



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

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Judgment of the Employment Tribunal in Case No: 4103573/2020 (V), Issued Following Open Preliminary Hearing Heard at Edinburgh on the Cloud Based Video Platform (CVP) on 1st of April 2021 at 10 am

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Employment Judge J G d’Inverno

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Mr G McKinlay

**Claimant
In Person**

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Royal Mail Group Limited

**Respondent
Represented by:
Mr Hay, Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

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(First) That the claimant’s complaint of Constructive Unfair Dismissal is dismissed for want of Jurisdiction;

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(Second) The claimant’s complaint of Discrimination because of the protected characteristic of Disability is dismissed for want of Jurisdiction.

REASONS

1. This case called at Edinburgh on the Cloud Based Video Platform for Open Preliminary Hearing on 1st April 2021 at 10 am.
2. The claimant appeared on his own behalf. The Respondent Company was represented by Mr Hay, Advocate.

Background

3. The Hearing proceeded against the background of the claimant having focused in the course of the Case Management Discussion which proceeded some five months earlier on 9th September 2020, the potential issue of whether he had, at the material time, the mental capacity necessary to agree the terms of the COT3 contract on the face of which he bears to have compromised, amongst others, his right to pursue his current complaints before the Employment Tribunal.

4. With a view to placing parties on an equal footing, the respondent enjoyed the benefit of professional representation and the claimant litigating in person, the Tribunal had directed, in terms of its Order **(Ninth)** of 11th September 2020 that the respondent's representative send to the claimant, and to the Tribunal in advance of the Open Preliminary Hearing a skeleton of the argument to be advanced on behalf of the respondent at the OPH, the same to set out in full the citations of any case authority or statutory provision referred to and relied upon in it, in order that the claimant may have advance notice of the arguments to which he would require to respond. That direction had been complied with and confirmed, at the outset of the Hearing of 1st April that he was in receipt of the skeleton.

Preliminary Matters

5. In the course of Case Management Discussion conducted at the outset of the Open Preliminary Hearing the claimant's advance receipt of the skeleton argument was confirmed and the running order of witnesses and of submissions discussed and all made the subject of agreement.

6. The claimant sought to object to the participation in the Hearing in the capacity of a witness for the respondent's then legal representative on the basis that he and that legal representative had not seen eye to eye in the course of their negotiation discussions which led to the apparent settlement of the previously issued proceedings and that they still did not see eye to eye. In response the respondent's representative Mr Hay submitted that the evidence of the previous representative was essential to the determination of the issues before the Tribunal, as was the evidence of the claimant who was the other party to the settlement discussions. Having explained to the claimant the grounds upon which he took objection were not grounds upon which the objection could properly be sustained, the Employment Judge repelled the objection confirming that the witness would be led in evidence by the respondents and be available to answer questions put in cross-examination by the claimant.

The Sources of Oral and Documentary Evidence

The Issues

7. The Tribunal heard oral evidence, on oath or on affirmation from Ms Kay Sutherland, the respondent's then representative in the historic proceedings before the parties and with whom the claimant negotiated and "agreed" the terms of the COT3 Agreement upon which the respondent relies as an ouster of the Tribunal's Jurisdiction.

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- Mr J Lee, the individual ACAS Conciliation Officer who had discussed the terms of the COT3, subsequently signed by the parties, with the claimant on the 12th of August 2018; and from the claimant who gave evidence on his own behalf. All witnesses answered questions in cross-examination and questions from the Tribunal.

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8. In compliance with the Tribunal's Case Management Orders the respondent's representative had prepared and there was before the Tribunal a Joint

Bundle of Documents extending to some 92 pages and to some of which reference was made by the parties in the course of evidence and submission.

9. The Preliminary Issues requiring investigation and determination at Open Preliminary Hearing were confirmed ?? parties, by the Employment Judge at the outset of the Hearing as being those set down in the Notice of Hearing and in Order **(Seventh)** of the Tribunal's Case Management Orders of 9th September 2020 and being:-

10 **(First)** Whether the claimant had, at the time of their first presentation in Case Number 4103573/20, Title to Present and whether the Tribunal has Jurisdiction to Consider the claimant's complaints of constructive unfair dismissal and of discrimination because of the protected characteristic of disability, by reason of the Tribunal's Jurisdiction having been ousted by the terms of an ACAS facilitated Compromise Agreement (COT3) entered into by the parties on 12th August 2019; and separately and in any event,

20 **(Second)** Whether both of the claimant's complaints were, which failing the claimant's complaint of unfair dismissal is, *res judicata* (having been litigated before and disposed of by, the Employment Tribunal, by Decree of Dismissal of 26th August issued following an unreserved withdrawal of the previous Claim Number 4104727/2018.

25 **Findings in Fact**

10. On the oral and documentary evidence presented and on submissions made, the Tribunal records the following undisputed background Facts and makes essential Findings in Fact as follows, restricted to those relevant and necessary to the determination of the Preliminary Issues before the Tribunal.

11. The claimant's employment as a postman with the respondent came to an end with effect on 10th September 2018 following his resignation, (the claimant asserts 9th September 2018 in his initiating Application ET1 but for

the purposes of this Open Preliminary Hearing the difference is of no moment).

12. On the 18th of May 2018 the claimant presented an initiating Application Form ET1 which was accepted and allocated the Claim Number 4104727/2018. That claim directed a complaint of unfair dismissal against the respondent.
13. Claim Number 4104727/2018 was withdrawn by the claimant and dismissed, respectively, under and in terms of paragraphs 51 and 52 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the Rules”) by a Judgment promulgated on the 19th of July 2018.
14. The claimant also presented a claim, originally in Leeds, to the Employment Tribunal in England and Wales, on 20th February 2019, which was accepted by the Tribunal and allocated Claim Number 1800754/2019. That claim directed a complaint of constructive unfair dismissal against the respondent.
15. Claim Number 1800754/2019 was transferred to Scotland. It is accepted by the claimant that he previously raised Claim Number 4104727/2018 complaining of unfair dismissal and 1800754/2019 complaining of constructive unfair dismissal and that both complaints related to dismissal from his employment with the respondent.
16. The Claim Number 1800754/2019 for constructive unfair dismissal was compromised by means of a COT3 Agreement facilitated by the “Acas” Conciliation Service. The COT3 Agreement (produced at pages 92-95 of the Joint Bundle) was signed by the claimant on the 14th of August 2019 and on the respondent’s behalf on the 16th of August 2019.
17. The respondent made payment to and the claimant accepted, from the respondent payment of, the sum contractually agreed in terms of the COT3, and the respondent thus performed its contractual obligations due to the claimant under that Agreement.

18. The claimant withdrew Claim 4104727/2018, without qualification. A Judgment of Dismissal was issued by the Employment Tribunal (Scotland) under and in terms of Rule 52 and dated 26th and sent to the parties on 30th August 2019.
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19. By initiating Application ET1 first presented on 2nd, rejected and, upon reconsideration of rejection, subsequently received by the Employment Tribunal on 13th July 2020 (copied at pages 1 to 13 of the Joint Bundle), the claimant bore to raise a further claim of constructive unfair dismissal and a claim of disability discrimination (Joint Bundle page 6) to which the Claim No. 4103573/2020 was allocated. It is claim 4103573/20 against which the challenge of Jurisdiction is directed and which called for Open Preliminary Hearing on 1st April 2021.
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20. The COT3 of 14/16th August 2019 provides, in its terms, that the obligations undertaken and to be performed by the respondent are in full and final settlement of Claim 1800754/2019 (clause 4.1.1 of the COT3) and further, at clause 4.1.2, in full and final settlement of:-
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- 20 *“Any and all claims and rights of action of whatever nature, past, present or future (and whether such claims are, or could be, known to the parties or in their contemplation at the date of this COT3) which are competent to the Claimant against the Respondent or any of its members, Directors, Officers or employees, professional advisors or agents (in that capacity) arising from or connected to the claimant’s employment with the respondent or its termination ...”*
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21. The COT3 signed by the claimant on 14th August 2019 constitutes the culmination of negotiations that included telephone and email correspondence between the claimant and the respondent’s then solicitor and law agent, Ms Kate Sutherland, some further correspondence with ACAS Conciliator Ms Mary Ansell, between 31st July to 12th August 2019 and including telephone conversations between; the claimant, the ACAS Duty Team Conciliator Mr Josh Hudson on 12th August at 12:26, the claimant and
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the ACAS Duty Team Conciliator Mr James Lee on 12th August 2019 at 13:05, the claimant and the ACAS Duty Team Conciliator Julie Kilver on 12th August 2019 at 13:40, and an email sent by the claimant to ACAS on 12th August 2019 at 13:26.

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22. In the last telephone conversation, which was initiated by the claimant the ACAS Conciliator explained to the claimant that the COT3 Agreement would be legally binding once both sides had verbally agreed to its terms and that the Employment Tribunal would be notified to vacate the Hearing. The email, again, initiated by the claimant and under reference to the COT3 Agreement the terms of which had just been discussed with him by the Conciliator James Lee, is in the following terms:-

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“Dear Sir/Madam

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I agree to this agreement to end this case.

Graham mckinlay

07403826062

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Sent from my iPhone”

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23. The terms of the written correspondence produced in the Joint Bundle at pages 48 to 49 are what they bear to be.

24. The terms of the written notes in the Joint Bundle between those pages 48 and 91 are an accurate record of the conversations to which they refer.

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25. By email dated 31st July 2019 (page 43 in the Joint Bundle) and, in the course of settlement negotiations, the respondent’s representatives offered on, the respondent’s behalf, to make a payment of £350 plus VAT towards the claimant’s legal fees to allow him to take legal advice on the terms and effect of the COT3 Agreement prior to signing. At the time of so doing the terms of the draft COT3 Agreement made reference to the claimant taking such advice.

26. In the email correspondence the respondent's representative goes on to state
"I would suggest that you start looking now for a lawyer that can advise you.
You can find a list of firms in Scotland which provide employment law advice
on the Law Society of Scotland's website".

27. On the same day the claimant telephoned the respondent's legal
representatives in response to the email and stated:-

- That he did not wish to take legal advice on the terms of the COT3 Agreement.
- That he considered it insulting that the respondent should offer to make a contribution towards the cost of him obtaining such advice.

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28. Following the claimant's rejection of the offer to make a financial contribution to his obtaining legal advice and his oral intimation of 31st July 2019 that he did not wish to take legal advice on the terms of the COT3 or the proposed settlement figures at which he had indicated he wished to accept, the respondent's representative redrew the COT3 Agreement to remove from it the requirement that the claimant take such advice.

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29. By email dated 1st August 2019 and timed at 11:01 (at page 50 of the Joint Bundle) the respondent's then representative wrote to the claimant reiterating the financial terms of the COT3 of which the claimant had indicated his willingness to accept and stating:-

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"Following my email yesterday you called me and told me that you did not want to take legal advice on the terms of the COT3 agreement. This has therefore been removed as a requirement of the agreement.

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Once the COT3 terms are agreed, ACAS will advise the Employment Tribunal that parties have resolved matters and the Tribunal will then cancel the Hearing on 12th August 2019.

5 *I have copied in the ACAS Conciliator, Mary Ansell, and you may wish to speak to her before confirming whether or not you accept the attached terms.”* The email attached the updated draft of the COT3.

10 30. Following further negotiation in which the claimant requested that the tax free lump sum payment to be made to him in consideration of settlement of his claims be increased by £1,000, and that the respondents give up their right to recover from the claimant an overpayment of £1,407 net made to him in the course of and due and outstanding by him to the respondents as at the Effective Date of Termination of his employment, the respondents agreed to
15 those additional terms and redrew the COT3 to reflect them.

20 31. The claimant had also indicated that he would have “liked an offer of reinstatement” but had noted and accepted that the respondents were not prepared to offer that.

25 32. The respondent expressly asked the claimant, in an email copied to ACAS, that he for his part confirm by email whether or not he was willing to accept the increased offer on the updated terms of the COT3 attached to their email of 12th August timed at 11:19.

30 33. At 13:05 on the 12th of August the claimant called ACAS and spoke with the Duty Team Conciliation Officer James Lee. In terms of that telephone discussion the Conciliation Officer went through, “Clause by Clause”, the wording of the COT3 Agreement which both the claimant and he had before them at the time.

34. The Conciliation Officer explained to the claimant the meaning of each clause and the consequences of signing an agreement in their terms.

35. In the course of that conversation the claimant at no time indicated that he did not understand or that he had any difficulty in understanding any of the terms discussed. The Conciliation Officer, who was experienced and who was sharply focused on the conversation because of the imminent of the commencement of the Open Preliminary Hearing set down to proceed at 2 pm that same day, both formed the unequivocal impression, and believed, at the time, and confirmed in his oral evidence before the Tribunal that he still believed, that the claimant fully understood the terms of the Agreement and the consequences of agreeing to those terms for the compromise of his statutory rights.
36. The claimant was clear and confident in his discussion with the respondent and focused only one issue, in relation to clause 14 of the Agreement, with which he was not satisfied.
37. Although the Conciliation Officer offered to revert to the respondent's representative to communicate the claimant's position in relation to clause 14, the claimant was adamant that he would raise the matter which was one of him seeking express comfort and assurance that the terms of clause 14 would have no impact upon any of his accrued pension rights or entitlements, directly with the respondent's representative.
38. The claimant contacted the respondent's representative and raised the one outstanding issue upon which he required comfort being the issue relating to clause 14.
39. By email dated 12th August and timed at 13:24, the respondent's representative wrote to the claimant, following his telephone discussion with her. That email, which is copied and produced at page 88 of the Bundle is in the following terms:-

"Dear Mr McKinlay

I have added the following to clause 14 "For the avoidance of doubt, this clause 14 has no impact on any of the claimant's accrued pension rights or entitlements."

5 *Please see the attached updated COT3.*

Please confirm by email, copying in ACAS, whether or not you are happy to accept the attached with this change. ..."

10 40. By email dated 12th August 2019 timed at 13:24 the claimant sent to the respondent's representative, and copied to ACAS, the email, again produced at page 88 of the Bundle, which is in the following terms:-

"Dear Sir/Madam

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I agree to this agreement to end this case.

Graham McKinlay

07403826062

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Sent from my iPhone"

41. That communication was recorded by ACAS at page 91 of the Bundle as concluding and constituting extra judicial settlement of the claim.

25 42. The terms of the extra judicial settlement which are reflected in the COT3 Agreement and which parties entered into on 12th August 2019 covered all of the rights and claims in respect of which the Tribunal had potential jurisdiction and had the effect of ousting such jurisdiction as the Tribunal had been seized with subject to the already existing plea of *res judicata*.

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Applicable Law

43. The applicable law relating to the permitted exceptions to the general prohibition against contracting out of statutory rights arising out of

employment are set out, respectively in section 203 of the Employment Rights Act 1996 c.18, in the case of the right to complain of express and or constructive unfair dismissal, and, in section 144 c.15 of the Equality Act 2010 in respect of the right to complain of discrimination because of the protected characteristic of disability.

44. Section 203 of the Employment Rights Act 1996 (ERA) is in the following terms:-

“203 Restrictions on contracting out.

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

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

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

(2) Subsection (1)—

(a) does not apply to any provision in a collective agreement excluding rights under section 28 if an order under section 35 is for the time being in force in respect of it,

(b) does not apply to any provision in a dismissal procedures agreement excluding the right under section 94 if that provision is not to have effect unless an order under section 110 is for the time being in force in respect of it,

(c) does not apply to any provision in an agreement if an order under section 157 is for the time being in force in respect of it,

(d)

5 (e) *does not apply to any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under any of sections 18A to 18C] of the Employment Tribunals Act 1996], and*

10 (f) *does not apply to any agreement to refrain from instituting or continuing ... any proceedings within the following provisions of section 18(1) of the Employment Tribunals Act 1996 (cases where conciliation available)—*

15 (i) *paragraph (b) (proceedings under this Act),*

(ii) *paragraph (l) (proceedings arising out of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000), if the conditions regulating settlement agreements under this Act are satisfied in relation to the agreement*

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(iii) *paragraph (m) (proceedings arising out of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002),*

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(iv) ...

30 (3) *For the purposes of subsection (2)(f) the conditions regulating [settlement] agreements under this Act are that—*

(a) *the agreement must be in writing,*

(b) *the agreement must relate to the particular [proceedings],*

5 (c) *the employee or worker must have received [advice from a relevant independent adviser] as to the terms and effect of the proposed agreement and, in particular, its effect on his ability to pursue his rights before an [employment tribunal],*

10 (d) *there must be in force, when the adviser gives the advice, a [contract of insurance, or an indemnity provided for members of a profession or professional body,] covering the risk of a claim by the employee or worker in respect of loss arising in consequence of the advice,*

15 (e) *the agreement must identify the adviser, and*

(f) *the agreement must state that the conditions regulating [settlement] agreements under this Act are satisfied.*

20 [(3A) *A person is a relevant independent adviser for the purposes of subsection (3)(c)—*

(a) *if he is a qualified lawyer,*

25 (b) *if he is an officer, official, employee or member of an independent trade union who has been certified in writing by the trade union as competent to give advice and as authorised to do so on behalf of the trade union,*

30 (c) *if he works at an advice centre (whether as an employee or a volunteer) and has been certified in writing by the centre as competent to give advice and as authorised to do so on behalf of the centre, or*

(d) *if he is a person of a description specified in an order made by the Secretary of State.*

5 (3B) *But a person is not a relevant independent adviser for the purposes of subsection (3)(c) in relation to the employee or worker—*

10 (a) *if he is, is employed by or is acting in the matter for the employer or an associated employer,*

(b) *in the case of a person within subsection (3A)(b) or (c), if the trade union or advice centre is the employer or an associated employer,*

15 (c) *in the case of a person within subsection (3A)(c), if the employee or worker makes a payment for the advice received from him, or*

20 (d) *in the case of a person of a description specified in an order under subsection (3A)(d), if any condition specified in the order in relation to the giving of advice by persons of that description is not satisfied.*

25 (4) *In subsection (3A)(a) “ qualified lawyer ” means—*

30 (a) *as respects England and Wales, [F16a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation (within the meaning of that Act), and]*

(b) *as respects Scotland, an advocate (whether in practice as such or employed to give legal advice), or a solicitor who holds a practising certificate.]*

5 *[(5) An agreement under which the parties agree to submit a dispute to arbitration—*

10 (a) *shall be regarded for the purposes of subsection (2)(e) and (f) as being an agreement to refrain from instituting or continuing proceedings if—*

15 (i) *the dispute is covered by a scheme having effect by virtue of an order under section 212A of the Trade Union and Labour Relations (Consolidation) Act 1992, and*

(ii) *the agreement is to submit it to arbitration in accordance with the scheme, but*

20 (b) *shall be regarded as neither being nor including such an agreement in any other case.]”*

45. The terms of section 144 of the Equality Act 2010 (EqA) are as follows:-

25 **“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.*

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(2) *A relevant non-contractual term (as defined by section 142) 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, in so far as the provision relates to disability.*

(3) *This section does not apply to a contract which settles a claim within section 114.*

5 (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*

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(b) *is a qualifying [settlement agreement].*

(5) *A contract within subsection (4) includes a contract which settles a complaint relating to a breach of an equality clause or rule or of a non-discrimination rule.*

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(6) *A contract within subsection (4) includes an agreement by the parties to a dispute to submit the dispute to arbitration if—*

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(a) *the dispute is covered by a scheme having effect by virtue of an order under section 212A of the Trade Union and Labour Relations (Consolidation) Act 1992, and*

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(b) *the agreement is to submit the dispute to arbitration in accordance with the scheme.”*

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46. In addition useful guidance and commentary upon the interpretation and application of those statutory provisions and upon capacity to contract are to be found in the case authorities and learned texts and commentaries set out at numbers 1 to 10 on the below List of Authorities for the respondent. Those authorities were produced to the Tribunal and to the claimant and reference made to some of their reference by the respondent's representative in the course of submission, and all of which the Tribunal found instructive.

47. List of Authorities for the Respondent

1. Section 203(1) and (2)(e) of the Employment Rights Act 1996
- 5 2. Section 144(1) and (4)(a) of the Equality Act 2010
3. Horizon Recruitment Ltd v Vincent [2010] ICR 491
4. Glasgow City Council v Dahhan UKEATS/0024/15
5. McBryde: The Law of Contract of Scotland, 3rd Edition
6. ET Rules 51 & 52
- 10 7. Staffordshire CC v Barber [1996] ICR 379
8. British Association for Shootings v Cokayne [2008] ICR 185
9. British Airways plc v Boyce 2001 SC 510
10. MacPhail: Sheriff Court Practice; 3rd Edition

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Submissions for the Respondent

48. The respondent's representative commenced by reiterating the Issues which were the Preliminary Issues which were before the Tribunal for determination at the Hearing namely:-
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(First) Whether the Employment Tribunal had Jurisdiction to Consider the claims presented in Claim 4103573/2020 by reason of it having been ousted in consequence of the claimant having entered into a valid ACAS facilitated Compromise Agreement (COT3); and

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(Second) Separately, whether the complaint of unfair dismissal is *res judicata* (the same having been litigated before and disposed of by the Tribunal by a Decree of Dismissal of 26th August 2019 issued following an unreserved withdrawal of the complaint by the claimant.

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49. The claimant's representative relied upon the skeleton argument and the authorities referred to therein and itemised on the list of authorities, all documents provided to the claimant in advance of the Open Preliminary

Hearing in compliance with the Tribunal's Case Management Orders of 9th September 2020.

50. Under general reference to the written skeleton argument he made the following additional oral submissions.

Submissions on the Evidence

51. The Tribunal had heard oral evidence on oath or affirmation from three witnesses, firstly the claimant; secondly, for the respondent from James Lee the individual ACAS Conciliation Officer who had discussed the terms of the COT3 subsequently signed by the claimant with him on the 12th of August 2019; and thirdly, from Miss Kate Sullivan, Solicitor who, at the material time, was acting in the capacity of legal representative for the respondent.

52. The respondent's representative invited the Tribunal to have no hesitation in accepting the evidence of both Mr Lee and Miss Sullivan as both credible and reliable. He submitted that the Tribunal should regard the evidence of Mr Lee, a wholly independent witness, as impressive by reason of the care with which he approached answering the questions put to him and the measured and confident manner in which he had responded, including in particular the detailed explanation given by him as to why he had, upon accessing the ACAS case record, been able to positively recollect the detail of his conversation with the claimant because of the unusual features of the case, not least the proximity of the start of the Time Bar Hearing in advance of which settlement was agreed. On the basis of Mr Lee's evidence, which he invited the Tribunal to so accept, the respondent's representative invited the Tribunal to make the following essential Findings in Fact relevant to the determination of the Preliminary Issues before it:-

- That Mr Lee's note set out at page 90 of the bundle was an accurate summary of the content and effect of the telephone conversation which proceeded between the claimant and himself on the 12th of August 2019 at 13.05 pm.

53. In relation to the evidence of Ms Sutherland the respondent's representative also invited the Tribunal to regard it as both credible and reliable. Ms Sutherland had given her evidence with care and consideration answering questions genuinely and frankly. He invited the Tribunal to accept that evidence and based upon it to make the following essential Findings in Fact relevant to the determination of the issue:-

- 10 • That at no stage in her dealings with the claimant had Ms Sutherland made any disrespectful or facetious reference to the claimant's late mother or the fact of her demise.
- 15 • Nor had she at any point or in any sense laughed at the claimant in the course of negotiations.
- 20 • Nor had she ever stated to the claimant that the respondents or their representatives would, or had ever otherwise offered to suggest or find or provide a solicitor to the claimant for the purposes of advising him of the terms of the COT3 and or its consequences. To do so would have been entirely inconsistent with and would have undermined the necessary independent character of such advice.
- 25 • Separately, that such an assertion was entirely inconsistent with the terms of the written communication between the parties in relation to that matter, which was produced at tab 4 and was an email of 31st July 2019 from Ms Sutherland to the claimant, in the second paragraph of which the respondent's representative states that the respondent is willing to pay the sum of £350 plus VAT towards the claimant's legal fees to allow him to take legal advice about the COT3 and goes on to expressly state "*I would suggest that you start looking now for a lawyer that can advise you. You can find a list of firms in Scotland which provide employment law advice on the Law Society of Scotland website*".
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- That the negotiations between the claimant and the respondent's representatives which led to the executed COT3 Agreement comprise the email communication set out at tab 4 page 43 and after tabs 7 to 26 pages 48 to 88 and thereafter the emails and notes of communications set out at tab 7 to tab 26 inclusive.
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- That there occurred between the claimant and the respondent's then representative Ms Sutherland on the 31st of July a telephone conversation the terms of which are accurately reflected in the telephone note produced at tab 7 page 48 of the bundle
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- That the terms of the voicemail left by the claimant for the respondent's then representative on the 6th of August 2019 were accurately set out at tab 18 page 68 of the bundle in which the claimant is seen to invite the representative to contact him by telephone to discuss a resolution of his dispute with the respondents which he was willing to do.

20 54. In addition the respondent's representative invited the Tribunal to make a further Finding in Fact arising from the evidence of the claimant, namely:-

- that in the summer of 2019 the claimant was discharging duties as executor of his late mother's estate.

25 55. Otherwise the respondent's representative invited the Tribunal to approach the claimant's evidence with a degree of caution on the basis, amongst others, that it was characterised by a blurring of distinction between matters of fact and opinion such as to render it substantially unreliable and not to be preferred over that of the respondent's witnesses on any matter on which it was in conflict. The respondent's representative prayed in aid of that

30 characterisation of the claimant's evidence the fact that when asked, in the course of cross examination, the straightforward question of which of his family members he had taken advice from, he having already confirmed that he had taken advice from a family member, the claimant, instead of answering the question, had delivered a lengthy statement about the matters

that he was contending with at the time and concluding by asserting that in asking him to confirm which family member he took advice from the questioner was seeking to make a fool of him.

5 56. He also invited the Tribunal to consider that the position adopted by the claimant in evidence that the respondent's representatives had offered to find him a solicitor and then failed to do so was a surprising and incredible suggestion standing the undermining that such a course of action would have had on the respondent's ability to rely upon the fact that such advice had
10 been taken and would have flown in the face of normal professional practice. In his submission, the email, produced at tab 4 page 43, could not, upon any objective construction of its terms, be said to bear that interpretation. Further and in contradiction, the second part of the relevant paragraph clearly advised the claimant that he should look for a solicitor and that he could find
15 the list of solicitors who provided employment advice on the website of the Law Society of Scotland.

57. The respondent's representative accordingly invited the Tribunal not to accept the evidence of the claimant as reliable and credible in relation to any
20 matter on which it was contradicted by the evidence of the respondent's witnesses and not supported by contemporaneous documents such as emails.

58. The respondent's representative further invited the Tribunal to make Findings
25 in Fact in respect of the relevant matters of background fact which he understood were not in dispute between the parties and had not been put in dispute in the course of the Hearing and which were set out at paragraphs 2 to 7 inclusive of his skeleton argument. He invited the Tribunal on the oral and documentary evidence presented, to further make the Findings in Fact,
30 proposed at paragraphs 8 and 9 of the skeleton argument, relating to the terms and scope of the COT3 on its face, the culmination of the negotiations between the claimant and the respondent's then representative and the execution by the parties, respectively on 14th and 16th August, of the COT3.

59. Turning to Submissions in Law and under reference to paragraphs 10 to 28 inclusive of the skeleton argument, the respondent's representative submitted that there were two Preliminary Issues before the Tribunal both of which had the potential to lead to the dismissal of the claims:-

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(1) The ouster of jurisdiction and

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(2) The question of whether the complaint of unfair dismissal was "*res judicata*" (that is to say having already been litigated and disposed of by the Tribunal at an earlier stage it was not open to the claimant to raise new proceedings in relation to it.)

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60. He submitted that the issue of *res judicata* may appropriately be considered first on the basis that there was an argument that it should be regarded as a plea applying not only to the complaint of unfair dismissal but also to the complaints of discrimination.

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61. Under reference to paragraphs 22 to 28 of the skeleton, he submitted that while some of the case law may be seen to return to the issue from time to time, the terms of Rule 51 and Rule 52 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1, which were materially different from the Rules which they replaced, provided a clear and unambiguous route to the determination of the Preliminary Issues stating as they do:-

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"51 Where a claimant informs the Tribunal, either in writing or in the course of a Hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a Costs, Preparation Time or Wasted Costs Order.

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52 Where a claim, or part of it, has been withdrawn under Rule 51, the Tribunal shall issue a Judgment dismissing it (which means that the claimant may not commence a further claim against the

respondent raising the same, or substantially the same, complaint) unless –

5 (a) *The claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or*

10 (b) *The Tribunal believes that to issue such a Judgment would not be in the interests of justice.”*

62. Neither of those exceptions had been invoked by the claimant at the time of withdrawal of his claim and, on the clear wording of the ET Rules, his claim of unfair dismissal could not be re-raised as it is the same complaint of constructive unfair dismissal.

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Res judicata

63. In any event the claim of constructive unfair dismissal was previously litigated by the claimant in claim 1800754/2019 and withdrawn by him without qualification the claim was thereafter dismissed.

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64. It had long been considered that a Decree of Dismissal by an Employment Tribunal amounts to a judicial act upon which a plea of *res judicata* or cause of action/issue estoppel can be maintained (**Staffordshire CC v Barbour** [1996] ICR 379 per Mummery J, as he then was, at 387B to 389E; *per* Neill LJ at 397B to 398A) – number 7 on the List of Authorities.

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65. Further, the status of an Order of Dismissal from a Tribunal was a formal termination of proceeding (see **British Association for Shootings v Cokayne** [2008] ICR 185 *per* HH J Richardson at paragraphs [31] and [35]) – number 8 on the List.

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66. Having particular regard to the Scots concept of *res judicata*, which to some extent straddles the two concepts of issue/cause of action estoppel found in English law, it had been held that a claim against the dismissal of an employee should ordinarily only result in one application being made to the Employment Tribunal (**British Airways Plc v Boyce** [2001] SC 510 *per* Lord Marnock at paragraphs [4] and [6]) and that in the Tribunal's system the *media concludendi* should be taken to cover everything in the legislation which is pertinent to the acts of the employer which are the subject of the complaint. (**Boyce** at paragraph [8]) – number 9 on the List.

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67. The respondent's representative's primary submission was that the claim for constructive unfair dismissal and in fact the claim for disability discrimination arising from the same act of the employer in the instant case, were both *res judicata* and should be dismissed.

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The Effect of the COT3 Agreement

68. In the alternative, and under reference to paragraphs 11 to 21 of the skeleton, the respondent's representative submitted that both of the claims asserted by the claimant in the current proceedings relate to his employment with the respondent, which employment ended on the 10th September 2018. As a result they clearly relate to events that are said to have occurred during the currency of that employment relationship and to events which had been known to the claimant from the time in which they occurred.

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69. If that proposition was correct, then the claims lie squarely within the province of the COT3 Agreement as agreed and implemented between the parties having regard to clauses 4.1.1 and 4.1.2 of the Agreement.

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70. The relevant statutory provisions as to the effect of a COT3 Agreement on the Tribunal's Jurisdiction to entertain a claim are found in **section 203(1)** and **(2)(e)** of the **Employment Rights Act 1996** and **section 144(1)** and **(4)(a)** of the **Equality Act 2010**, forming exceptions to the general prohibition

on parties from contracting out of enforcement of rights provided to employees under those two Acts.

- 5 71. The above had been the subject of judicial consideration in several Appellate decisions. For present purposes the relevant principles could be deduced from two decisions of the EAT being, **Horizon Recruitment Limited v Vincent** [2010] ICR 491 and **Glasgow City Council v Dahhan** UKEATS/0024/15.
- 10 72. In **Dahhan**, Lady Wise in her discussion at paragraphs [17] to [19] characterised the effect of a (in that case) Settlement Agreement, as having the effect 'to oust the jurisdiction of an ongoing complaint' (see paragraph [18]).
- 15 73. Both **Dahhan** and **Horizon Recruitment** recognised that there are exceptions to the application of this ouster where it can be demonstrated that an apparently (or *ex facie*) valid settlement agreement (or COT3), is invalid.
- 20 74. In **Horizon Recruitment**, Silber J considered and summarised the dicta from the relevant previous decision and approached the matter thus, at paragraph [27]. In **Dahhan** it was accepted by the EAT that an ET could consider and determine the validity of any such agreement on the basis that one party lacked the necessary mental capacity to contract. On the face of the COT3 Agreement in this claim, the jurisdiction of the Tribunal to determine those
25 claims is ousted. It was understood by the respondent that the claimant was asserting a lack of mental capacity on his part as the means of avoiding this ouster, albeit he had not provided any material by way of specification, or indeed material by way of evidence, to assist him in that assertion.
- 30 75. Before turning to the substance of the point in the instant case the respondent's representative made two preliminary observations:-
- The first that an apparently valid COT3 Agreement sets up a presumption, capable of being rebutted, that the claims have

been ousted. It is accordingly for the claimant to establish absence of contractual capacity, as at 14th August 2019, when he signed the COT3 Agreement.

- 5
- The second point overlapped with the *res judicata* issue which was to be considered by the Tribunal and was whether the appropriate vehicle for such an assertion was truly a new claim, as opposed to an application for reconsideration of the original Judgment of Dismissal in claim number 1800754/2019, which had
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- been the vehicle adopted in the **Dahhan** case.

76. The respondent had produced an extract from Professor McBryde's "Treaties The Law of Contract of Scotland", 3rd edition as a useful summary of the approach of the law of Scotland to capacity to contract as set out by him at

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paragraphs 3-36 to 3-46. The following propositions could be extracted from that text:

- All human beings are presumed to be sane and know the consequences of their actions, absent any judicial declaration to the opposite (see paragraph 3-42)
- 20
- Proof of mental incapacity absent any prior judicial pronouncement on the matter, has been said to be a problem more for medical men than the uninstructed judgment of a layman (see paragraph 3-44)
- 25
- The issue is primarily one of fact. There must have been a mental (or physical) defect which rendered the contracting party incapable of understanding what was being done so that there was no consent to that contract ... the question of capacity will be decided on medical
- 30
- evidence and evidence of behaviour (see paragraph 3-46)

77. Turning to the evidence in the instant case, the respondent's representative submitted that the Tribunal must be satisfied on the evidence that the claimant had proved, on the balance of probability, that at the relevant time

he was suffering from a mental or physical defect which rendered him incapable of understanding what was being done in the course of settlement negotiations and, thereafter, in implement of the settlement.

5 78. The claimant had produced no evidence which would support such a
conclusion or Finding in Fact. He had been on notice that the issue of
determination of his mental capacity was to be considered by the Tribunal,
since, at the latest, the Preliminary Hearing of 9th September 2020, some six
months prior to today's Open Preliminary Hearing (see Order **(Third)** sub-
10 paragraphs (c) and (d) of the Tribunal's Case Management Orders of
9th September 2020, Order **(Fourth)** and paragraph 1.6(d) of the Note of the
same date. The only medical evidence produced, and none had been
foreshadowed in any Further and Better Particulars of Claim, was an
incomplete copy of an Occupational Health Report of 17th April 2018,
15 produced at pages 45 to 47 of the Joint Bundle and which to a time some
11 months prior to the signing of the COT3 Agreement. That Report was
silent on the question of any mental incapacity of the sort relevant to establish
a lack of contractual capacity. Similarly, no evidence of surrounding
circumstances that might cast light upon his capacity had been provided by
20 him. The only witness evidence provided was a statement from a David
McArthur of 23rd February 2018 talking to events within the claimant's
employment (at page 44 of the Joint Bundle) and investigation notes of an
Appeal spanning the months of February to May 2018, all concerned matters
relative to the claimant's employment and were silent on the question of his
25 mental capacity and predated substantially the material date on which the
COT3 was entered into.

79. There had been no evidence produced that went to rebut the presumption of
the claimant's mental capacity to contract.

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80. Further, and by contrast, the available evidence of the exchanges in
negotiation between the claimant and the respondent (see the Joint Bundle at
pages 48 to 88) point to the opposite conclusion, namely that he was well
aware of the terms of a contract being negotiated between the parties and its

consequences (those consequences being explicitly referred to in clause 6 of the COT3 (page 93 of the Joint Bundle) a clause which on the evidence of Mr Lee the Conciliation Officer he had gone through with the claimant and explained and in the course of which Discussion and Explanation the claimant had given no indication to Mr Lee of a failure to understand those consequences or the terms of that clause.

81. In short, submitted the respondent's representative, there was nothing for the Tribunal by way of evidence upon which a conclusion of an absence of contractual capacity on the part of the claimant could be reached. The COT3 was not only *ex facie* valid but was valid as a matter of fact on the evidence adduced by parties at this Preliminary Hearing. The claims advanced by the claimant fell within the ambit of the COT3 Agreement and the Tribunal's Jurisdiction to determine those claims had been ousted by operation of the COT3 Agreement which had been implemented in full by both parties. On that separate ground the respondent's representative invited the Tribunal to dismiss the claim.

Submissions for the Claimant

82. In recognition of the fact that the claimant appears on his own behalf, the submissions made by him are noted below in the full terms in which they were made.

83. The claimant commenced his submissions by stating that it was surprising that the Conciliation Officer Mr Lee, who had given evidence, could remember his case given the number of cases he must have had to deal with both at the time and since. He stated that he believed that Mr Lee had been coerced to say what he said in evidence. That was a matter to which he had made no reference by way of Preliminary Issue at the outset of the Hearing nor put to Mr Lee in cross examination. In answer to the Tribunal's question by whom did he submit the witness had been coerced, the claimant stated that it must have been the respondent's representative Mr Hay.

84. Regarding the evidence of Ms Sutherland, he stated that Ms Sutherland and he had been in conflict at the time of their negotiating settlement proposals as she was acting for the respondents in the litigation which he was trying to settle and he considered that he was still in conflict with her and that her evidence should be regarded in that light since he and she did not see eye to eye in the past and continued not to see eye to eye.
85. The claimant went on to submit that at the material time, that is the period from on or about 31st July 2019 to 12th August 2019 during which he and the respondents' then representative Ms Sutherland, with the assistance of ACAS, engaged in settlement negotiations, he had had poor mental health, was acting as executor of his late mother's estate and that while he could have obtained something from his doctor to say that, the main thing was the fact that he was dealing with the consequences of his mother's death. He stated that in the period prior to and leading up to the termination of his employment the respondents were aware of the fact that he was vulnerable and that had been reflected in the way they treated him prior to his dismissal and that he also believed that he had been vulnerable when negotiating the terms of settlement which, in his evidence he had stated had all been dictated by the respondents. He went on to state "*Okay I asked for a couple of things and was surprised that they were agreed to*", those things being the giving of comfort in respect of his accrued pension rights or entitlements and an increase, requested by him, in the sum of money to be paid to him by the respondents in settlement of his claims by a further amount of £1,000, confirmed in the email exchange of 12th of August produced at page 81 of the bundle.
86. The claimant reiterated in submission the general assertion made by him in evidence that he was told by the respondents' representative that if he did not settle he would be charged costs.
87. He stated, by way of the outcome which he sought from the Open Preliminary Hearing that he felt that he should be allowed to go back because there was still a lot to be answered in relation to the merits of his claim and that he had

not got closure through the settlement. He had loved his job and felt that he had been a vulnerable target to be picked on and had been picked on during his employment by a Manager of the respondent; and because the COT3 had not been done in a proper way and that nothing had been done to the people who had treated him wrongly.

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88. He stated that he had a disfiguring scar which, since 2012, had brought him within the ambit of the Equality Act.
- 10 89. The claimant stated that he had been badly affected by the treatment which he had received at the hands of the respondents and it still affected him badly. He was looking for closure and to be able to move on and that he believed that the respondents should agree to a settlement (by which the Tribunal understood him to mean another or a second settlement). He stated that he was looking for the respondents to come to him to resolve it. He stated that they had entered the COT3 knowing that he did not understand it and that he was stressing over money issues because he had gone from a well-paid job to a minimum wage job which meant that he was living from hand to mouth with what he had to live on and that he could not afford to have a lawyer represent him at these Hearings.
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- 20

Reply for the Respondent

- 25 90. The respondents' representative exercised a limited right of response in relation to one matter only which was raised by the claimant for the first time in the course of his submissions and thus to which he had had no previous opportunity to respond. This related to the assertion, made by the claimant in the course of his submissions, that the Conciliation Officer Mr Lee had been coerced to give his evidence in the terms in which he had by the respondents' representative Mr Hay. The respondents' representative invited the Tribunal to reject that contention making the following points:-
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- The claimant had neither raised that matter by way of a Preliminary Issue nor had he made reference to it in the course of

his evidence in chief and materially, had not put it to the witness, Mr Lee, when cross examining him.

- 5 • The basis upon which the claimant stated he made the assertion was that he found it surprising that the witness was able to remember his case. There was no basis in any of the oral or written evidence before the Tribunal that went to support such an assertion.

- 10 • That Mr Lee had explained fully in evidence how it came to be that he did have a clear recollection of the claimant's case.

- That, for his part, he had had no communication with Mr Lee in relation to his evidence and indeed had not seen Mr Lee before
15 he joined the Video Hearing in his capacity as a witness.

- He refuted entirely the assertion that he had coerced or otherwise rehearsed or sought to rehearse Mr Lee in the giving of his
20 evidence.

- For him to have done so would have constituted a serious act of professional misconduct.

- He had not done so.

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Discussion and Disposal

91. The respondent puts in issue the claimant's Title to Present and the Tribunal's Jurisdiction to Consider his complaints both of constructive unfair
30 dismissal and of discrimination because of the protected characteristic of disability, upon two separate grounds.

92. On the one hand that the subject matter of both litigations, what in Scots Law is defined as falling within the descriptor "*media concludendi*" has been

previously litigated before the Employment Tribunal and disposed of by Decree of Dismissal of 26th August 2019. Thus, in the respondent's representative's submission both claims were subject to the rule given expression to in the Scots concept and "plea in law", of *res judicata*, namely that the rights to make claim which arise out of the Contract of Employment should ordinarily result in only one application being made before the Employment Tribunal (**Boyce Airways Plc v Boyce** (number 9 on the List of Authorities) *per* Lord Marnock at paragraphs [4 and [6]], which is authority for the proposition that before the Employment Tribunal the *media concludendi* is to be taken as covering everything in the legislation which is pertinent to the acts of the employer the subject of the complaint (**Boyce** at paragraph [8]).

93. On the other hand, the proceedings, and each of the complaints of constructive unfair dismissal and of discrimination because of the protected characteristic of disability and the events relating to them which are set out in Claim 1800754/2019, relate to and arise out of the claimant's employment relationship with the respondent, which employment ended on the 9th of September 2018 the events, all being events known to the claimant from the time that they occurred.

94. The Tribunal found the evidence of both Ms Sutherland and Mr Lee to be measured, given in a considerate manner and accepted it as both credible and reliable. As the Tribunal has found in fact, on the evidence presented, the claimant had entered into a COT3 ACAS facilitated Agreement in which he had expressly compromised the very rights to complain of which he now seeks to give notice in the current action, all as set out in clauses 4.1.1 and 4.1.2 of the Agreement. The Agreement was one the terms of which were respectively compliant with the requirements of sections 203(2)(f) of the ERA and with section 144(4)(a) of the EqA, and under which the respondents had fully performed their obligations.

95. The claimant accepts that he entered into the compromise agreement on 12th August 2019 and that he has received performance from the respondent of their obligations under it. He does not maintain that its terms are not those

to which his oral and email communications, conveying his agreement on 12th August 2019, referred. Rather, the claimant's position was that the compromise agreement should be disregarded variously on the following grounds:-

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(a) That while the respondent's solicitors had offered to make a contribution to the cost of his obtaining independent legal advice in relation to the COT3 Agreement, they did not in fact themselves provide a solicitor to the claimant or otherwise make arrangements for a solicitor to give him that advice; and that he had not taken legal advice on the COT3;

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(b) That he had little or no money available at the time to otherwise pay for legal representation;

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(c) That he was dealing with the consequences of family bereavement at about the time; and

(d) Although he had signed the Agreement he did not "really understand what he was signing".

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96. The above was the position disclosed by the claimant on the 9th of September 2020 at the Case Management Discussion which proceeded on that date, as is recorded in the Tribunal's Note of Output issued following that earlier Hearing.

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97. The understanding of the claimant's position which the Tribunal gained in the course of his oral evidence was that at the material time that he was acting as executor of his late mother's estate, the trauma of having himself discovered her dead in her home having been unable to make contact with her by telephone and the fact that a brother was seriously ill, those matters had combined to deprive him of the capacity to understand what he was agreeing to or to give his consent.

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98. In relation to the first ground; an asserted failure on the part of the respondent's legal representatives to themselves source and provide to the claimant legal advice, the Tribunal rejected that contention both in fact and as providing any relevant basis in law for the claimant's position that the COT3 was not effective. The claimant's evidence, which was that the respondent's representative had told him in the course of a telephone conversation that the respondent's representatives would provide a solicitor to him, was unequivocally contradicted by the terms of their emails to the claimant of 31st July 2019 and of 1st August of that year, by the terms of the intervening telephone note of the conversation of which the claimant asserts the statement was made and by the respondent's then legal representative's oral evidence which the Tribunal accepted as both credible and reliable. These sources of evidence make clear, in their terms that the offer made to the claimant was the standard offer of provision of a financial contribution to the cost of his taking legal advice. The matter is put beyond doubt by the express suggestion contained in the material email that the claimant "*start looking now for a lawyer who can advise you*" and further "*You can find a list of firms in Scotland which provide employment law advice on the Law Society of Scotland's website*".

99. Separately and in any event, while one of the exceptions to the general prohibition against contracting out of statutory rights is to do so through a qualifying Settlement Agreement which are respectively identified in sections 203(3) of the ERA and section 144(4)(b) of the EqA and while those options do involve a requirement that a claimant take independent legal advice on the consequences of entering into such an agreement, it is not upon those provisions that the respondents rely. Rather they rely on the alternatives respectively contained within each of section 203 of the ERA and 144 of the EqA, namely that the agreement which is entered into is one facilitated via ACAS by a Conciliation Officer. The COT3 vehicle used in the instant case meets those alternative requirements which do not include a requirement that a claimant take independent legal advice.

100. Regarding the question of capacity, the position is set out by the Learned Professor McBryde in the third edition of the Law of Contract of Scotland at paragraphs 3-36 to 3-46 which were summarised by the respondent's representative in his submissions. Read shortly:-

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- There is a presumption in favour of capacity.
- The onus of proving mental incapacity, which is primarily an issue of fact, rests squarely with the party asserting that position.

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- There must have been a mental (or physical) defect which rendered the contracting party incapable of understanding what was being done so that there was no consent to the contract.

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- That is an issue of fact which falls to be determined on a combination of medical evidence and evidence of behaviour.

101. There was no medical evidence placed before the Tribunal by the claimant which went towards the discharge of that burden of proof. Separately, the evidence of behaviour which was before the Tribunal, including in particular that of the claimant's own engagement in contemporaneous negotiations and the wholly independent evidence of the Conciliating Officer Mr Lee combine and point to the conclusion to demonstrate that the claimant was subject to no such mental incapacity at the time. The Tribunal preferred that evidence to the often repeated but nevertheless bald and otherwise unspecified assertion of the claimant that he did not understand either the content or effect of what he assented to. The COT3 Agreement is one which, on its face is regular and binding. The onus sat squarely with the claimant to prove, on the balance of probabilities and on the preponderance of the evidence, that it was not valid and binding upon him. He has failed to discharge that burden of proof.

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102. The Tribunal separately accepted the submission of the respondent's representatives as to the unequivocal wording of Rules 51 and 52 and

concluded in relation to Claim Number 4104727/2018, which was unreservedly withdrawn by the claimant and subsequently dismissed by the Tribunal that the Tribunal's jurisdiction was ousted. The operation of those rules in relation to Claim Number 4104727/2018 and the terms of the regular and binding COT3 Agreement in relation to, amongst others, the current
5 Claim Number 1800754/2019 are enough to remove the claimant's Title to insist upon and the Tribunal's Jurisdiction to Consider the complaints either of unfair dismissal or discrimination. Separately, however, the Tribunal accepted the respondent's representative's submission that, on the authority
10 of Lord Marnock in **British Airways Plc v Boyce** with which analysis and approach to what comprises the *media concludendi*, it respectively agrees that both claims were *res judicata* and that at the point of its transfer to Scotland, if not sooner, the claimant lacked Title to Pursue and the Tribunal Jurisdiction to Consider the claims incorporated in the subsequently raised
15 claim which was before the Tribunal as Claim Number 4103573/20 at Open Preliminary Hearing.

103. The claimant's complaints accordingly fall to be dismissed for want of jurisdiction.

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104. In the course of making his submissions, and although a matter to which the claimant had made no previous reference at any point in the procedural history of the case or, in the course of giving his own evidence in chief and materially had not put in cross examination to the Conciliation Officer Mr Lee, the claimant submitted that the only explanation for the clear and compelling
25 evidence of Mr Lee that the claimant had understood the terms and effect of the COT3 Agreement into which he had entered, was that the Conciliation Officer had been coerced into giving the oral evidence, which he had done on affirmation, by the respondent's representative Mr Hay. The respondent's
30 representative refuted that allegation on the various grounds already noted. The Tribunal, however, makes clear that it considered the assertion to be entirely substance and wholly lacking in evidential foundation and rejects it.

Employment Judge: Joseph d'Inverno
Date of Judgment: 14 April 2021
Entered in register: 07 May 2021
and copied to parties

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I confirm that this is my Judgment in the case of McKinlay v Royal Mail Group Limited and that I have signed the Judgment by electronic signature.