and whether arising directly or indirectly out of or in connection with the Claimant's contract of employment with the Respondent, its termination or otherwise and/or including but not limited to:*

….

(G) any claim of less favourable treatment, discrimination, harassment, detriment or victimisation in relation to racial grounds or sex, marital status, disability, sexual orientation, religion or belief, age or part-time or fixed-term status;" (55)

"14. *Clause 13 applies to all present and future claims, costs, expenses or rights of action and shall have effect irrespective of whether or not the Claimant is or could be aware of such claims, costs, expenses or rights of action at the date of this Agreement and irrespective of whether or not such claims, costs, expenses or rights of action are in the express contemplation of the Respondent and the Claimant at the date of this Agreement (including such claims, costs, expenses or rights of action of which the Claimant becomes aware after the date of this Agreement in whole or in part as a result of the commencement of new legislation or the development of common law or which arise after the date of this Agreement).*" (56)

"17. *The Claimant undertakes:*

(A) not to use, disclose or communicate to any person whatsoever save for her partner, immediate family, legal or professional advisors (unless required by law, ordered by a Court of competent jurisdiction

or required by any regulatory authority having jurisdiction over the Respondent (or any Group Company)):

(1) any trade secrets or confidential information (which may include commercially sensitive information) important to and relating to the business of the Respondent (or any Group Company) or any clients thereof or their affairs of which the Claimant may have become possessed during or after her employment with the Respondent;

(2) the circumstances leading up to the termination of her employment; and

(3) the fact of or the terms of this Agreement;

this undertaking to apply until such time as such information comes into the public domain other than by reason of any breach of this undertaking; and

(B) not to make any derogatory comment about the Respondent or any Third Party in public or to any other party, including any comment about or in relation to its business or any of its officers or employees; …." (56 - 57)

19. Within clause 26 the COT3 says "*Relevant Documents*" means all disclosure as provided to the Claimant by the Respondent and all interparty correspondence for the purposes of Tribunal Claims under case numbers 2206013/2017 and 2207175/2017.

20. The COT3 agreement does not contain a term saying that nothing in it prevents the claimant from making a protected disclosure. This was a requirement of FCA rules at the time however (Rule SYCA 18.5.1).

21. The COT3 agreement makes no specific reference to claims for personal injury or in respect of claims for accrued pension rights.

22. The claimant said she had immediate concerns about the negotiated deal that she had entered. She did not act on these concerns initially, however.

23. Immediately following the conclusion of the settlement, the claimant tried to find new employment and this was her focus. She was not able to find a permanent position until relatively recently in late 2019. Instead she undertook a series of casual and fixed term positions. She made many job applications in the two year period after the COT3 agreement before acquiring a new permanent position.

24. The use of settlement agreements in discrimination cases became a matter of public interest from later 2017 onwards following the Weinstein affair. In the UK, this led to the Women and Equalities Committee (of the UK parliament) taking evidence from a variety of participants in an enquiry into sexual harassment in the workplace.

25. The claimant listened to several of the sessions in Spring 2018. The evidence given to a session on 28 March 2018, the claimant made a complaint to the Solicitors Regulatory Authority ("SRA") about the conduct of the respondent's lawyers. She submitted the complaint on 10 April 2018. It included a complaint about the inclusion of clauses 9 and 17 in the COT3 agreement (181–186). I note that the SRA investigation was not concluded until April 2020. I am told that no adverse findings were made against the lawyers acting for the respondent.

26. After the claimant listened to the evidence given to a further session of the Women's and Equalities Committee on 23 May 2018, the claimant submitted a complaint dated 27 May 2018 to the FCA (215–216). The complaint was concerned the breach of rule SYSC 18.5 referred to above. I note that the FCA investigation that ensued was concluded in February 2019. No adverse findings appear to have been made against the respondent (220).

27. The claimant's purpose in contacting the regulators was to raise concerns about the COT3 agreement in the capacity of a whistleblower highlighting what she considered to be unlawful practice. She did not initially think about bringing legal action.

28. In around June 2018, however, she tried to obtain legal advice. She found this difficult from a practical perspective because people from the law firms she contacted were only available during her working hours. After a while she gave up. I note that the reason for her seeking advice was in relation to a potential professional negligence claim rather than future employment tribunal proceedings.

29. At this point in time, in the claimant's mind, there were two barriers that prevented her form pursing legal action against the respondent in the form of a fresh claim to the employment tribunal.

30. The first of these was that she was unaware that the things she was unhappy about could be framed as detriments in the context of a victimisation claim. Her view changed in October 2019. It is not entirely clear to me why the claimant's view changed. For the purposes of this hearing, I was simply concerned with the fact that it did and the timing of that change in view.

31. There is corroborative evidence that by October 2019, the claimant believed, at least some of the things she was unhappy about, could form the basis of a victimisation claim. I note that on 1 October 2019 she published on twitter a screen shot of clause 9 of the COT3 agreement with the following message:

    "*Solicitors drafting #NDAs settlement agreements need to ensure language and terms do not intimidate, deliberately limit potential not yet known claims, infringe legal rights, prevent public interest disclosure in #discrimination, to avoid victimisation #ukemplaw #emplaw*" (105 – 106)

32. She published further messages on twitter using the term “victimisation” in the context of complaints about the use of settlement agreements on 28 and 29 October 2019 (102 – 103).

33. The second barrier the claimant perceived existed to pursuing a claim was her concern that she was prevented from doing so by the COT3 agreement itself. The claimant said this concern fell away when the Equality and Human Rights Commission (“EHRC”) published a document called “Guidance on the use of confidentiality agreements in discrimination cases” in October 2019 (the “EHRC Guidance”) (227 – 267). The claimant interpreted what was written on page 28 of the EHRC Guidance as meaning the COT3 would be unlawful as a whole.

34. The claimant wrote to the respondent on 24 November 2019 raising her concerns about the COT3 agreement and specifically alleged the respondent was guilty of victimisation under section 27 of the Equality Act 2010.

35. The respondent replied on 20 December 2019. In its letter it acknowledged that the COT3 agreement signed by the claimant failed to include an express provision dealing with her right to make a protected disclosure as required by the FCA rules. The respondent apologised unreservedly for the omission which it said was the result of “*an honest mistake….likely to have arisen due to the extremely short timeframe within which the agreement was created*.” (271) The letter also stated that the respondent had not sought in any way to prevent the claimant from making protected disclosures (including to the FCA) and confirmed that it had no intention of doing so in the future. (273)

36. The claimant published 11 tweets about her concerns between 23 December 2019 and 7 January 2020. Six of these tweets were accompanied by screenshots of extracts from the respondent’s letter, the first of these on 23 December 2019. (90 – 96).

37. The claimant initiated the ACAS early conciliation process on 11 January 2020. It was concluded on 11 February 2020 (1). She presented her claim to the tribunal 12 days later on 23 February 2020 (2).

38. In her evidence, the claimant explained why she waited until 23 February 2020 before submitting a claim, despite believing in October 2019 that such a claim was possible. Her explanation was that she wanted to give the employer an opportunity to remedy the position before taking legal action. She did not take action immediately having received the letter of 20 December 2020 because of Christmas and because she wanted to take to reflect before she initiated a legal claim. She waited 12 days between the conclusion of the ACAS process and presenting her claim because she believed she had a month to do this.

39. The claimant has a medical condition which causes her to take medication and, she has in the past, received other therapeutic interventions.

Although her condition causes her to feel tired, she did not argue that it prevented her from taking any actions in connection with her claim. My finding is that it did not prevent her taking any actions in connection with her claim.

THE LAW

Enforceability of Contracts

40. As a COT3 is a contract, its enforceability is subject to the normal common law principles that prevent contracts being enforced in certain circumstances. Such circumstances include, for example, where one party lacks capacity, duress, misrepresentation, mistake and illegality.

41. Illegal contracts potentially include contracts which are tainted by criminality and quasi criminality and those which are prohibited by statute. Contracts which offend public policy may also be unenforceable.

Settlement / Waiver of Discrimination Claims

42. The law on contracting out of discrimination claims is contained in section 144 if the Equality Act 2010. The default position (section 144(1)) is that a term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a cause of action contained within the Equality Act 2010.

43. Section 144(1) Equality Act 2010 is disapplied by section 144 (4)(a) Equality Act 2010 where the relevant contract settles a complaint within section 120 Equality Act 2010, and it has been made with “the assistance of a conciliation officer”.

44. Section 120 of the Equality Act lists the discrimination claims over which an employment tribunal has jurisdiction which includes a claim of victimisation made under section 27 of the Equality Act 2010 made under Part 5 (work).

45. Section 18C(1) of the Employment Tribunals Act 1996 sets out the responsibility of a conciliation officer following presentation of an employment tribunal claim. It provides that the officer shall “*endeavour to promote a settlement*”. A settlement according to section 18C(3) means “a settlement that brings proceedings to an end without their being determined by an employment tribunal”.

46. The phrase “*endeavour to promote a settlement*” has been considered in various cases (*Moore v Duport Furniture Products Ltd and anor* [1982] ICR 84, HL, *Slack v Greenham (Plant Hire) Ltd and anor* [1983] ICR 617, EAT *Allma Construction Ltd v Bonner,* 2010 WL 3807971 (2010) EAT(S), *Clarke v Redcar and Cleveland Borough Council* [2006] IRLR 324, [2006] ICR 897, EAT). Although some of the cases concern the interpretation of section 203 of the Employment Rights Act 1996 (and its predecessor

legislation) they are still relevant to the interpretation of section 144 of the Equality Act.

47. The principle deriving from the cases is that ACAS conciliation officers, providing they do not act in bad faith or adopt unfair methods, are free to determine how to perform their function as a matter of discretion depending on the circumstances of the particular case.

48. A waiver contained in a COT3 agreement can in theory, exclude future claims provided the language used is "absolutely clear and leaves no room for doubt" (*Royal National Orthopaedic Hospital Trust v Howard* [2002] IRLR 849).

49. An ACAS conciliator does not have statutory power to conciliate in claims for personal injury, but provided both parties are happy to settle past claims for personal injury such waivers can be included in a COT3. Claims for future personal injury cannot be excluded, however, as they are prohibited by the Unfair Contract Terms Act 1977.

50. A COT3 can cover pensions issues arising out of employment as well. However, section 91 of the Pensions Act 1995 operates to protect employees by limiting the extent to which claims for accrued pension rights can waived.

The use of confidentiality agreements in discrimination cases

51. The Equality and Human Rights Commission issued guidance on the use of confidentiality agreements in discrimination cases in October 2019. The guidance was issued under section 13 of the Equality Act 2006 using the EHRC's powers to provide information and advice. The aim of the guidance is said to be to "clarify the law on confidentiality agreements in employment and to set out good practice in relation to their use".

52. The guidance is not a statutory code issued under section 14 Equality Act 2006. Therefore, while an employment tribunal is not obliged to take the guidance into account, it may still be used as evidence in legal proceedings where it is relevant.

53. The foreword to the EHRC Guidance states that the #MeToo movement exposed the scale of the problem of sexual harassment in all types of workplace and highlighted the fact that many people who have experiences sexual harassment felt unable to speak up about it. It identifies the use of confidentiality agreements which prevent employees from discussing their experiences of discrimination as "*part of the problem.*"

54. The EHRC guidance makes a number of recommendations to employers regarding the use of confidentiality agreements in discrimination cases. This includes giving careful consideration to their use; limiting their scope so that employees are not prevented from speaking about alleged discriminatory treatment, ensuring where reasonably possible, that such

agreements are signed off by someone who was not involved in the act of discrimination or in hearing any grievance related to it and maintaining oversight of their use at board level of an organisation.

55. The guidance includes a section headed "Unlawful confidentiality agreements" with a sub-heading "Whistleblowing" on page 28 which says:

"*A confidentiality agreement will be unlawful if it seeks to stop a worker whistleblowing. Whistleblowing means making 'protected disclosures' as defined by the Employment Rights Act 1996 (page 29). Confidentiality agreements that seek to stop workers making protected disclosures must not be used.*

This relates to sections 43A and 43J of the Employment Rights Act 1996." (255).

56. "*Confidentiality agreement*" is defined in the document's glossary as

"Any clause or separate agreement which prevents a worker (or their employer) from discussing or passing on information. Sometimes referred to as confidentiality clauses, non-disclosure agreements, NDAs or gagging clauses." (266)

Section 43J – Employment Rights Act 1996

57. Section 43J(1) of the Employment Rights Act 1996 says:

"*Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure*."

By virtue of subsection (2), subsection (1) applies to a COT3 agreement.

58. Section 43J(1) operates to modify the terms of a contract agreed by the parties regardless of the agreed wording of the contract. It does this automatically by operation of law.

Time Limits

59. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).

60. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period. A distinction needs to be drawn between a continuing act and a one-off act that has continuing consequences (*Barclays Bank plc v Kapur and others* [1992] ICR 208;). This distinction

will depend on the facts in each case. (*Sougrin v Haringey Health Authority* [1992] IRLR 416, CA)

61. The normal three month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

62. The tribunal has a wide discretion to extend time on a just and equitable basis as confirmed in *British Coal Corporation v Keeble* [1997] IRLR 36 and more recently *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] Civ 640. This might include consideration of factors such as:

- The length of and reasons for the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the claimant acted once they knew of the possibility of taking action.
- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

63. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the rule (*Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] EWCA Civ 576).

ANALYSIS AND CONCLUSIONS

64. The COT3 includes an express provision waiving claims of victimisation in clause 13 (G)

65. The alleged detriments in this case were all present at the time the claimant signed the COT3 and she appears to have been aware of them. Even if this were not the case the language of clause 14 is sufficiently clear to meet the test in the *Royal National Orthopaedic Hospital Trust v Howard* case and the COT3 covers claims not in the claimant's contemplation and future claims.

66. I am satisfied that the COT3 complies with the requirement in section 144 (4)(a) Equality Act 2010 which enables discrimination claims to be waived in an agreement made with "the assistance of a conciliation officer".

Role of ACAS Officer

67. It is for the claimant to prove that the COT3 is not valid. I have not been presented with any evidence that leads me to believe that the ACAS conciliation officer failed in his or her duty or acted in bad faith or adopted unfair methods.

68. As confirmed in the relevant case law, ACAS conciliation officers have a wide discretion to determine how to perform their role. Having not heard evidence from the ACAS officer in this case I would not wish to speculate in too much depth as to his or her particular thinking. From an objective perspective, however, it would seem sensible for an ACAS conciliation officer to apply a 'light touch' were both parties have legal representation and the agreement is reached as a result of a judicial mediation.

69. The claimant suggested the conciliation officer did not act properly because the COT3 agreement made no specific reference to personal injury claims or claims for accrued pension rights. I reject this as I do not consider this omission leads to an inference of improper behaviour. The statutory provisions do not require an ACAS conciliation officer to highlight the difficulties with waivers of such claims. Although ACAS conciliation officers will often discuss such clauses with the parties, the extent to which they focus on these is, in my judgement, merely part of the exercise of discretion that ACAS conciliators have and which is referred to above.

70. The omission of express provisions preserving the claimant's rights with regard to personal injury claims and accrued pensions right do not result in the waiver of victimisation claims in the COT3 being invalid.

EHRC Guidance

71. The claimant argues that the COT3 should be treated as invalid as a whole because of it contains clauses 9 and 17 which she says are contrary to the EHRC Guidance and was signed by someone who was involved in her alleged discriminatory treatment.

72. Clauses 17A(1)(b) and 17B of the COT3 are drafted broadly enough to prevent the claimant from discussing her alleged discrimination, contrary to the EHRC Guidance.

73. Clause 17A(1)(b) prevents the claimant from disclosing "*the circumstances leading up to the termination of her employment*". The claimant says the circumstances leading up to the termination of her employment of her employment included alleged discriminatory treatment. She will therefore be in breach of the COT3 if she discusses that alleged discrimination with anyone other than her partner, immediate family and legal or professional advisors unless required by law, ordered by a Court of competent jurisdiction or required by any regulatory authority.

74. This clause is exactly the type of restriction to which the EHRC Guidance urges employees to give very careful consideration.

75. The position is similar with Clause 17(B) which prevents the claimant from making any derogatory comment about her former employer and colleagues. The claimant would fall foul of this obligation if she accused former colleagues of discriminatory treatment, even if such allegations were true. The inclusion of clauses with the same formulation as clause 17(B) is highlighted as a matter of concern in the EHRC Guidance.

76. The EHRC Guidance does not address clauses which require employees to return documents to their employer and therefore does not provide any guidance which is relevant to the presence of clause 9 of the COT3.

77. The EHRC guidance does however make a specific recommendation that confidentiality agreements should not be signed by someone who was involved in the alleged discrimination. The COT3 in this case does not comply.

78. Although the COT3 contains clauses which do not meet the recommended practice outlined in the EHRC guidance, this does not, in my judgement, render the whole COT3 invalid.

79. The publication of the EHRC Guidance in October 2019 did not change the law on the use of settlement agreements. The EHRC Guidance is only concerned with the use of confidentiality agreements in discrimination cases and not the use of COT3 agreements generally.

80. It is possible that the publication of EHRC Guidance represents a change in public policy regarding the use of confidentiality provisions within settlement agreements. If this is the case, it may also be arguable that a change in the law has occurred such that, as a matter of common law, confidentiality provisions which prevent employees from speaking about discrimination should not be enforceable because they offend public policy.

81. I make no decision in this regard because I do not need to decide this issue for the purposes of this case. In my judgement, the impact of such a change in the law, if it had occurred, would be limited to the offending confidentiality provisions rather than apply to the COT3 agreements that contain them. I reach this view because COT3s are governed by primary legislation which allows settlement and waiver of discrimination claims. The maximum that can have changed by the introduction of the new EHRC guidance (if indeed there has been any change) is the common law approach to confidentiality provisions within a COT3. The EHRC guidance cannot have changed the statutory law on the validity of waivers within a COT3.

82. I therefore conclude that even if courts and tribunal may need to adopt a different approach when interpreting confidentiality provisions in COT3 agreements, their presence does not affect the overall validity of the agreement itself. The waiver in this case therefore remains valid notwithstanding the presence of clause 9 and clause 17 in the COT3.

83. I note that having found the waiver to be valid, I do not need to go on and consider the extent to which clauses 9 and 17 of the COT3 may be unenforceable in light of the EHRC guidance. Indeed, I consider it would be inappropriate for me to do so as this may be the subject of other litigation between the parties if the respondent were to seek to take action against the claimant for her twitter activity.

Section 43J Employment Rights Act 1996

84. The claimant argues that the COT3 should be treated as invalid as a whole because of the operation of section 43J Employment Rights Act 1996. This is due to the presence of clauses 9 and 17 because they prohibit her from making protected disclosures and/or the absence of a clause preserving her right to make a protected disclosure.

85. Section 43J of the Employment Rights Act 1996 was in force at the time the settlement was agreed and is a legislative provision rather than a common law principle or mere guidance.

86. In my judgement, however, section 43J cannot operate to invalidate the COT3 agreement as a whole. I consider it is clear from the wording of section 43J itself that it only operates to render “provisions” within “agreements” to be void rather than any agreement as whole.

87. It is obviously true that if all the operative parts of an agreement were rendered void by section 43J, the agreement itself would fall away, but that it not the case here. If the claimant’s argument is right and clauses 9 and 17 were rendered void by the operation of section 43J, this would not render the whole agreement void. All other operative parts of the COT3 therefore remain valid. In this case, this includes the waiver against bringing a victimisation claim.

88. The absence of an express provision in the COT3 confirming the rights of the claimant to make protected disclosures does change this position. This is because the statutory right contained in section 43J modifies the wording of the contract automatically through operation of the law. There is therefore no need to include an express provision protecting the rights to make protected disclosure for this right to be preserved to the claimant.

89. I note that the omission of the express provision is contrary to the FCA rules. This makes no difference to the enforceability of the COT3 as the rules do not have legal force.

90. In reaching the conclusion that section 43J does not render the waiver in the COT3 invalid, I have not needed to consider the extent to which clauses 9 and 17 of the COT3 may be unenforceable in light of section 43J. Again, it would not be appropriate for me to comment given the possibility of future litigation.

Is the claim in time?

91. Having decided in favour of the respondent with regard to the validity of the COT3 agreement, it is not necessary for me to decide the time point. I have done so, however, in case the claimant wishes to appeal the judgment on the earlier point.

92. The claimant's primary argument as to why her claim is in time is that this is a continuing act case and so her claim is in time by operation of section 123(3)(a). She argues this because the COT3 continues to have an ongoing effect on her. In the alternative, she says it would be just and equitable to extend time because she was not aware of her rights to pursue this case until October 2019.

93. In my judgement, this case involves a one-off act that has continuing consequences rather than a continuing act. The parties entered into the COT3 on 30 November 2017 and it has remained unchanged since then. Although the respondent has entered into correspondence about the COT3, this has not led to the agreement being changed.

94. The ordinary three month time limit therefore expired on 28 February 2018 (2108 was not a leap year). The claimant's claim is consequently nearly two years out of time. She does not benefit from any extension of time for early conciliation as she did not commence early conciliation within the normal time limit.

95. I have decided not to extend time on just and equitable grounds. There is without prejudice caused to the respondent by having such a late claim issued which is not outweighed by the circumstances of the delay.

96. The delay was in part caused by the claimant's ignorance of the law. I find that it genuinely took until October 2019 for the claimant to decide in her own mind that she could bring a claim in the employment tribunal genuinely held by the claimant, although I note that it was open to her to take legal advice any any time before then.

97. Significantly though, the claimant waited a further four months plus after deciding a claim was possible before presenting her claim.

98. I am not satisfied that she acted promptly enough. With a claim so significantly out of time the onus was on the claimant to expedite the process as quickly as possible. The requirements of justice and equity do not entitle the claimant to take longer than the original three month normal time to act. Where there is a two year delay, she is required to pursue a claim extremely promptly.

99. The claimant said she wanted to seek a resolution with the employer before presenting her claim. I note that the early conciliation process is designed for exactly this purpose. The claimant could have used the early conciliation machinery to raise the issue with her former employer and thereby progressed the claim much more quickly. It was also open to her to submit a "holding" claim while trying to resolve her concerns with the respondent.

100. Finally, the further delay after the claimant received the employer's letter of 20 December 2019 was entirely unreasonable when the claimant was actively tweeting throughout the period from 23 December 2019 to 11 January 2020.

101. My conclusion is therefore that the claimant's claim is out of time.

Employment Judge E Burns
7 August 2020

Sent to the parties on:

10/08/2020

For the Tribunals Office - OLU