EMPLOYMENT TRIBUNALS

At an Open Preliminary Hearing

Claimants: Mrs S Aston & others

Respondent: Derby City Council

Heard at: Nottingham via Cloud Video Platform

On: 18 December 2020, 21 December 2020, 22 December 2020 and 23 December 2020

Before: Employment Judge Hutchinson (sitting alone)

Representation
Claimants: Melanie Tether of Counsel
Respondent: Mohinderpal Sethi QC of Counsel

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

The Employment Judge gave judgment as follows;

1. The Employment Judge is satisfied that the Claimants named in the attached schedule 1 had signed COT3 agreements which did not prevent the Claimants from pursuing equal pay claims in respect of their post as teaching assistants.

2. The Claimants named in schedule 2 have issued claims that were not irregular and that the tribunal does have jurisdiction to hear the claims.

RESERVED REASONS

1. This preliminary hearing was listed by myself at a case management hearing on 8 October 2020. Its purpose is to consider jurisdictional issues affecting some of the Claimants in the multiple.

2. The issues for me to determine in respect of the 21 Claimants I am dealing with today are as follows;

   2.1 Are the 19 Claimants in Schedule 1 barred from making equal pay claims in respect of their positions as teaching assistants by COT3 settlements they signed in 2007/2008. This was referred to by the parties as "The COT3 issue".

   2.2 Are the 2 Claimants in Schedule 2 affected by rule 9 of the Employment Tribunals Rules of Procedure 2013 in that their claims were irregular and that the tribunal does not have jurisdiction to hear the claims. This is known as "The Rule 9 issue".

3. In all the 19 cases in which the Claimant is alleged to be barred by a COT3 settlement, I am asked to decide whether the agreements relied upon by the Respondent, which record or are alleged to record settlements relating to one or more role(s) that the Claimants held at the relevant time, prevent the Claimants bringing equal pay claims in relation to the separate role of teaching assistant. For most of the Claimants, the relevant role was midday supervisor, a manual role which was governed by the collective agreement for manual workers known as The White Book. Some of the Claimants had jobs as teaching assistants at the time of the COT3 settlement in addition to the jobs in respect of which settlement payments were made. Others started jobs as teaching assistants later.

4. Six of the Claimants did not accept that they signed any COT3 settlement agreement. I must determine whether they did sign such an agreement even though the Council has not been able to produce a copy of any COT3 agreement for those Claimants but rely on the fact that they are shown as having accepted payments in a spreadsheet.

5. The Claimants also state that I need to consider whether a valid settlement agreement was entered into because they say that the settlement agreement was not made with the assistance of a conciliation officer.

6. In respect of the two Claimants who were affected by the rule 9 issue, the Respondent says that a Claimant in a multiple is only able to bring a claim on the same Claim Form as the lead Claimant if it is based on the same set of facts.

7. It is said that where two or more Claimants are wrongly included on the same Claim Form, this is treated as an irregularity falling within rule 6 and thereby allowing the employment tribunal to take such actions as it considers just,

including the specific steps set out in rule 6(a) to (d), which expressly include a striking out of the claim and/or making of a costs order.

8. It is said by the Respondent that there is no good reason why the irregularity should be waived because the Respondent is prejudiced by having to defend such claims and they should be struck out.

9. In the claim of Lisa King, she brought her claim on the same Claim Form as Aimee Baldwin, who was the lead Claimant. Aimee Baldwin says her role was as a "Teaching Assistant".

10. It is said by the Respondent that Lisa King is in fact a "Higher Level Teaching Assistant" from 1 July 1985 until 31 May 2016 and that she then became an "Additional Needs Higher Teaching Assistant" from 1 June 2016. It is said that because she did not hold the role of "Teaching Assistant" her claim should be dismissed from non-compliance with rule 9.

11. In respect of Karen Leszczyszak, she brought her claim on the same Claim Form as lead Claimant Aimee Baldwin. It is said that she held the role of "Team Leader" from 13 December 2001 until 31 May 2016 and that she then became an "Additional Needs Teaching Assistant 2" from 1 June 2016 until 31 August 2017.

12. The Respondent says that at the time of her claim, the Claimant did not hold the lead Claimant's role of a teaching assistant and it should be dismissed for non-compliance with rule 9.

13. Counsel for the Claimant and the Respondent had helpfully provided me with opening submissions and skeleton arguments which set out their respective cases.

Evidence

14. I heard evidence from the following Claimants;

- Aimee Baldwin
- Margaret Dickens
- Rebecca Everett
- Zoe Gingell
- Lesley Gregory
- Jane Mawbey
- Shazia Qadeer
- Ruth Terzoni
- Monika Zareba
- Lisa King

15. For the Respondent, I heard from the following;

- Liz Moore (Head of HR for Derby City Council)

- Laura Jones (former HR Consultant for Derby City Council)
- Andrew Jones (former Finance and Research Officer and Principal Accountant for Derby City Council)
- Toni Nash (current Head of Finance for Derby City Council)

16. There was an agreed bundle of documents and some additional documents were added to the bundle during the hearing. All the witnesses were doing their best to give evidence and recall events which occurred more than 12 years ago. Their recollection is bound to be affected by the passage of time.

17. Where I refer to page numbers, it is from the agreed bundle.

The facts

18. In most local authorities' certain types of roles historically benefited from bonus payments. These were generally manual workers. The roles were carried out normally by male workers such as refuse collectors, grounds maintenance and arborists. The bonuses were the subject of challenge in group equal pay claims that became commonplace in the public sector and particularly in the north-east.

19. In 2007, because of becoming aware of the equal pay challenges faced in other local authorities, the Respondent decided to remove its bonus schemes. This was done in consultation with the recognised trade unions and they offered payments to individuals that could potentially have brought an equal pay claim in respect of the historical bonus schemes in consideration for entering into a COT3 agreement.

20. At that time, local authority manual workers were employed under contracts which were governed by the Local Government Collective Agreement known as The White Book. The terms and conditions of teaching assistants was governed by a different collective agreement known as The Purple Book.

21. All 19 of the Claimants affected by the COT3 issue were employed as midday supervisors, except for Aimee Baldwin who was a Club Helper. Margaret Dickens and Marie Fay were also employed as Taxi Escorts. Sharon Taylor was a Senior Midday Supervisor. It is not in dispute that all these roles were manual roles, although the Respondent says in respect of Aimee Baldwin that her role was non-manual.

22. I am satisfied though that Aimee Baldwin's role was also a manual role and was not greatly different to that of a midday supervisor.

23. Some of the Claimants already also worked as teaching assistants as well as their role as midday supervisors.

24. The following Claimants were not employed as teaching assistants in February 2007, namely;

    24.1 Tina Carr whose employment commenced in September 2008;

24.2 Margaret Dickens who took on a full-time permanent role as a Teaching Assistant in September 2007;

24.3 Rebecca Everett whose commenced in September 2007;

24.4 Zoe Gingell who commenced in September 2008;

24.5 Clare Naylor who commenced in 2009;

24.6 Monika Zareba who commenced in September 2010.

25. I am satisfied that at the time when the COT3 agreements were concluded, there were no issues between the parties in relation to the pay of teaching assistant. The role of teaching assistant was a non-manual role and it was never in the contemplation of the parties that the post of teaching assistant was affected by equal pay issues.

26. The COT3 agreements identify on the first page the post or posts to which the settlement agreement related. This is referred to as "the specified post". In this respect, I was referred to the agreements of;

- Tina Carr (page 57)
- Margaret Dickens (page 97)
- Lesley Gregory (page 258).

27. Tina Carr had been employed as a Teaching Assistant since November 2004. The only post entitled referred to is that of Midday Supervisor.

28. Margaret Dickens had been employed as a Teaching Assistant since January 2000 and it can be seen that the posts referred to at page 97 is in respect of her job as;
- Taxi Escort
- Midday Supervisor.

29. Lesley Gregory had been employed as a Teaching Assistant since 23 November 2004 and the COT3 agreement in respect of her at page 258 only refers to her post as being a Midday Supervisor.

30. The specification of the posts was wholly consistent with the background to the agreements.

31. It can be seen from the compensation offer form at pages 821 – 822 that the Respondent had made it clear that not all jobs were "eligible" for an equal pay settlement. The form specified the compensation that would be offered in respect of the "eligible job", which is also referred to as the "eligible post".

32. In note 3 of the form it states;

> *3. Please note that not all jobs qualify for a compensation payment – this may explain why not all the jobs you do – or did – for Derby City Council are listed on this form*".

33. Other than the employees' specific details, including their names, addresses, national insurance numbers and posts, all the agreements are in the same format.

34. All the agreements are expressed to be between the Council as "*the employer*" and "*the employee*". I am satisfied that the term "employee" was intended to refer to their employment in the specified post or posts.

35. Paragraph 5 (GENERAL) (page 853) of the agreement states that the agreement would not affect any rights "*Arising out of the Employee's contract of employment and/or the termination thereof which is not a Claim as defined*".

36. The Claimants jobs as Teaching Assistants were separate jobs involving separate contracts of employment from the contracts under which they were employed as Midday Supervisor or variously Club Helper, Bus/Taxi Escort and Relief Midday Supervisor.

37. Clause 1 of the agreement gives the background to it and states as follows;

> "*1. THE PARTIES AGREE AS FOLLOWS:*
>
> *The parties recognise;*
>
> *a) the underlying issues between them relate to allegations of inequality of pay and sex discrimination whether by reference to basic rates of pay, annual salaries, grades, bonuses or other pay supplements both in relation to the Employer's historic and existing pay and pay structures and to the future pay and grading structures of the Employer and the Parties thereby enter into this Agreement on the following express understanding:*
>
> *b) the need to avoid discrimination in the workplace in terms of equality of treatment and access to and receipt of benefits*
>
> *c) the disruption and cost arising out of lengthy mass litigation involving allegations and perceptions of discrimination, and the need to maintain good industrial relations and*
>
> *d) the Respondent is working to implement the 1997 Single Status Agreement and the Respondent recognises the benefit of continuing positive industrial relations towards achieving this objective*
>
> *e) that this Agreement is intended to compromise any claim under any of*

the causes of action in clause 2 below in relation to the Subject Matter that the Employee has brought by the Agreement Date; and/or that the Employee might bring during and/or in respect of the Defined Period

f) that the intention of the Parties in entering into this Agreement is that the Employee will accept the Settlement Sum in full and final settlement of the claims referred to in (a) above

g) that the Employee understands and accepts the effect this Agreement has in relation to any rights that she may have (i) on or prior to the Agreement Date in relation to the Subject Matter and (ii) during and/or in respect of the Defined Period in relation to the Subject Matter

h) during the Defined Period the Employee shall not commence, or present any Court or Employment Tribunal proceedings against the Employer under any of the causes of action referred to in Clause 2 below in relation to the Subject Matter and shall not at any time thereafter claim, in any Employment Tribunal or Court proceedings, damages, arrears of remuneration or compensation in relation to the Subject Matter in respect of any period of time before and/or during the Defined Period."

38. As I have outlined above, there were no "*issues"* between the parties in relation to the teaching assistants at the time. The Respondent does not suggest that at the time of the settlement agreements, any of the Unions recognised by the Council had raised any equal pay claim or issue of sex discrimination in relation to the pay of teaching assistants.

39. I am satisfied that if they had done so, then the job of teaching assistant would no doubt have been treated as an eligible job. The post of a teaching assistant was not treated as an eligible post and employees who were employed as teaching assistants did not receive settlement offers from the Respondent relating to that post. This can be seen from the list of jobs in respect of which settlement compensation was paid at pages 971 – 972.

40. As Laura Jones told me, the criteria for determining which jobs were eligible for compensation were agreed with the recognised trade union. It is clear and I am satisfied that the Respondent did not have any policy reason for stipulating that teaching assistants who happened to hold posts which were eligible for equal pay settlement compensation should be precluded from bringing equal pay claims in relation to their job as a teaching assistant when none of their teaching assistant colleagues were so precluded.

41. Lesley Gregory and Jane Mawbey both told me that an ACAS representative had told them that the settlement related only to their roles as midday supervisor and did not affect their roles as teaching assistants. I am satisfied that it did not.

42. Clause 2 deals with the issue of settlement. It says for example in the agreement of Margaret Dickens at pages 99 to 100;

"***2. SETTLEMENT***

The Employee and the Employer have agreed as follows: -

(i) The Employer shall without admission of liability, pay and the Employee shall accept the sum of £2,250 (Two Thousand Two Hundred and Fifty Pounds), ("the Settlement Payment") which relates to the following service;

Job title	***Service in post***
Taxi Escort	*14years10 months4weeks*
Midday Supervisor	*15years9months2weeks*

…"

43. All the agreements were in the same form.

44. Where an employee held more than one specified post, she received a separate cheque in relation to each post. This is dealt with in the Volunteer Briefing Pack at page 692 and is shown in the tracking sheet for Margaret Dickens at page 96.

45. Nothing in the wording of clause 2 indicates that the settlement compensation related to service in any other post.

46. The wording of clause 2 is consistent with the compensation offer form at pages 821 – 922, which explain that the offer of compensation had been calculated based on a formula which depended on qualifying length of service and qualifying hours in the eligible job. The payment matrix, which is the same for all the eligible jobs, is at pages 815 – 816.

47. Clause 2(ii) states;

"*(ii) The Settlement Payment is offered by the Employer and accepted by the Employee in full and final settlement of any claim based upon either English, or European Union law for or in respect of,-*

(a) Equal pay;
(b) Sex discrimination (including but not limited to a claim for compensation for injury to feelings);
(c) Unauthorised deduction from wages, (in respect of any sum alleged to be payable under an equality clause); and
(d) Breach of contract, (in respect of any sum alleged to be payable under an equality clause),

in connection with the Subject Matter that has or might have been commenced against the Employer by the Employee in respect of;
a) the period of six years immediately before the date of the signature on behalf of Derby City Council below and/or
b) the Defined Period.

For the avoidance of doubt, clause 2, and therefore the settlement contemplates claims arising at common law, statute, European Law or otherwise and whether it falls within the jurisdiction of the Employment Tribunal and/or civil courts or not.

For further avoidance of doubt, by accepting the Settlement Payment the Employee is settling any claim for an adjustment of any award under section 31 Employment Act 2002 (non-completion of statutory dispute resolution procedure: adjustment of awards).

The Employee and Employer agree to bear their own legal costs (if any) in respect of proceedings that have, at the time of this agreement having been reached, been commenced against the Respondent."

48. Clause 7 of the agreement provides as follows;

"*…*

This Agreement sets out the entire agreement between the parties and supersedes all previous discussions, negotiations, agreements and arrangements (if any) whether verbal or in writing relating to the Subject Matter.

…"

49. The Respondent had undertaken several settlement events and undertook a rigorous process for employees to go through before they were able to collect their settlement cheques.

50. The equal pay settlement events were typically large events involving many employees. I have seen the template Equal Pay Compensation Volunteer Briefing Pack at pages 689 – 693. This informed Council volunteers who staff the various desks at the settlement events of the importance of each stage of the process.

51. Individual employees were sent letters with information about the proposed settlement wording of the COT3 agreement, compensation offer form, ACAS settlement and an appointment to attend a settlement event (pages 819 – 824).

52. On the day of the settlement event, attendees were met and greeted as they arrived. At the registration point, they were asked whether they had the necessary identification to proceed and asked to sign in if they did. The necessary documents were not checked at this stage but if an individual did not have identification, they were told to return on another day if possible.

53. After signing in, individuals would take a seat in the waiting area in the main hall. Ushers would ensure that individuals would attend the right table in the main hall at the right appointment time. The ushers were also responsible for ensuring that the file for each individual containing two copies of the standard

COT3 agreement (which was the same for all employees attending) and a tracking sheet which was pre-populated (page 96) was available for the ACAS/union member advisers.

54. The main hall had several tables with ACAS/union member advisers. Each adviser would see several employees at a time but in timed slots. The ACAS/union member adviser would then sign the tracking sheet to confirm that advice had been given. The attendee would take receipt of their file containing both copies of the COT3 agreement and the tracking sheet.

55. Individuals would then proceed to another area where their identity was checked carefully. I have seen a list, which is at page 691. Only on providing the requisite identification would their tracking sheet be signed off. All attendees were informed that they were unable to collect the settlement cheque without their identification documents.

56. The Council authorised individuals to sign the agreements on behalf of the Council. They would only do so once they had verified that the advice had been given to the attendees and that their identity had been checked and verified.

57. The top part of the tracking sheet was populated with employee details prior to the events. As attendees worked their way around each checkpoint, the tracking sheet would be signed off. At the bottom of the form, the cheque issuer signed the tracking sheet after checking the correct signatures were on that. Only then would the individuals be able to collect a cheque in settlement.

58. Cheques were kept in national insurance number order and again the COT3 agreements were checked for all necessary signatures prior to the cheques being handed out. An individual would not have been able to collect a cheque without the tracking sheet because their national insurance number was needed to locate the cheque. The cheque number was then written on the tracking sheet. A signed copy of the COT3, along with the tracking sheet, was retained at this point. (An example of a completed tracking sheet is at page 257). The other copy of the signed COT3 agreement would be retained by the employee.

59. Once the signed COT3 agreement had been received along with the tracking sheet, the cheques would be handed over. I am satisfied that no individual would have been handed a settlement cheque without having signed and handed in a signed COT3 agreement.

60. After the settlement event, all the COT3 agreements and tracking sheets were boxed up for the file retrieval team to take away. Several the COT3 agreements are now missing. The Council has moved offices on two occasions since the settlement event and this might be some explanation for them missing.

61. I have seen the master payments spreadsheet at page 814(A) of the bundle. It shows a schedule of payments that were made to employees following the settlement events. It was created at the time of these events, or shortly after they had taken place.

62. I am satisfied that the purpose for which the spreadsheet was produced was to accurately record payments and to reconcile payments made following the settlement events. The master payments spreadsheet is therefore a spreadsheet of all Claimants who signed an agreement and received a cheque.

63. Where the Council holds either a signed COT3 agreement or the tracking sheet, the amount stated on these documents matches the amounts stated in column 1 of the spreadsheet "*A - value of payments accepted*".

64. In cross-examination most of the Claimants who had no recollection of signing a COT3 agreement accepted that they probably did so and/or that they had no reason to dispute the information contained in the Respondent's spreadsheet of settlement payments. I am satisfied that they did.

65. In respect of Shazia Qadeer, she was quite adamant that she had not signed a COT3 agreement, describing herself as a punctilious record keeper who retained all documents relating to her employment but does not have any documents on file relating to a settlement agreement.

66. On balance, I am satisfied that she did sign an agreement and simply cannot recall signing it. The fact that her name is on the spreadsheet with a payment against her name indicates to me that she must have signed the agreement.

67. Lisa King and Karen Leszczyszak both presented their claims under the claim of Aimee Baldwin on 21 November 2017. The pleadings relating to Lisa King are at 856 – 889 and Karen Leszczyszak at 927 – 959.

68. Aimee Baldwin says her job is a Teaching Assistant.

69. I have not seen any contract of employment for any of the employees or a section 1 statement or job description.

70. In respect of Miss King, I have seen the job information questionnaire dated 2 February 2016, which was completed regarding the evaluation of her job under the Council's Job Evaluation Scheme (pages 891 – 924) and a document described as "pay data at page 925.

71. In the Claim Form, Miss King is described as a Teaching Assistant, as is Miss Leszczyszak.

72. Miss King works as a Teaching Assistant at Ivy House School, which is a special school for pupils with additional needs. She does have what is described as a "slight leadership role" when the teacher is not present.

73. I have heard no evidence from the Respondent that teaching assistants employed at special schools are regarded as doing a job different from teaching assistants at ordinary schools or that there is any significant difference between the jobs of different levels of a teaching assistant.

74. Miss Leszczyszak's position between 13 December 2001 and 31 May 2016 is described in some pay data at page 966 as "team leader". She was still though employed as a teaching assistant in a leadership role.

The law

Effect of the COT3 agreements

75. Section 144 of the Equality Act 2010 provides;

> ***144 Contracting out***
>
> *(1) A term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act.*
>
> *…*
>
> *(4) This section does not apply to a contract which settles a complaint within section 120 if the contract—*
>
> *(a) is made with the assistance of a conciliation officer, or*
>
> *…*"

76. It is not in dispute between the parties that I should apply the principles laid down by the House of Lords in ***Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] WLR 896*** in construing the COT3 agreements.

77. Miss Tether in her closing submissions helpfully set out how Lord Hoffman summarised the applicable principles in the following way;

> "*(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonable available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are*

admissible only in an action for rectification. The law makes this distinction for reason of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd v Eagle Star Life Assurance Co. Ltd [1997] A.C, 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A v Salen Rederierna A.B [1985] A.C 191, 201:

> *'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'"*

78. I was further referred by both Counsel to the case of ***Bank of Credit & Commerce International SA v Ali & others (No 1) [2002] 1 AC 251 HL***.

79. In that case, Lord Bingham of Cornhill said, as referred to by both parties;

> "***8***. *I consider first the proper construction of this release. In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified. …"*

80. He went on to say;

> "***9***. *A party may, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, if appropriate language is used to make plain that that is his intention …*
>
> ***10***. *But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware."*

81. Miss Tether referred me then to what Lord Nicolls had considered in respect of problems that might arise in the construction of a general release and referred me to two paragraphs of his speech, namely;

> "***28*** *… However widely drawn the language, the circumstances in which the release was given may suggest, and frequently they do suggest, that the parties intended, or, more precisely, the parties are reasonably to be taken to have intended, that the release should apply only to claims, known or unknown, relating to a particular subject matter. The court has to consider, therefore, what was the type of claims at which the release was directed. For instance, depending on the circumstances, a mutual general release on a settlement of final partnership accounts might properly be interpreted as confined to claims arising in connection with the partnership business. It could not reasonably be taken to preclude a claim if it later came to light that encroaching tree roots from one partner's property had undermined the foundations of his neighbouring partner's house. Echoing judicial language used in the past, that would be regarded as outside the "contemplation" of the parties at the time the release was entered into, not because it was an unknown claim, but because it related to a subject matter which was not "under consideration".*
>
> ***29*** *This approach, which is an orthodox application of the ordinary principles of interpretation, is now well established. Over the years different judges have used different language when referring to what is now commonly described as the context, or the matrix of facts, in which a contract was made. But, although expressed in different words, the constant theme is that the scope of general words or a release depends upon the context furnished by the surrounding circumstances in which the release was given. The generality of the wording has no greater reach than this context indicates.*"

82. Miss Tether then went on to refer me to two Employment Appeal Tribunal cases, which summarised the principles, namely;

- ***Royal National Orthopaedic Hospital Trust v Howard [2002] IRLR 849****, and*
- ***McClean v TLC Marketing plc and others [UKEAT/0429/08]***.

83. Mr Sethi also referred me to the case of ***Clarke v Redcar and Cleveland BC [2006] IRLR 324*** which was an unsuccessful attempt to set aside agreements to settle many equal pay claims. That does not though override the principle of the two cases in the House of Lords that I have referred to above.

The rule 9 issues

84. At the material time, rule 9 provided;

"***Multiple claimants***

9*. Two or more claimants may make their claims on the same claim form if their claims are based on the same set of facts. Where two or more claimants wrongly include claims on the same claim form, this shall be treated as an irregularity falling under rule 6*"

85. Rule 6 proves;

*"**Irregularities and non-compliance***

6*. A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rule 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following –*

(a) waiving or varying the requirement;

(b) striking out the claim or the response, in whole or in part, in accordance with rule 37;

(c) barring or restricting a party's participation in the proceedings;

(d) awarding costs in accordance with rules 74 to 84."

86. Again, both advocates referred me to the case of ***Asda Stores Ltd v Brierley [2019] IRLR 327***.

87. As Mr Sethi said, the Court of Appeal in that case held in the context of equal pay claims that multiple claimants cannot bring claims on the same claim form where they perform different jobs, although what matters is the work they do not

the job title and it does not matter if there are variations, such as working different hours or having different lengths of service. They also do not need to rely on the same comparators. In that case, the Court of Appeal went on to make clear that the tribunal had a discretion to waive such an irregularity under rule 6.

88. Miss Tether also referred me to ***Sainbury's Supermarket Ltd v Ahmed & others, Fenton & others v Asda Stores Ltd [2019] ICR 910***. That decision also confirmed that a tribunal has a wide discretion under rule 6 to waive any irregularity.

89. Miss Tether also referred me to my colleague, Employment Judge Camp's decision in ***Ahmed & others v Sainsbury's Supermarket Ltd*** dated 8 June 2020. Whilst that is not a binding authority, I cannot help but agree with my colleague Employment Judge Camp's views in that case at paragraphs 86 to 133.

My conclusions

90. I am satisfied that a reasonable person, having all the background knowledge reasonably available to the parties, would have interpreted the terms of the COT3 agreements as confined to claims related to the posts identified in those agreements. He or she would not have interpreted the agreements as compromising claims relating to separate posts which were not identified in the agreements and (in some cases) not even held by the employee at the relevant time.

91. I am satisfied that on the balance of probabilities, all the Claimants had signed a COT3 agreement and that they were all in accordance with the wording as identified in the claims of Tina Carr (page 57), Margaret Dickens (page 97) and Lesley Gregory (page 258). I am also satisfied that they were executed properly and that the settlement agreements had been made with the assistance of ACAS officers. On balance I am satisfied that the events were well organised with the cooperation of ACAS and that agreements were signed by a Trade Union official if the person was a member of a Trade Union and by an ACAS official if they were not.

92. I agree with the contentions made by Miss Tether in support of that finding. In particular;

    92.1 the agreements only related to specific posts. Each agreement identified the post or posts to which the settlement agreement related. That was consistent with the background to the agreements. The Respondent had made it clear in the lead up to the settlement events that not all jobs were "eligible" for an equal pay settlement. The compensation offer form specified the compensation that was being offered in respect of the "eligible job". This was emphasised by note 3 at page 821.

92.2 The agreement was expressed to be between the Council as the employer and the employee. The words "the employee" were intended to refer to the employee's employment in the specified post or posts in the context of this agreement. Miss Tether referred me to paragraph 5 (General) of the agreement at page 101, which reinforced this position. It is not in dispute that at the relevant time, local authority manual workers were employed under contracts which were governed by the Local Government Collective Agreement known as The White Book. The terms and conditions of a teaching assistant were governed by a different collective agreement known as The Purple Book.

92.3 Clause 1 of the agreement, which describes the background, states that;

"*The underlying issues between them relate to allegations of inequality of pay and sex discrimination …*"

At the point in time when the COT3 agreements were concluded, there were no "issues" between the parties in relation to the pay of teaching assistants. No such issues had been raised at that time. I am satisfied that the job of teaching assistant would have been treated as an eligible job if it had been in the contemplation of the parties that those claims should be compromised. Teaching assistants did not receive any settlement offers from the Respondent relating to that post.

92.4 Clause 2(i) of the COT3 agreement states that the settlement payment was referral to the length of service in the specified posts. Nothing in the wording of clause 2 indicates the settlement compensation related to service in any other post.

The wording is consistent with the compensation offer form, which explained that the offer of compensation was calculated based on a formula which depended on qualifying length of service and qualifying hours in the eligible job.

I am satisfied that the scope of the claims released by the settlement clause 2(ii) is confined to any equal pay claim relating to employment in the specified post(s).

As Miss Tether says, clear words would have been required to demonstrate that the release was intended to compromise any claim the employee might have in relation to any and all job or posts she might hold with the Council, including jobs or posts not specified in the agreement and jobs or posts which the employee might hold in the future.

92.5 I am also satisfied that there is ambiguity in the temporal scope of the settlement clause as described by Miss Tether again. The temporal scope of clause 2(ii) (Settlement) was not "absolutely clear" and left room for doubt as to whether and, if so, in what circumstances claims in respect of future service would be precluded.

92.6 Unambiguous wording is required to effect a release of claims arising from future events and the use of the past tense in clause 2(ii) lacks the requisite clarity in saying;

"*… that has or might have been commenced against the Employer by the Employee in respect of:*

a) the period of six years immediately before the date of the signature on behalf of Derby City Council below and/or

b) the Defined Period.

…"

92.7 Six of the Claimants had not taken up their roles as teaching assistants after the conclusion of the February 2007 settlement. I am satisfied that these Claimants could not have been aware that they had any potential equal pay claim in respect of the role of teaching assistant and had no reason to contemplate the possibility that they might have such claims in future.

92.8. As said before, clear wording would be required to demonstrate the release was intended to encompass future claims in respect of any job the employee might acquire at any time during the defined period. I am satisfied that there is no working to that effect in Clause 2.

93. I do not accept the contentions made by Mr Sethi that the COT3

"… v*ery clearly waived the Claimant's right to bring claims in equal pay, sex discrimination, deductions from wages and breach of contract in connection with the Subject Matter in the 7 years post-agreement."*

94. The express terms are not unambiguous regarding future claims in respect of different positions of non-manual roles, which were not in any way in the contemplation of the parties at the time.

95. That construction of the settlement agreement would I am satisfied produce "an extravagant result".

96 I do not accept that the agreement precludes not simply claims relating to the post that was specified in the agreement and to which the settlement compensation related but claims arising from any job the employee might hold during the Defined Period, including any jobs in which she might be employed in the future.

97. I am satisfied that the Respondent's interpretation of the agreement goes far beyond the result that, viewed objectively, was within the reasonable contemplation of the parties. Clear words would have been required to achieve such an "*extravagant"* result, and the requisite wording is manifestly absent from the settlement agreement.

98. Mr Sethi also places much reliance on the reference to the entire agreement clause in the settlement agreement. As Miss Tether described, I am also satisfied that this is a "*red herring*". The Claimants here are not relying on some feature of precontractual negotiations which are inconsistent with the terms of the contract.

99. I am therefore satisfied that the tribunal does have jurisdiction in respect of those claims.

Rule 9 issue

Lisa King

100. I am satisfied that in her Claim Form Miss King is described as a "*Teaching Assistant*". This is not an inaccurate description for the job. The Council itself uses the term "Teaching Assistant" to refer to all teaching assistants, even where there are differences between the duties carried out by individual assistants from day to day.

101. In her cross-examination by Mr Sethi, Miss King provided many features of her role which arise from the fact that she is employed at a special school for pupils with additional needs. There is also an element of her role which involves leadership when the teacher is not present.

102. On the evidence I have heard, I am satisfied that Miss King's role as a Teaching Assistant employed at a special school is not a job that is different from teaching assistants at ordinary schools. Her claim therefore is not irregular and even if it had been, I would have been content to apply my wide discretion under rule 6 to waive such an irregularity. It would have been in the interests of justice and consistent with the overriding objective for me to waive any such irregularity that might have been found in her case. She would undoubtedly have suffered prejudice if her claim had to be struck out and there was no prejudice of the requisite kind to the Respondent.

Karen Leszczyszak

103. I have not seen any contract of employment in respect of this Claimant and the only documents that I have are a letter referring to her as a Teaching Assistant and some pay slips. The fact that some pay data refers to her as a "*Team Leader"* does not affect the position.

104. Having heard evidence from this Claimant, I am satisfied that she was engaged as a Teaching Assistant and there was no irregularity with her Claim Form.

105. In the circumstances, I decline to dismiss either of these Claimants from these proceedings and their claims will continue because the tribunal does have jurisdiction to hear them.

Employment Judge Hutchinson

Date: 22 January 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

SCHEDULE 1

Claimants: Mrs S Aston & others
Respondent: Derby City Council

1	2601991/2017	Julie Roome
2	2600870/2017	Jane Mawbey
3	2601647/2017	Ruth Terzoni
4	2601610/2017	Marie Fay
5	2601978/2017	Aimee Baldwin
6	2601061/2018	Monika Zareba
7	2601526/2018	Clare Naylor
8	2601606/2018	Sharon Taylor
9	2602093/2018	Sandra Harrison
10	2602095/2018	Helen Taylor
11	2602383/2018	Karen Mousley
12	2602295/2018	Rebecca Everett
13	2602682/2018	Zoe Gingell
14	2602933/2018	Carol Jones
15	2601622/2017	Shazia Qadeer
16	2601624/2017	Rosemary Singh
17	2601606/2017	Tina Carr
18	2601613/2017	Lesley Gregory
19	2600533/2018	Margaret Dickens

SCHEDULE 2

Claimants: Mrs S Aston & others
Respondent: Derby City Council

1	2601987/2017	Lisa King
2	2601989/2017	Karen Leszczyszak