EMPLOYMENT TRIBUNALS

Claimant: **Ms S Jackson**

Respondent: **New Look Retailers Ltd**

ON: 11 August 2021

BEFORE: **Employment Judge Brain**

REPRESENTATION:

Claimant: **Written representations**
Respondent: **Written representations**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. UPON the issue of the Employment Tribunal's jurisdiction to consider the complaints brought by the claimant:
   1.1. There is no jurisdiction to consider the claim of constructive wrongful dismissal brought pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.
   1.2. There is jurisdiction to consider the complaint of constructive unfair dismissal brought pursuant to Employment Rights Act 1996.
   1.3. There is jurisdiction to consider the complaint of harassment related to disability brought pursuant to Equality Act 2010.
2. Pursuant to Rule 37 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the claimant's complaint brought under section 15 of the 2010 Act (that she was unfavourably treated for something arising in consequence of disability) is struck out as it has not been actively pursued.
3. The respondent's application for an Order that the claimant's complaints in paragraph 1 shall be struck out pursuant to Rule 37 of the 2013 Rules as having no reasonable prospect of success is refused.
4. The hearing shall proceed as listed upon 27, 28 and 29 October and 1 and 2 November 2021 to determine the complaints in paragraphs 1.2 and 1.3.

REASONS

1. This case has had a somewhat complex procedural history. It will be necessary to go through this in some detail in these reasons. It suffices to say by way of introduction that the case was listed to be heard before a full Employment Tribunal panel to be chaired by me. The case was listed for hearing between 1 and 5 March 2021. A preliminary issue arose as to the jurisdiction of the Employment Tribunal to hear the case arising out of the fact that the respondent had entered into a company voluntary arrangement under Part I of the Insolvency Act 1986. That CVA was approved by the High Court on 21 September 2020.

2. Upon 1 March 2021, the Tribunal adjourned the hearing of the case and made Orders for the parties to make written representations upon the issue of jurisdiction. The claimant's written representations were sent to the Employment Tribunal on 26 April 2021. Those of the respondent were filed on 24 May 2021.

3. The respondent's written representations were settled by Miss Owusu-Agyei of counsel. She appeared before the Employment Tribunal in this matter on 1 March 2021. In her written submissions, she invited the Tribunal to dismiss the claimant's claims upon the grounds that the Tribunal has no jurisdiction to hear them or to strike out the claims upon the grounds that there were no reasonable prospects of success.

4. There was a further issue around a claim brought by the claimant of unfavourable treatment for something arising in consequence of disability. This was a claim brought pursuant to section 15 of the 2010 Act. Miss Owusu-Agyei invited the Tribunal to strike out the claimant's section 15 complaint upon the grounds that not only did it have no reasonable prospects of success it had also not been actively pursued.

5. The Order made upon 1 March 2021 then contemplated me ruling upon the issues of jurisdiction and the summary dismissal of the claims on paper. Upon consideration of the written representations of 26 April 2021 and 24 May 2021, I caused a letter to be sent to the parties on 21 June 2021 inviting further representations. The respondent made further representations on 16 July 2021. These were supplemented by representations dated 22 July 2021 in answer to points raised by the claimant in her further submissions which were dated 10 July 2021.

6. The Tribunal shall start its analysis with a consideration of the jurisdiction issue. As will become apparent from these reasons, the Tribunal's judgment is that jurisdiction to consider the claimant's complaints has not been ousted by the CVA. The Tribunal will then go on to consider the issue of the summary disposal of the claims.

7. The jurisdiction issue that arises is whether the Tribunal's jurisdiction to consider the claimant's claims may be ousted by the terms of a CVA. There is no direct authority upon the point. At any rate, the Tribunal was not referred to any. It may be surmised that there is no such authority because the costs of litigating such a point may reasonably be supposed to outweigh any benefit likely to be obtained from proceedings brought against a company which has entered a CVA.

8. The claimant presented her claim form to the Employment Tribunal on 2 July 2019. She worked as a sales advisor for the respondent between 6 July 1999 and 8 April 2019. The respondent is the principal operating company in the New Look group

which operates a retail, clothing, footwear and accessories business. The respondent presented their response on 2 August 2019.

9. The matter then became before Employment Judge Rostant at a case management preliminary hearing which was held on 8 October 2019. He identified that the claimant pursues the following complaints:

   9.1. Constructive wrongful dismissal.

   9.2. Constructive unfair dismissal.

   9.3. Harassment related to disability.

10. The relevant disability is the physical impairment of hyperflexion. This condition causes difficulty for the claimant with day-to-day activities including standing. To alleviate the effects of the impairment upon her, at the material time with which we are concerned (being during her employment with the respondent) she needed to wear or at least preferred to wear trainers upon her feet. It was her wish so to do which led to the conduct of which the claimant complains as identified by Employment Judge Rostant.

11. The claimant's grounds of complaint annexed to her claim form included complaints of a disability discrimination brought under the 2010 Act (in addition to the complaint of harassment). As has been said, Employment Judge Rostant identified only a complaint of harassment related to disability. As is recorded in the minute of the case management hearing, Employment Judge Rostant *"explained that although she has pleaded direct and indirect discrimination and failure to make reasonable adjustments, as well as harassment, the first three claims could not be sustained."* Employment Judge Rostant ordered the parties to inform the Tribunal as soon as possible following their receipt of the case management summary should they consider that the record of the issues that arise in the case is inaccurate or incomplete in any way.

12. Pursuant to that Order, the claimant wrote to the Employment Tribunal on 21 October 2019. She said, *"After careful consideration and advice provided by the court, I do not wish to continue with my claims of direct and indirect discrimination and of failure to make a reasonable adjustment on the basis of insufficient evidence, or reason to sustain. I still wish to pursue the claims of harassment (related to disability) and constructive unfair dismissal and wrongful dismissal".*

13. Paragraph 14.9 of the grounds of complaint annexed to the claim form refers in addition to a complaint of discrimination arising from disability (pursuant to section 15 of the 2010 Act). As far as the Tribunal can discern, this complaint was not mentioned or considered by the Tribunal or the parties at the hearing held on 8 October 2019 nor is it referred to in the claimant's letter of 21 October 2019.

14. The case was listed by Employment Judge Rostant for a hearing to take place upon 4, 5, 6 and 7 May 2020. A notice of hearing to this effect was sent to the parties on 10 October 2019. On 29 October 2019 the claimant's complaints of direct and indirect discrimination and failure to meet the duty to make reasonable adjustments were dismissed following the claimant's withdrawal (in her letter of 21 October 2019). A Judgment to this effect was made by Employment Judge Cox on 29 October 2019 and promulgated on 30 October 2019.

15. On 25 November 2019, the respondent filed a position statement upon the question of disability. This followed upon the claimant serving an impact statement and supporting medical evidence. The respondent conceded the claimant to have a

physical impairment by reason of arthralgia and hypermobility of her knee joints. However, the respondent did not concede the claimant to be a disabled person for the purposes of section 6 of the 2010 Act. The respondent was unable to concede at that point that that condition had a substantial adverse effect upon her ability to carry out normal day to day activities at the material time.

16. Due to the Covid-19 pandemic, the hearing which had been listed for May 2020 was postponed. In accordance with the practice at the time, the scheduled first day of the hearing was converted to a case management hearing. This came before Employment Judge Shepherd. He gave directions primarily aimed at the case management of the disability issue. He also directed there to be an exchange of witness statements for the purposes of the final hearing. The case was then listed for hearing upon 12, 13, 14 and 15 October 2020.

17. On 23 June 2020, the respondent provided an updated position statement upon the question of disability. The respondent conceded the claimant to be a disabled person for the purposes of section 6 of the 2010 Act (because of her physical impairment of hypermobility or hyperflexion). The respondent put in issue whether it had knowledge of her disability at the material time.

18. On 28 September 2020 the Employment Tribunal received a letter from the respondent. This notified the Employment Tribunal that a proposal for a CVA had been sent to the respondent's creditors on 26 August 2020 and had been approved by the creditors and members of the respondent on 15 September 2020. Like may businesses, the respondent had suffered enormously as a result of the COVID-19 pandemic.

19. The letter of 28 September 2020 said:

"With effect from the approval of the proposal [for the CVA] on 15 September 2020, all unsecured creditors of NLRL [the respondent] are bound by the terms of the proposal, whether or not they receive notice of the meeting and whether or not they voted in favour of it. The claimant is an unsecured creditor of the company and the proposal accordingly sets out the ways in which the claimant's claims against NLRL are compromised by the proposal, the rights that the claimant and the company have in respect of such claims.

Pursuant to the proposal, the claimant waives and releases NLRL from any breaches or defaults (potential or actual) of term of any contract relating to the claimant's claim, which includes a contract of employment, resulting from non-payment of any amounts due or from the existence of and/compromises in the CVA, and is not entitled to enforce any rights as a result of legal process or otherwise. The claimant is not entitled therefore to commence or continue any procedural action, statutory action or self-remedy action, including by way of legal proceeding, execution or judgment or other action as a result of such breach or default and is required to discontinue any such action or other action that is ongoing. Further, the claimant is obliged to consent to any application by NLRL and/or any members of NLRL's group for relief against such process or action".

20. On 5 October 2020 Employment Judge Lancaster directed that the hearing listed for 12 to 15 October 2020 shall remain listed and that the suggestion that the claimant was disqualified from pursuing the case was misconceived. He noted that the claimant does not require consent to continue a claim against a company in a CVA. This position may be contrasted with the moratorium on legal proceedings which applies in the case of companies who enter administration pursuant to schedule B1 of the 1986 Act. The moratorium on legal proceedings is to be found

in section 43 of schedule B1. The effect of section 43 is that no steps may be taken (whether by instituting proceedings or continuing them) against the company in administration without the consent of the administrator or with the permission of the court.

21. On 29 September 2020 the claimant emailed the Tribunal. She said that she had received no prior notification about the proposal for the CVA or indeed the CVA itself until receipt of the respondent's letter of 28 September 2020. This is accepted by the respondent. In a letter addressed to the claimant dated 22 February 2021 the respondent said that *"the respondent believes you were first informed of the CVA by a letter from Deloitte dated 16 October 2020."* (This appears to be factually incorrect as the claimant knew of the CVA in late September 2020. However, the fact remains that she did not know of the CVA until after it had been voted upon affirmatively on 15 September 2020). In the letter of 22 February 2021, the respondent maintained its position that the terms of the CVA meant that the claimant was not entitled to pursue her claim but would agree to the hearing going ahead.

22. On 12 October 2020, the matter came before a full Employment Tribunal panel chaired by Employment Judge Little. He ordered the hearing of the case to be postponed to 1 to 5 March 2021 inclusive. This was principally due to the unavailability of one of the respondent's key witnesses.

23. As with the preliminary hearing which came before Employment Judge Shepherd, no mention or reference was made to the claimant's section 15 complaint in Employment Judge Little's record of the hearing held on 12 October 2020.

24. At the commencement of that hearing, Miss Owusu-Agyei presented an opening note on behalf of the respondent. It was the respondent's position that the terms of the CVA are such that from 15 September 2020 the claimant has waived her claims against the respondent. Nonetheless, the respondent intended to defend the claim during the liability hearing before the Tribunal without prejudice to their position upon the effect of the CVA. She attached to the note extracts from the CVA. This was very helpful.

25. The CVA runs to some 303 pages. It is a document of considerable complexity which is a challenge even for skilled lawyers to fully comprehend. For an unrepresented claimant, attempting to read and understand the CVA promises only much heft but little enlightenment. Albeit that some of the salient clauses were not included in her extract, the Tribunal has benefited from Miss Owusu-Agyei's attempts to condense and simplify matters.

26. When the matter came before the Employment Tribunal on 1 March 2021, Miss Owusu-Agyei again presented an opening note. This referred to the claimant's complaints as being confined to constructive unfair dismissal under the 1996 Act and harassment related to disability under the 2010 Act. No reference was made, again, to the section 15 claim nor the claimant's complaint of constructive wrongful dismissal.

27. The Tribunal was concerned as to whether there was jurisdiction for it to consider the claimant's claims in light of the terms of the CVA. Notwithstanding that each party was prepared to go ahead with the hearing, the Tribunal's view was that a jurisdictional issue had arisen. The Tribunal therefore needed to be satisfied that there was indeed jurisdiction for the Tribunal to consider the case. Accordingly, Orders were made for the parties to make written submissions upon the jurisdiction point.

28. In the course of the parties' written submissions following the Order of 1 March 2021 the Tribunal's attention was drawn to two Employment Tribunal Judgments which have considered this matter. As a point of principle, these Judgments are not persuasive let alone binding upon this Tribunal. Nonetheless, the Tribunal has found them helpful.

29. The first of the cases chronologically is a Judgment of Employment Judge Allen sitting in the Watford Employment Tribunal (**Kim Burrows v New Look Retailers Ltd:** case number 3321958/19). The judgment was promulgated on 31 March 2021. The respondent was represented by Mr Kirk of counsel. Employment Judge Allen held that the CVA does not inhibit the Employment Tribunal from dealing with the merits of the claim.

30. Employment Judge Allen set out a chronology of events. This records that on 26 August 2020 the respondent's creditors were notified of the meeting to approve the CVA. The creditors meeting approved the CVA on 15 September 2020. High Court approval was obtained on 21 September 2020. Miss Burrows in fact first heard of the CVA on 25 September 2020, around several weeks before the claimant did. Like the claimant, Miss Burrows received a letter dated 16 October 2020 notifying her of the CVA.

31. The second case came before Employment Judge Dunlop sitting in Manchester (**Ms H Parry v New Look Retailers Ltd**: case number 2409303/20). Miss Owusu-Agyei appeared for the respondent. Employment Judge Dunlop rejected the respondent's application for Ms Parry's claims of unfair dismissal and discrimination to be dismissed or alternatively for them to be struck out.

32. The Tribunal notes that Employment Judge Dunlop mentioned of a challenge to the validity of the CVA which came before the High Court earlier this year. The High Court's judgment in the matter was handed down on 10 May 2021. The challenge to the CVA was brought by some of the respondent's landlords. In the event, the challenge was unsuccessful (**Lazari Properties 2 Limited and Others v New Look Retailers Limited and Others** [2021] EWHC 1209 (Ch) Zacaroli J). It is perhaps a little surprising that the first that this Employment Tribunal knew of this matter was upon reading it in Employment Judge Dunlop's judgment. Be that as it may, the challenge was unsuccessful in any case.

33. After setting out the salient parts of the CVA in some detail, Employment Judge Dunlop concluded that the Employment Tribunal's jurisdiction to consider Miss Parry's claims (brought under the 1996 Act and the 2010 Act) had not been ousted by the CVA.

34. The Tribunal now turns to the terms of the CVA. As has been said, this is a complex legal document which is some 300 pages in length. As observed by Employment Judge Dunlop, it is *"an extremely dense and complex legal document. Its predominant focus is on the relationship between the respondent and its landlords and, in particular, on substantially reducing the rent obligations on many, if not all, of its store properties".* The prescience of Employment Judge Dunlop's observation is perhaps borne out by the fact that the unsuccessful challenge to the CVA was spearheaded by some of the respondent's landlords.

35. The CVA applies to those who are a 'CVA Creditor.' This term is defined in the lengthy 'Definitions and Interpretation' section in schedule 1 to the CVA. There are twelve categories of CVA Creditor. A 'Category L CVA Creditor' means 'any Former Employee to whom New Look owes a Liability, including those Former Employees listed in Part 4 of schedule 19 (*List of CVA Creditors*).'

36. A 'Former Employee' is defined to mean 'any person who has previously been employed by New Look but is not an Employee at the CVA Creditors' Meeting Date.' The CVA Creditors Meeting Date means the date on which the CVA Creditors Meeting was held (that being 15 September 2020). The claimant's employment with the respondent had terminated by that date. It follows therefore that she comes within the category of 'Former Employee' and is therefore a 'Category L CVA Creditor.' The claimant is not listed in Part 4 of schedule 19. This would appear to follow because she was not sent notice of the CVA meeting. However, that she does not feature in the Part 4 list does not preclude her from being a Category L CVA Creditor as the definition of that term is only said to be inclusive of those in Part 4 which is thus not an exclusive list.

37. It follows therefore that the claimant is a Former Employee and comes within Category L as she is one to whom the respondent owes or may owe a liability.

38. We must therefore turn to the definition of liability within the CVA. This is very widely defined. The CVA provides that it means *"any obligation of a person, whether it is present, future or contingent, whether or not its amount is fixed or liquidated, whether or not it is disputed, whether or not it involves the payment of money, whether it is secured or unsecured and whether it arises at common law, in equity, by contract, or by statute in England or in any other jurisdiction, or by any order, judgment, decree or any other act of any court (including without limitation to the foregoing generality, the Court) or in any other manner whatsoever, and 'Liabilities' shall be construed accordingly."*

39. The definitions section then defines the term 'Compromised CVA Creditor' to include the category L CVA Creditors. A 'Compromised CVA Creditor Claim" means the claims of a Compromised CVA Creditor. A 'Compromised CVA Creditor Contract' means any contract that relates to the Compromised CVA Creditor Claim as set out in the proposal. A 'Compromised Former Employee Liability' is "any and all Liabilities owed by New Look to a Former Employee other than the Redundancy Payments."

40. Clause 4 of the proposal provides as follows:

> "4. Waiver and Moratorium
>
> 4.1 Waiver
>
> With effect from the Effective Date:
> (a) each Compromised CVA Creditor and each Category A Landlord waives and releases New Look from any breaches or potential or actual defaults of any terms of a Lease, Agreement for Lease or Compromised CVA Creditor Contract that may have arisen and are continuing as at the Effective Date or that may arise thereafter in either case as a result of:
>
> (i) New Look not paying any amount due under any Lease, Agreement for Lease or Compromised CVA Creditor Contract before the Effective Date; or
> (ii) a CVA Related Event or the compromises under, or any other provision of, the Proposal; and
>
> (b) subject to Clause 4.2 (Landlord proprietary rights) below, no Compromised CVA Creditor or Category A Landlord shall be entitled as a result of any of the events referred to in Clause 4.1(a) (Waiver) above, by way of a Legal Process or otherwise:
> (i)-(ii)…
> (iii) to enforce any other contractual or other right that they may have in their capacity as Landlords or Compromised CVA Creditors in respect of

> Leases, Agreements for Lease or Compromised CVA Creditor Contracts (as the case may be);
>
> (iv)-(vi)…
>
> and any Compromised CVA Creditor or Category A Landlord that has commenced or completed any Legal Process or other action which falls within Clause 4.1(b)(i)-(vi) (Waiver) above, agrees and acknowledges that it will discontinue such Legal Process or other action, and (if applicable) consent to any application by New Look and/or any Group Company for relief against any such process of action."

41. I now turn again to the Definitions and Interpretation section of the CVA to ascertain the meaning of the term 'Legal Process' within clause 4. This means 'any procedural action, statutory action or self-remedy action (whether by way of demand, legal proceedings, alternative determination process (including an expert determination process), the levying of distress, execution of judgment, any petition for the winding up or liquidation of New Look, or otherwise) or commercial rent arrears recovery.'

42. Although Clause 4 of the CVA is headed *'Waiver and Moratorium'* nothing is said about a moratorium upon proceedings (as opposed to a waiver of them) within any of the sub-clauses of Clause 4.

43. Clause 5 concerns the effect of a CVA on Ordinary Unsecured Creditors. This term is defined to mean each creditor to whom New Look owes an Ordinary Unsecured Liability. This is inapplicable to the claimant because the term Ordinary Unsecured Liability means any liability of New Look to a creditor other than any Liability owed to that creditor as (amongst other things) a Compromised CVA Creditor. (By way of reminder, the claimant falls into the category of Compromised CVA Creditor by virtue of her status as a category L CVA Creditor which in turn means any Former Employee of New Look to whom New Look owes a Liability (including a contingent liability). In short, therefore, the terms of Clause 5 may be disregarded.

44. Clause 6 is headed, *'The Effect of the CVA on Employees.'* Again, this appears to be inapplicable in the claimant's case because clause 6 provides that "The CVA shall not affect the rights of any Employee …" The term "Employee" means those in employment at the CVA Creditors' Meeting Date and thus is distinct from that of 'Former Employee.'

45. For the impact of the CVA upon Former Employees such as the claimant we need to turn to Clause 22 which deals with the effects of the CVA upon category L CVA Creditors (who are, by definition, Former Employees).

46. We can pass over the Clause 22.1 which deals with redundancy payments. Such is not relevant to this case.

47. The remainder of Clause 22 provides as follows:

> "The Effect of the CVA on Category L CVA Creditors – Former Employees
>
> 22.1 Redundancy Payments
>
> ...
>
> 22.2 Compromise of Compromised Former Employee Liabilities
>
> To the extent that a Category L CVA Creditor's CVA Claim in respect of Compromised Former Employee Liabilities becomes an Allowed CVA Claim in accordance with Clause 30 (Notice and Acceptance of Claim), the CVA will release and compromise the claim for Compromised Former Employee Liabilities held by such Category L CVA Creditor to 2% of the amounts assessed by the Supervisor as outstanding at the Effective Date.

22.3 Payment

The amount calculated in accordance with Clause 22.2 (Compromise of Compromised Former Employee Liabilities) shall be paid to Category L CVA Creditors by New Look following the Interim CCF Claim Date, provided that no payment shall be made if a Challenge Application has been made to the Court in respect of the CVA on or before the end of the Challenge Period, unless such Challenge Application has been withdrawn, settled or decided judicially in favour of New Look.

22.4 Full release and discharge

From the Effective Date, each Category L CVA Creditor irrevocably and unconditionally, fully, finally and absolutely releases and discharges New Look from any Compromised Former Employee Liability and from any further actions, proceedings, costs, claims, demands and expenses with respect to any Contingent Liabilities, and accepts such amount to be paid under Clause 22.3 (Payment) in full and final settlement of such Compromised Former Employee Liabilities."

48. Clause 27 of the proposal reads (in so far as material) as follows:

"Full and Final Settlement and Bar Date

27.1 Full and Final Settlement
(a) … the provisions of the CVA shall constitute a compromise of all Compromised CVA Creditor Claims which have been modified under the terms of this Proposal. Accordingly, the payments made pursuant to the CVA… to any Compromised CVA Creditor shall be in full and final settlement of any such claims.

(b) Without prejudice to the generality of Clause 27.1(a) (Full and Final Settlement) above, New Look's obligation to make the payments referred to in… Clause 22 (The Effect of the CVA on Category L CVA Creditors – Former Employees)… save as expressly stated in those Clauses, will be accepted in full and final satisfaction of any Liability to a Compromised CVA Creditor.

(c) …

(d) …

(e) For the avoidance of doubt, Clause 4 (Waiver and Moratorium) provides that Category A Landlords and Compromised CVA Creditors may enforce their rights under the CVA, including under the Leases as modified and varied by the CVA and/or for any non-payment of any amount when due under the CVA."

49. Clause 30 provides that in order to benefit from payments under the CVA, the creditor must submit a notice of claim to the CVA supervisors before the bar date of 31 December 2023. An 'Allowed CVA Claim' means, in relation to a CVA Claim *[that being any claim against New Look in respect of a CVA Liability]*, the CVA Claim or that part of a CVA Claim that is admitted by the Supervisors or has been determined in a final and binding manner in accordance with clause 30 (notice and acceptance of claim).

50. Clause 30.3 concerns the process for allowance of Allowed CVA Claims. The allowed CVA claim of a Compromised CVA Creditor (such as the claimant) shall be determined by the supervisors based upon a review as set out in Clause 30.7. This provides that a notice of claim may be admitted by the supervisors either for the whole of the amount claimed by the Compromised CVA Creditor or for part of that amount and that the supervisors may reject a CVA claim in whole or in part for any

reason. If they do reject a claim, they shall prepare a written statement of reasons for doing so.

51. A procedure is set out for the resolution of a disputed claim. Clause 31 provides that a Compromised CVA Creditor shall deliver a disputed claim notice within 21 days of the Compromised CVA Creditor receiving confirmation from the supervisors that their CVA Claim has been allowed for a lower amount than claimed or rejected. Clause 33 then provides a dispute resolution procedure. This says that the matter shall be adjudicated by a chartered accountant jointly nominated by the supervisor and the relevant Compromised CVA Creditor or in default of any agreed nomination within seven days, to the President for the time being of the Institute of Chartered Accountants in England and Wales. The adjudicator is known as the 'Dispute Accountant.' The agreement provides that the Dispute Accountant shall be a chartered accountant having not less than 10 years' experience of similar disputes contemplated by the clause. The fees and costs of the Dispute Accountant are to be shared between the parties equally.

52. The Tribunal will now endeavour to pull together all of these threads. The effect of Clause 4(1)(a) is that the claimant waives and releases the respondent from any breaches or potential or actual defaults of any terms of her contract of employment. This is because the contract of employment comes within the definition of a "Comprised CVA Creditor Contract' and a Compromised CVA Creditor includes category L CVA Creditors being Former Employees of New Look. The definition of "Comprised CVA Creditor Contract" means any contract that relates to the Compromised CVA Creditor Claim. This does not appear to be wide enough, therefore, to catch the statutory claims of unfair dismissal and harassment related to disability.

53. In the Tribunal's judgment, it is wide enough to encompass complaints of wrongful dismissal. The claimant resigned her position summarily. She claims to be entitled to the payment of notice because she was wrongfully constructively dismissed by the respondent. A wrongful dismissal claim is essentially one made by an employee complaining of a fundamental breach of contract by the employer and that the employer has failed to pay remuneration for the notice period. Such a claim falls four-square within the scope of Clause 4.1(a) as a breach of the Compromised CVA Creditor's [*viz. the claimant's*] Contract [*of employment*].

54. Clause 4.1(b) provides, as we have seen, that no Compromised CVA Creditor such as the claimant shall be entitled as a result of the events referred to in Clause 4.1(a) to proceed to enforce any contractual or other rights which they may have in their capacity as Compromised CVA Creditors. In and of themselves, the words of Clause 4.1(b)(iii) would wide enough to encompass the statutory claims under the 1996 Act or the 2010 Act, this being 'other rights.'. However, importantly Clause 4.1(b)(iii) refers to contractual or other rights vested in the Compromised CVA Creditor which arise as a result of the events referred to in Clause 4.1(a). Therefore, Clause 4.1(b) is expressly made subject to Clause 4.1(a). Unfair dismissal and harassment related to a protected characteristic (such as disability) are statutory rights. They are not contractual rights. True it is that in all complaints of unfair dismissal and in the majority of complaints brought under the 2010 Act of discrimination or harassment in the workplace there will be a contract of employment in existence. However, when suing for unfair dismissal or a breach of the Equality Act 2010, the claim is not contractual but statutory. The claims therefore do not arise from a breach or potential breach of a contract that relates to a Compromised CVA Creditor. They arise because the employer has committed

acts constituting conduct that is prohibited under the 2010 Act or unfairness in dismissing an employee under the 1996 Act. It follows in my judgment, therefore, that there is no obligation pursuant to Clause 4.1(b) to discontinue the legal proceedings instituted by the claimant in the Employment Tribunal prior to the CVA upon the basis of Clause 4. The harassment and unfair dismissal claims do not arise from a breach of contract. True it is that but for there being a contract of employment between the parties the statutory claims would not have arisen but in my judgment that is insufficient to bring them within the orbit of Clause 4.

55. In my judgment, therefore, Clause 4 does not assist the respondent. It is to Clause 22 that we must now turn.

56. In essence, as the Tribunal understands matters, an employee such as the claimant must demonstrate, in order to participate in the distribution under the CVA, that they have an Allowed CVA Claim which is one that is admitted by the supervisor of the CVA or determined in the creditor's favour pursuant to the dispute resolution scheme provided for by the CVA. Such a claim may arise in respect of any 'Liability' as defined in the CVA. We have already seen that the definition of liability in the CVA is very wide. It expressly covers a present, future or contingent liability arising out of a cause of action arising by statute. On the face of it, therefore, this is wide enough to embrace unfair dismissal and Equality Act claims.

57. A Former Employee such as the claimant is therefore required, under the CVA, to make a claim prior to the bar date of 31 December 2023 by submitting a notice of claim. If this is accepted by the supervisor of the CVA, then the claimant will be entitled to a distribution capped at 2% of the admitted claim. Where the supervisor does not to accept the notice of claim, then the claimant must avail herself of the dispute resolution procedure for disputed claims. The costs of the adjudicating chartered accountant must be split equally between the claimant and the respondent in the case of a disputed claim.

58. It may be anticipated, in this case, that the claimant's claim will not be categorised by the supervisor as an Allowed CVA Claim. The Tribunal must proceed upon this basis given that the respondent is advancing a defence to the claim and has appeared before the Tribunal to defend it. It will therefore be a disputed claim. Given that the claimant will be paid at 2% of the value of the claim (if determined in her favour by the adjudicator) and must pay 50% of the adjudicator's fees, it is unlikely to be economically viable or sensible for her to pursue it through the CVA dispute resolution mechanism. If she is bound to pursue vindication of her rights (by the obtaining of a merits judgment in her favour) and must do so through the mechanism provided by the CVA then effective pursuit of her claims will be rendered excessively difficult and expensive.

59. The Tribunal was not taken to any provision obliging a creditor contractually to discontinue a claim other than as provided for in Clause 4. (The Tribunal has held that Clause 4 does not apply to the complaints which the claimant pursues other than the complaint of wrongful constructive dismissal).

60. If the respondent is correct in its interpretation of the provisions between Clauses 22 and 33 of the CVA, then the impact upon the claimant (and other employees in her position) is indeed profound. It will have the effect of ousting the statutory rights vested in the employees pursuant to the 1996 Act and the 2010 Act.

61. The claimant argued in her submissions that she should not be bound by the CVA for lack of notice. Unfortunately for the claimant, the position is that creditors are

bound by the CVA whether or not they have notice of the proposal. Section 5(2) of the 1996 Act provides as follows:

"The … voluntary arrangement –

(a) takes effect as if made by the company at the time the creditors decided to approve the voluntary arrangement, and

(b) binds every person who in accordance with the rules –

(1) was entitled to vote in the qualifying decision procedure by which the creditors decision to approve the voluntary arrangement was made or

(2) would have been so entitled if he had notice of it, as if he were a party to the voluntary arrangement".

62. Section 5(2)(b) was inserted by the Insolvency Act 2000. Whereas formerly it had been held that a creditor must have actual notice so as to be bound by the arrangement, the provision in the 2000 Act does away with the requirement for actual notice. Instead, section 5(2)(b) binds two classes of person as party to the voluntary arrangement on the assumption that any such person would have been entitled to participate in the creditor's decision-making process upon the CVA proposal.

63. The two classes of persons bound by section 5(2)(b) are:

(1) Every person entitled to vote in a creditor's decision process (ie who had notice of the decision process, irrespective of whether or not they participated) or

(2) Any person who would have been entitled to have had such notice (irrespective of whether such notice was received or otherwise communicated).

64. The Tribunal has considered the work *'Annotated Insolvency Legislation'* by Doyle, Keary and Curl. This work says that class (2) cited in paragraph 62 above *"will catch both creditors who are not known to the nominee initiating the creditor's decision process and also creditors who are known but to whom notice is not given through, say, an administrative oversight or even a deliberate omission."*

65. Harsh as it may seem to the claimant, therefore, the position is that she is bound by the CVA notwithstanding that (even on the respondent's case) she was not served with notice of it. That is the clear effect of section 5(2)(b) of the 1986 Act.

66. The Tribunal pauses here to observe that, with respect, the Watford Employment Tribunal in the **Burrows** case appears to have been incorrect to cite sections 257(2B) and 260(2)(b) as authority for the proposition that the CVA is binding on all creditors whether or not notice was given. Those provisions apply in the case of individual voluntary arrangements which has no applicability to this case.

67. The respondent drew the Tribunal's attention to the case of **Britannia Heat Transfer Limited (in Administration and in Company Voluntary Arrangement)** (2007) BCC 470. The Tribunal accepts Miss Owusu-Agyei's submission that this is an authority binding upon the Employment Tribunal. The High Court is, like the Employment Tribunal, a court of first instance. However, the Tribunal considers there to be much force in her point that the Employment Appeal Tribunal (which hears appeals from Employment Tribunals) is a division of the High Court. Decisions of the EAT are binding upon the Employment Tribunal. As a matter of logic, therefore, it appears to follow that decisions of another branch of the High Court must also be binding. The Tribunal shall therefore proceed upon this basis.

68. Britannia Heat Transfer Limited entered administration on 14 November 2002. One of the purposes of the administration was the approval of a Company Voluntary Arrangement under Part 1 of the 1996 Act. The administrators sold the three trading divisions of Britannia and were then able to propose a CVA providing for a moratorium on legal proceedings and the payment of 100 pence in the pound to preferential creditors and a smaller dividend to unsecured creditors. The CVA creditors included various employees of Britannia and the Redundancy Payments Directorate. (The Redundancy Payments Directorate was involved because payments out had been made to Britannia's employees from the National Insurance Fund and those employees' rights were subrogated to the Directorate who pursued them against the company effectively seeking recovery of monies paid to the employees for the benefit of the National Insurance Fund).

69. One of the joint administrators of Britannia who was the supervisor of the CVA sought a declaration from the High Court upon the question of whether the employees' statutory rights could be compromised by way of a CVA.

70. The employees' claims in **Britannia** all arose under the 1996 Act. There were complaints of: unlawful deductions from wages; the right to a minimum period of notice; the right not to be unfairly dismissed; and the right to a redundancy payment. The employees' claims in **Britannia** did not include any arising under the 2010 Act.

71. The concern which arose was whether the statutory rights in the 1996 Act may be compromised pursuant to an arrangement not made in compliance with section 203 of the 1996 Act.

72. Section 203 of the 1996 Act (and equivalent provisions in other statutes including the 2010 Act in section 144) provide that individuals cannot contract out of their statutory employment rights. However, settlement agreements which have this effect are permissible. To be legally binding, settlement agreements must comply with certain formalities as set out in section 203(3) of the 1996 Act and section 147 of the 2010 Act. There was no dispute in **Britannia** that the CVA did not comply with the provisions of section 203(3) of the 1996 Act. Indeed, HHJ Norris QC who handed down the judgment in **Britannia** held that in practical terms *"it is very difficult to see how the possibility of making a [settlement] agreement validated under section 203(3) could in practice ever be realised. The provisions of section 203(3) are simply not adapted to the procedure for promoting a CVA."*

73. He held that a CVA is not an agreement for the purposes of section 203 of the 1996 Act. Therefore, the statutory requirements and formalities of section 203 did not apply and none of the provisions of the CVA were to be modified or avoided upon that account. The CVA approved in **Britannia** (on 17 October 2005) was therefore held to be binding upon all parties notwithstanding the provisions of section 203 of the 1996 Act.

74. HHJ Norris held that the CVA effectively bound all non-statutory employment claims. Those complaints (such as a complaint of wrongful dismissal) do not fall within the ambit of section 203 of the 1996 Act (or indeed of section 144 of the 2010 Act). Common law claims such as for wrongful dismissal may be compromised in any way (provided that there is legal certainly) including by way of a CVA. Clause 4 therefore has the effect of ousting the wrongful dismissal claim from the Tribunal's jurisdiction.

75. As **Britannia** is binding upon the Tribunal, it follows that the CVA is not avoided in its application to her unfair dismissal claim by reason of a failure to comply with the formalities in section 203(3) of the 1996 Act. That the claimant had no notice of the

creditor's meeting until afterwards and the safeguards in section 203(3) were not followed is of no assistance to her. Upon the unfair dismissal complaint, therefore, she is bound by the terms of the CVA. The pursuit of the unfair dismissal claim is confined and restricted by the terms of the CVA. However, in my judgment, this does not mean that the Tribunal cannot hear her complaint. What it does mean is that the satisfaction of a successful complaint is constrained by the operation of the CVA as I shall now explain.

76. What this means in practical terms is that the claimant must present to the supervisor a notice of claim. Without the benefit of an Employment Tribunal Judgment in her favour it may be anticipated that the claim will be rejected forcing the claimant to utilise the dispute resolution mechanism provided for by the CVA.

77. **Britannia Heat Transfers Limited** is not authority for the proposition that the Tribunal's jurisdiction is ousted by the existence of a CVA. It is authority for the proposition that the CVA is not invalidated for want of compliance with the formalities in section 203(3).

78. Unlike the statutory administration process provided for in schedule B1 of the 1996 Act, a CVA does not impose a statutory moratorium upon proceedings. It can be taken therefore that a Parliament decided to distinguish the position between CVAs on the one hand and administrations upon the other and the impact upon those statutory processes upon legal proceedings (actual or contingent). If a CVA resulted in a statutory moratorium, one would have expected Parliament to have expressly provided for such.

79. Further, the CVA itself nowhere provides for a moratorium. The nearest that one gets within the CVA is the reference in Clause 4 to a moratorium (albeit that the terms of Clause 4 appear not to provide for such in any case). While Clause 4 provides for a contractual obligation for discontinuance of legal proceedings caught by it (for our purposes complaints of breach of contract) no such provision applies (so far as the Tribunal is aware) to Clauses 22 to 33.

80. Therefore, both the statutory scheme provided by the 1986 Act and the terms of the CVA itself appear to contemplate or at any rate do not preclude the bringing of or continuance of legal proceedings. It follows, in the Tribunal's judgment, that the claimant may therefore pursue her complaint of constructive unfair dismissal.

81. Should the claim fail, then that will be the end of matters. Should the claim succeed, then the claimant may present a notice of claim pursuant to the provisions of the CVA. It would be a surprising step, if presented with an Employment Tribunal Judgment, for the supervisor to reject the claim. After all, the complaint will have been adjudicated upon by a specialist labour court. However, that is for another day. For now, the Tribunal's determination is that for the reasons given the claimant's unfair dismissal complaint may proceed.

82. The Tribunal also determines that the claimant's complaint of harassment related to disability brought under the 2010 Act may proceed. This is for the reasons already given. There are however additional considerations under the 2010 Act.

83. Notwithstanding the UK's decision to withdraw from the European Union, general principles of EU law are retained pursuant to section 6 of the European Union (Withdrawal) Act 2018. These general principles are the fundamental legal principles that govern how EU institutions operate and the application EU law within member states.

84. Since October 2010, the 2010 Act is the legislative instrument by which the UK implements into domestic law the protections from discrimination guaranteed under EU law. In particular, the EU Equal Treatment Framework Directive (No 2000/78) sets out a general framework for eliminating employment or occupational inequalities based upon disability (amongst other things). The concept of disability discrimination in this context includes harassment (pursuant to Article 2).

85. Member states are entitled to impose conditions or limitations upon the exercise of rights derived from EU law such as time limits or territorial restrictions. However, such restrictions must not render virtually impossible or excessively difficult the exercise of EU-derived rights. Member states must also not place conditions and limitations on the enforcement of EU rights that are less favourable than those governing similar domestic rights.

86. The latter principle of equivalence means that it inexorably follows from the Tribunal's ruling upon the unfair dismissal complaint that the harassment complaint must also be allowed to proceed. It would breach the principle of equivalence for a similar domestic remedy to be allowed to proceed whereas a complaint derived from EU law is not.

87. In any case, as has been said, the principle of effectiveness is binding upon member states (and continues to bind the UK pursuant to the 2018 Act). In the Tribunal's judgment, it would be a breach of the principle of effectiveness to permit the use of a statutory procedure such as that in Part 1 of the 1986 Act to effectively abrogate the claimant's rights to have her harassment complaint adjudicated upon by a specialist Tribunal.

88. A finding to the contrary would be that it is permissible under a domestic statute such as the 1986 Act for a statutory scheme provided by that statute to be utilised by a party (such as the respondent) in a way which effectively negates the ability of employees such as the claimant to have a discrimination or harassment claim heard by a specialist labour court. In the Tribunal's judgment, there would have to be a very clear expression of Parliamentary intent for this result to arise (and even then such would breach the principle of effectiveness in any case and, as the law currently stands, would require the court or tribunal to interpret such domestic legislation in accordance with EU law and with a view to providing effectiveness of it so far as possible).

89. A finding against the claimant would be to bar the claimant from having her harassment case adjudicated upon by the Employment Tribunal and compel it to be submitted for arbitration or adjudication pursuant to the dispute resolution mechanism provided for by the CVA. With respect to those nominated to conduct the adjudication pursuant to Clause 33 of the CVA, it is difficult to see how such can provide an effective remedy. It is difficult to see how the claimant's harassment complaint could be decided upon (where the core facts are in dispute) other than by proceedings before a specialist Tribunal familiar with and well versed in equality law. In addition, there is no fee payable by the claimant to bring her case before the Employment Tribunal. A significant cost will be incurred by her in pursuit of the matter before the adjudicator appointed under the CVA. The provision in the CVA providing for the sharing of the costs of adjudication offends against the principle prohibiting member states from placing conditions upon the enforcement of EU-derived rights such as to make such enforcement excessively difficult. The provision of a statutory scheme such as that in the 1986 Act whereby a CVA can be drawn which binds employees who have had no notice of it and creates a structure for

dispute resolution which to all intents and purposes negates EU-derived rights offends against the principle of effectiveness.

90. For these reasons, the Tribunal holds that the Employment Tribunal does have jurisdiction to consider the claimant's complaints brought under the 1996 Act and 2010 Act. Should the claimant succeed with the complaints, then the CVA may be an effective bar to enforcement of any judgment in the claimant's favour and may then compel her to utilise the dispute resolution mechanism within the CVA. Indeed, in the Tribunal's judgment, this is the correct interpretation. In the Tribunal's judgment, the CVA does not oust the Tribunal's jurisdiction. The Tribunal can determine the claims. What has effectively happened is that the claimant has compromised her contingent claims under the 1996 Act and 2010 Act. However, the contingency may be determined by the Employment Tribunal. Then, if successful, she is bound by the CVA to be paid out only at the rate of 2% of the value of the claims as determined ultimately by the Tribunal.

91. This is the effect of the CVA. It is difficult to see any basis upon which the Tribunal's jurisdiction can be ousted other than as provided for by the 1996 Act and 2010 Act themselves in sections 203 and 144 respectively. Indeed, this was the conclusion reached in **Britannia**. Upon vindication of her contingent claims the claimant is then bound by the straight jacket of the CVA. In my judgment, this is how the CVA and the statutory rights mesh together. The position with the common law wrongful dismissal claim may be distinguished as such a claim may be compromised other than by following the formalities such as those in the 1996 and 2010 Act, there is no EU-law general principle in play and the CVA clearly catches such a claim by the wording of Clause 4. Had the Clause 4 or the CVA generally ben couched in wider terms purporting to waive the statutory claims and requiring discontinuance of them, then my conclusions would have been the same. The statutory rights cannot be ousted other than by compliance with sections 203 and 144, there is no moratorium imposed by a CVA and thus there is no exclusion of the Employment Tribunal's jurisdiction.

92. The Tribunal now turns to the claimant's complaint brought under section 15 of the 2010 Act. Upon this issue, I agree with the submissions of Miss Owusu-Agyei that the claim should be struck out as having not been actively pursued.

93. It is the case that the claimant made mention of a complaint of unfavourable treatment for something arising in consequence of disability in the grounds of claim attached to her claim form. However, the matter then appears to have not been referred to or mentioned again until the issue was raised by me at the hearing on 1 March 2021. The claimant had ample opportunities to refer to the matter as the matter proceeded prior to March 2021. There was no reference to it in the hearings before Employment Judges Rostant, Shepherd or Little. The Tribunal agrees with the respondent's submissions that the claimant's focus has understandably been entirely upon the harassment and unfair dismissal complaints.

94. Pursuant to Rule 37(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 a claim may be struck out upon the basis that it has not been actively pursued. Pursuant to Rule 37(2) a claim may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing. The claimant was given an opportunity to make written representations pursuant to the Orders made at the hearing on 1 March 2021. Notwithstanding what she says, the Tribunal is satisfied that the section 15 claim has simply not be advanced at all.

Indeed, the Tribunal would go so far as to say that had I not raised the matter on 1 March 2021, the matter may not have surfaced again.

95. If it is any consolation to the claimant, were she to fail with the complaint of harassment related to disability she would also in all likelihood fail with the section 15 claim in any case. The claimant will appreciate that awards of compensation are not inflated simply by the number of heads of complaint upon which a party succeeds. In reality, as identified by Employment Judge Rostant, the complaint of harassment covers the nature of the matter upon which the claimant wishes to have the Employment Tribunal's adjudication. It follows therefore that the section 15 complaint is struck out as having not been actively pursued.

96. My ruling upon this issue renders otiose the question of whether the section 15 claim should be struck out as having no reasonable prospect of success. The unfair dismissal and harassment complaints are not amenable to summary disposition. There are disputed facts which need to be adjudicated upon in order to decide these complaints. They shall not be struck out at this stage.

97. In conclusion, therefore, the complaints of harassment related to disability and unfair dismissal shall proceed to an adjudication by the Employment Tribunal. I am satisfied that Clause 4 has the effect of waiving the wrongful dismissal complaint.

Employment Judge Brain
Date: 09 September 2021

JUDGMENT SENT TO THE PARTIES ON
Date: 20th September 2021