EMPLOYMENT TRIBUNALS

Claimant: Dr Li Bai

Respondents: University of Nottingham (1)
Professor J Garibaldi (2)

Heard at: Nottingham Employment Tribunal (hybrid hearing)

On: 16 and 18 May 2022

Before: Employment Judge K Welch (sitting alone)

Representation
Claimant: Mr R Kohanzad, Counsel
Respondent: Ms A Reindorf, Counsel

RESERVED JUDGMENT AT AN OPEN PRELIMINARY HEARING

1. The claimant had mental capacity to enter into a settlement agreement by way of COT3 on 14 May 2019;

2. There was no misrepresentation by the respondents in relation to the COT3 agreement;

3. The COT3 agreement entered into by the parties on 14 May 2019 therefore remains in force and is not revoked; and

4. All claims are dismissed following a COT3 settlement agreed through ACAS.

RESERVED REASONS

Background

1. This open preliminary hearing came before me on 16 May 2022. The hearing was listed to determine the following issues as agreed in the closed preliminary hearings held on 12, 31 August and 1 November 2021:
    a. whether or not at the time of the Judicial Mediation hearing in 2019 the claimant on the evidence lacked mental capacity to enter into a settlement agreement by way of COT3 and therefore whether the COT3 should be set aside; and
    b. whether, as an alternative, the COT3 should be set aside because of averred misrepresentation that occurred during the said Judicial Mediation hearing.
2. The claimant made an application to set aside the COT3 agreement on 30 May 2019 [P138-140] on the grounds that she did not have sufficient mental capacity to enter into the agreement when she signed it on 14 May 2019. The respondent objected to the application on 5 June 2019 [P141-144]. The claimant provided some evidence supporting her application on 10 June 2019 [P147-156], which included two fit notes for the claimant dated 21 September 2018 and 30 April 2019 for work-related stress, each for one month's duration.
3. Employment Judge Ahmed refused the application to set aside the COT3 agreement by letter dated 24 June 2019 [P162] which stated, "…*The claimant was independently represented by counsel and was supported by her daughter on the day of the mediation. There was no indication that the claimant lacked the necessary mental capacity to enter into an agreement,*

and if there was any hint of that, the mediation process would have ceased. The medical evidence supplied in support of the application falls very short of establishing the absence of capacity."

4. A dismissal Judgment was issued on 10 May 2019. The claimant applied for a reconsideration of the dismissal Judgment by email of 20 August 2019. This was refused by EJ Ahmed on 4 September 2019 [P216].
5. The claimant appealed to the Employment Appeal Tribunal on 18 September 2019 [P218-221], which was successful. The EAT Judgement dated 21 July 2021 [P249] quashed both the dismissal Judgment of 10 August 2019 and the decision to refuse a reconsideration of 4 September 2019 and the case was remitted for fresh consideration by any Judge nominated by the Regional Employment Judge, other than Employment Judge Ahmed.

<u>The open preliminary hearing</u>

6. The hearing was originally listed as an attended in person hearing, but following applications from both parties, I agreed that the claimant's counsel and the second respondent, Professor Garibaldi, could attend remotely, via CVP.
7. The open preliminary hearing had been listed for three days, although the claimant's counsel was unavailable for the second day of the hearing as he was appearing before the Employment Appeal Tribunal. It was, therefore, agreed by all parties that we would aim to finish evidence by close of business on the first day to enable the claimant to be represented throughout. All parties agreed to sit slightly later than usual, and, despite giving adequate breaks, the evidence of all the witnesses was completed by 5:30pm on the first day.

8. It was agreed that the parties would not attend on Tuesday, 17 May 2022 and that on Wednesday, 18 May 2022, the parties may choose whether to attend in person or remotely via CVP for submissions. The parties were requested to provide any written submissions by 10am on 18 May 2022, and the hearing would commence at 10.30am.
9. I was provided with an agreed a bundle of documents running to 800 pages for the purposes of the preliminary hearing. References to page numbers within this Judgement refer to page numbers within that bundle.
10. I was provided with one additional document agreed by both parties to be included in the bundle, which was a joint medical statement from Dr Manoj Kumar MBBS MRCPsych (the 'claimant's medical expert') and Dr Julian Beezhold MBChB FRCPsych IDFAPA (the 'respondents' medical expert').
11. The claimant sought to include one further document into the bundle, which appeared to be the claimant's own research into the effects of blood sugar on mental capacity since she disagreed with both of the medical experts, who were not held out as experts in diabetes. The claimant's counsel made an application for its insertion, although accepted that even if it were included, it would hold little weight and would have very limited relevance. The respondent objected to its inclusion and, having heard from both parties, and having given reasons already, I refused its insertion into the bundle.
12. I heard oral evidence from witnesses in an order agreed between the parties which ensured that the claimant's counsel would be available to cross examine the respondents' witnesses. I therefore heard from the following witnesses:
    a. Professor J Garibaldi, second respondent

b. Ms E Heyhoe, human resource business partner; and

c. the claimant herself.

13. The witnesses had provided written statements for the purposes of the open preliminary hearing which stood as their evidence in chief. Their evidence was given on oath and tested under cross examination.

14. Breaks were given during the hearing; the parties and representatives were told to request any additional breaks, as and when required.

15. After the hearing, the claimant sent in an additional email on 19 May 2022 seeking to adduce additional evidence. This was not taken into account in coming to my deliberations.

FINDINGS OF FACT FOR THE PURPOSES OF THE PRELIMINARY HEARING

16. The claimant was employed at all material times as an Associate Professor in the School of Computer Science by the University of Nottingham (referred to as the first respondent or the University). She had been employed by the University from 1998. Professor Garibaldi, the second respondent, was the Head of the School of Computer Science, and was the claimant's line manager from January 2016.

17. The claimant brought two claims in the Employment Tribunal in 2018. The first claim was against the University, her employer at the time; the second claim was against Professor Garibaldi. The claims were for discrimination contrary to the Equality Act 2010 together with a claim for an unauthorised deduction of wages.

18. It was clear that the claimant had been subjected to previous disciplinary action by the University, although this had not resulted in any formal warnings. It was also apparent that the respondents had raised concerns with the claimant about her performance.

19. The claimant considered that the disciplinary action previously taken against her and the low performance gradings, (level 3 - performing significantly below the expectation of the role) that she had been given in her personal development and performance reviews ('PDPRs') from 2015/16 onwards, had been unjustified.

20. The claimant had requested, and been given, different performance improvement managers during the latter part of her employment with the University, all of whom had graded her '3' in her PDPRs, which she maintained were unjustified. The respondents' evidence was that the claimant's poor performance was escalated to the University's Faculty Pro Vice Chancellor for the Faculty of Science, for him to manage in the summer of 2018.

21. It is unnecessary for me to consider whether or not the disciplinary action and/or the grades for the claimant's PDPRs were justified. It is sufficient for me to note that there was sufficient evidence before me that the University's Faculty Pro Vice Chancellor believed that the claimant had not engaged with him concerning his management of her performance.

22. He sent an email to the claimant on 10 April 2019 [P626] which stated that he was very disappointed that the claimant had failed to submit information as requested and that, "*I will be instructing HR to [bring] a disciplinary investigation because I consider that you have refused a reasonable management request.*" This email was copied into Professor Garibaldi and Ms Heyhoe.

23. Ms Heyhoe emailed HR on the same day [P626] which stated that the Pro Vice Chancellor would like to instigate a disciplinary investigation into the claimant.

24. There was further evidence of emails within the bundle which showed that Professor King had been appointed to undertake a disciplinary investigation in to the claimant's conduct on 10 April 2019, although it was accepted by all parties that the claimant had not been formally invited to a disciplinary investigation meeting.
25. The claimant's evidence was that in her earlier disciplinary proceedings, which resulted in no disciplinary action being taken, she had received a disciplinary investigation meeting invitation within three days of the initial notification that disciplinary action was to be taken. She therefore gave evidence that she did not believe that disciplinary action would be taken against her at the time of the Judicial Mediation.
26. It was clear, however, that by the time of the Judicial Mediation the first respondent had not resiled from its intention to carry out an investigation in to the claimant's conduct as set out in the email to the claimant from the Pro Vice Chancellor dated 10 April 2019 and referred to above [P626], confirming that a disciplinary investigation would be carried out.
27. The respondent's evidence, which I accept, was that the respondent held off sending an invitation to a disciplinary investigation until after the judicial mediation as, if successful, the disciplinary investigation would not go ahead and a formal invitation letter might have resulted in the claimant pulling out of the mediation.
28. At a case management hearing on 22 November 2018, the parties indicated that they may be interested in Judicial Mediation. The claimant was intending to obtain some legal advice and therefore further time was given in order for her to obtain this, and to consider whether she wished to take part in Judicial Mediation. The respondent confirmed that the claimant had

indicated that she was interested in Judicial Mediation on 20 December 2018.

29. A further preliminary hearing for case management was listed to discuss the possibility of Judicial Mediation, which took place on 15 March 2019, before Regional Employment Judge Swann. At this, it was agreed that a Judicial Mediation, by way of an attended closed preliminary hearing, would take place on 14 May 2019.

30. On 30 April 2019, the claimant was signed off for one month for work related stress [P309]. She had previously been signed off sick with work related stress from 11 April 2017 until 3 May 2017 and with depression from 24 September 2018 until 21 October 2018 [P655].

31. The claimant, without the aid of a solicitor, prepared a statement of expectations in accordance with the case management orders Regional Employment Judge Swann had made for the Judicial Mediation. She sent this to the respondent**'**s solicitor on 9 May 2019 [P111]. On the same date, the respondents' solicitor sent their statement of expectations and counter schedule of loss [P114 – 118]. On receipt of this, the claimant sent an email to the respondents' solicitor on 10 May 2019 [P119] which confirmed that she had realised that her statement of expectations did not say what her expectations of the Judicial Mediation were and asked if she could submit a new version by Monday 13 May 2019 [P119]. A much more detailed statement of expectations together with a schedule of loss [P123 – 128] were provided by the claimant on 13 May 2019. This later statement of expectations included the following: "*The claimant considers that one of the options available to the parties is to consider an early retirement package which will not prejudice the Claimant's*

financial entitlement had she retired as originally planned….. she would be willing to accept a termination package that would bring her employment to an end in 2020. *The Claimant would want any agreement reached between the parties to be recorded in a COT3 agreement*."

The Judicial Mediation hearing

32. The claimant attended the Judicial Mediation before Employment Judge Ahmed on 14 May 2019. Her adult daughter attended with her to provide support. Additionally, the claimant was represented at the Judicial Mediation by a barrister, Seth Kitson. None of the people attending the Judicial Mediation, including the Employment Judge, the claimant's daughter, the claimant and/or the claimant's barrister raised any concerns or issues surrounding the claimant's mental capacity or her ability to understand the Judicial Mediation or settlement process during the hearing.
33. At the start of the Judicial Mediation there was an initial meeting at which all parties were present. The Employment Judge outlined the procedure for the day. Following this, the parties went into their separate rooms for the rest of the day, with the Employment Judge flitting between them to see whether settlement could be reached. It was noted by the respondents in their evidence that the claimant was dressed smartly and looked professional and "well-kept", as did her daughter.
34. Clearly, the parties are unable to give evidence of what was said in the separate meetings between the Employment Judge and the respective party.
35. The respondents' evidence was that early on in the day, they made it clear to the Judge, in one of their own separate meetings with him, that if settlement was not reached, then, when the claimant returned to work from

sick leave, she would be invited to attend a disciplinary investigation regarding the allegation that she had failed to follow reasonable management instructions. This was said, on the respondents' own admission, as a further persuasive reason for her to settle the case.

36. The claimant's evidence, as set out in an earlier statement from the claimant dated 1 July 2019 in support of her application [P184-187] and confirmed in cross examination, was that the Judge said, "*you are under performance management, and there is an ongoing disciplinary against you…..*" The Judge then went on to set out an offer to settle the claims on the basis that the claimant left the University's employment.

37. The claimant gave evidence that this came as a surprise to her, and that she was "stunned and shaken" by what the respondents had said to the Employment Judge. At this point, she says that she was, "*so distressed that [she] had become irrational*." She describes being numb and unable to read the documents provided to her.

38. The claimant was clearly upset and distressed during the Judicial Mediation, as evidenced by the claimant and her daughter in statements made in support of the application [P184-190], although the claimant's daughter did not attend to give evidence to the Tribunal.

39. The claimant appeared able to clearly recall what had happened during the Judicial Mediation on 14 May 201. Her statement made in July 2019, her oral evidence at the Tribunal hearing, and her statements to the respondent's medical expert during his assessment with her, all support this finding.

40. Following further negotiations between the claimant and the respondent, as mediated by the Judge, a final agreement was reached between the claimant and the respondents.

41. It was clear to me that the claimant understood that the settlement terms included the termination of her employment. This was apparent from the claimant's own evidence in her statement from 1 July 2019: "*That was it, £55,000 for me to leave my employment immediately, and the end of mediation. The reality of the situation only started to sink in at this point and I shouted: 'how am I going to get my stuff?'.* [P185] It was then agreed that her office and personal effects would be collected on Friday of that week.

42. This was before she had signed the COT3 agreement and, whilst the claimant's evidence was that she did not know what she was doing during the Judicial Mediation, her evidence indicates to me that she understood the implications of the settlement immediately prior to signing the COT3 agreement.

43. The respondents' solicitor sent a draft COT3 agreement to ACAS and copied this in to the claimant's barrister at 4:50pm on 14 May 2019 [P129 – 134]. This included a reference for the claimant and the terms which had been discussed during the Judicial Mediation. The claimant had the opportunity to go through the terms of the COT3 agreement with her barrister before signing it.

44. The claimant's evidence was that she was not able to read the COT3 agreement and could not focus or take anything in at the time. It was clear, from the claimant's statement that her barrister and her daughter had read the COT3 agreement and her daughter had, in fact, read out loud a few

lines of the reference attached to the COT3 agreement. The claimant's evidence was that the reference was "unjust and inaccurate".

45. The claimant's evidence was that it was only in the taxi ride home that her brain started to clear and she, "*broke down realising what happened*" [paragraph 10 of the claimant's statement of 1 July 2019]. It is therefore clear that on the claimant's own evidence, she understood what she had agreed to in the Judicial Mediation without having this repeated to her.

46. On 15 May 2019, the claimant stated that she had contacted the University and that it became clear there was not an ongoing disciplinary against her, nor was there any performance management as this formed the basis of her tribunal claim.

47. In cross-examination, the claimant confirmed that in fact she had emailed her union representative, who was employed by the University, on 15 May 2019 [P685] to ask, "*Please could you let me know if [the University] have started the disciplinary?*" His reply was that if an investigation had been opened into her performance, she would have received a letter from HR advising her of that and "*inviting [her] to a meeting with the investigator."* If no such letter had been received, then he stated that, disciplinary proceedings have not begun.

48. Following the Judicial Mediation, and between 14 and 17 May 2019, the claimant contacted the University to tell them she had left and asking them to find someone to supervise her PhD student(s). She also attended the University between these dates to collect her belongings. She gave evidence that she did this outside of normal working hours to avoid seeing people.

Medical evidence

49. The claimant's medical expert provided a psychiatric report dated 29 September 2020 [P347-376], having assessed the claimant on 8 August 2020 and following medical consultations on 3 occasions, the earliest being 29 August 2019.
50. The respondents obtained a medical report from their medical expert dated 5 December 2021 [P458-515].
51. Both medical experts provided supplementary medical reports in answer to questions from the parties. [The respondents' supplementary medical report dated 2 March 2022 appeared at pages 516-538 and the claimant's supplementary medical expert report dated 21 March 2022 appeared at pages 539 – 554].
52. The reports differed in a number of areas, and helpfully the parties obtained a joint statement from both medical experts confirming the issues upon which they agreed, those on which they did not agree and a summary of the reasons for their respective opinions [P790-800].
53. The experts agreed that on the date of the Judicial Mediation, 14 May 2019:
    a. the claimant was suffering from "*an impairment of, or a disturbance in the functioning of the mind or brain" within the meaning of section 2(1) of the Mental Capacity Act 2005 - in the form of anxiety and depression*."
    b. The claimant was not suffering from any such impairment due to her "*diabetes mellitus*" (something which the claimant did not agree with);

c. the claimant, "*was able to retain the information relevant to the decision regarding whether or not to sign the COT-3 agreement*" within the meaning of section 3(1)(b) of the Mental Capacity Act 2005; and

d. the claimant was able to communicate her decision regarding whether or not to sign the COT-3 agreement within the meaning of section 3(1)(d) of the Mental Capacity Act 2005.

54. There were three areas of disagreement, with each expert providing its opinion on why they had come to that opinion. They were as follows:

a. whether the claimant was able to understand information relevant to the decision regarding whether or not to sign the COT3 agreement within the meaning of section 3(1)(a) Mental Capacity Act 2005;

b. whether on 14 May 2019 the claimant was able to use or weigh that information as part of the process of making the decision regarding whether or not to sign the COT3 agreement within the meaning of section 3(1)(c) of the Mental Capacity Act 2005; and

c. whether, on 14 May 2019, the claimant had the necessary mental capacity to make the decision whether or not to sign the COT3 agreement within the meaning of the Mental Capacity Act 2005, although they did agree that "*she did have 'an impairment of, or a disturbance in the functioning of the mind or brain' within the meaning of section 2(1) of the Mental Capacity Act 2005 on that day*".

55. The claimant's expert's opinion was that the claimant was not able to undertake paragraphs 54.a or 54.b and lacked the mental capacity to come to a decision in paragraph 54.c above.

56. The respondents' expert's opinion was that the claimant was able to undertake paragraphs 54.a and 54.b and had the mental capacity to make the decision in paragraph 54.c.

57. I do not propose to recite all of the factors which either expert took into account in coming to their respective opinions, but attempt to summarise what I considered to be their main points as follows:

58. The Claimant's expert's opinion was based on the claimant's GP records, his interview with her and the statement from her daughter. He considered that the claimant had been struggling with symptoms of depression and anxiety for a while prior to 14 May 2019, as evidenced by her GP records and the claimant's own account. Active depressive symptoms, as suggested by the recent change in the claimant's medication, included impaired attention and concentration together with an impaired memory which could have been exacerbated by a stressful situation. On a balance of probabilities, therefore, he considered the claimant was unlikely to have been capable of adequately understanding or fully appreciating the complexity of issues on which her consent decision was likely to be necessary, and was unable to use or weigh that information. His view was that cognitive impairment can significantly affect the ability to rationally and adequately weigh up the information to make decisions. The claimant, therefore, did not satisfy the test for capacity set out in sections 3 (1)(a) and (c) Mental Capacity Act 2005.

59. The respondents' expert considered the contemporaneous evidence that no one at the all-day mediation proceedings, including the barrister, her daughter, the ACAS conciliator, the Employment Judge and the claimant herself, raised any concern regarding the claimant's ability to understand

information on the day of the Judicial Mediation. He noted that the claimant was an intelligent individual with a PhD and had demonstrated a good ability to understand the issues. The issues themselves were not overly complex, and the claimant had indicated her understanding by asking her barrister whether it meant that she would leave her job now. The claimant had told the respondents' medical expert that she felt that the University did not want her to work there and that she could not stand the thought of another disciplinary process and so had signed the COT3 agreement. The claimant had prepared detailed documents, represented herself in further proceedings with no contemporaneous evidence to show that she was significantly worse on the day of the Judicial Mediation. Also, that the claimant had visited her workplace to collect her possessions indicating that she understood that she was leaving as part of the settlement. In his view there was very little evidence to suggest a lack of decision making capacity on 14 May 2019.

SUBMISSIONS

60. The parties provided me with written submissions and expanded upon them orally. I will deal with their submissions briefly.

Respondents' submissions

61. The respondents contended that the claimant's submissions written by herself should be read with care. Otherwise, there was nothing between the parties' counsel's submissions on the law. This was not a complicated area, as the law for both capacity and misrepresentation is well settled.

62. There is a presumption in favour of capacity and the burden is on the claimant to show that she lacked capacity at the time of entering into the COT3 agreement. The claimant was the first to raise the possibility of the

termination of employment in her schedule of expectations prior to the Judicial Mediation. It was contended that the respondents' medical expert should be preferred to the claimant's as being more reliable, since Dr Beezhold's careful findings and conclusions provided greater reliability than the general observations of Dr Kumar, whose observations were in part said to be provisional and were, in places, inconsistent.

63. For the misrepresentation assertion, the claimant's evidence was that she had been told by EJ Ahmed, "you are under performance management, and there is an ongoing disciplinary against you. They offer £45k for you to leave your employment". This was not false in substance or fact and therefore, this should be rejected.

64. The claimant had, in the respondent's view, entirely failed to prove that the COT3 should be voided, whether for lack of mental capacity or for misrepresentation. The claimant simply regretted her decision.

65. The respondent referred me to 3 authorities: Hennessey v Craigmyle & Co Ltd [1986] ICR 461,CA, Masterman-Lister v Brutton & Co (referred to below) and Industrious Limited v Horizon Recruitment Limited (in liquidation) and Vincent [2010] IRLR 2014 EAT.

Claimant's submissions

66. The claimant provided two sets of written submissions prepared by herself and her counsel provided a further set on the final morning of the hearing. The first set of submissions from the claimant herself consisted mainly of evidence, some of which had never been adduced during the hearing. The second was a reference to the law and attached the case of Dunhill v Burgin [2014] UKSC 18, which concerns for the test for capacity.

67. The claimant's counsel was clear to say that any new evidence contained within the claimant's own submissions should not be considered and to attach such weight to the claimant's self prepared submissions as was deemed appropriate.

68. The Claimant's counsel's submissions were that the respondents' medical expert wrongly looked for independent, contemporaneous evidence as to the claimant's capacity, and rejected the claimant's own evidence as to what had happened on the day of the Judicial Mediation. His flawed approached and inferences drawn should be rejected in favour of the claimant's medical expert's report.

69. The Tribunal is not bound by the respondents' medical expert's conclusions. Depression is often an insular experience. The Claimant described being numb, not being able to think and not being able to read the documents. She may have, therefore, appeared outwardly to be functioning normally to those around her. She lacked the mental capacity to enter into the settlement agreement.

70. For the misrepresentation aspect of the claimant's application, this is not a complicated area of law. The Tribunal needed to consider whether there was an unambiguous false statement of fact. The statement that she was "under performance management, and there is an ongoing disciplinary against [her]" was an unambiguous misstatement of fact, made with the purpose of inducing her to enter into the COT3 agreement, and which had that effect. The disciplinary procedure had not been initiated or instigated. There is little doubt that this induced the claimant to enter into the COT3 agreement, and therefore it should be set aside.

RELEVANT LAW

71. The Mental Capacity Act 2005 ('MCA 2005') provides the following principles:

"*(1) The following principles apply for the purposes of this Act.*

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action."

72. ***Section 2 of the MCA 2005 provides:***

"People who lack capacity

(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to–

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities…"

73. *"**Section 3: Inability to make decisions***

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable–

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of–

(a) deciding one way or another, or

(b) failing to make the decision."

74. There is therefore a presumption in favour of capacity, and the burden of providing lack of capacity at the time of entering into the COT3 agreement lies with the claimant.

75. The proper approach is as set out in Masterman-Lister v Brutton & Co (1) Jewell and Home Counties Dairies (2) [2002] EWCA Civ 1889, CA.

Chadwick LJ said at paragraph 58: "*The authorities are unanimous in support of two broad propositions. First, that the mental capacity required by the law is capacity in relation to the transaction which is to be effected. Second, that what* is *required is the capacity to understand the nature of that transaction when it is explained."*

76. Johnson v Edwardian International Hotels Ltd UKEAT/0588/07 confirmed at paragraph 12 that: "…*there is in the context of High Court proceedings a presumption that a party has capacity: see Masterman-Lister v. Brutton & Co. (nos. 1 and 2) [2003] 1 WLR 1511. I am sure that a similar presumption should apply in the Employment Tribunal*."

77. A misrepresentation is an unambiguous, false statement of fact made by a party to a contract (the 'representor') to another (the 'representee'), which has the purpose and result of inducing the representee into the contract. The misrepresentation may be made via a third party. The representation must be false in substance and fact, in order to be a misrepresentation, such that the discrepancy would be considered material by a reasonable representee.

CONCLUSION

78. I considered carefully the evidence provided to me, both in documentary form, and oral evidence given at the Tribunal hearing. I also took into account the submissions of both parties in coming to my decision.

79. Dealing firstly with the issue of capacity. I acknowledge that there is a presumption in favour of the claimant having sufficient mental capacity to enter into the COT3 agreement at the time, i.e. on 14 May 2019. However, it is possible to displace that presumption should the claimant prove, on a balance of probabilities, that she lacked mental capacity at that time.

80. In considering the whether the claimant had mental capacity at the time, I took into account all of the medical evidence provided by both parties, and also the joint medical experts' report, which I found to be particularly helpful in assisting me with my decision.

81. From my findings of fact, I am satisfied that the claimant was suffering from an impairment of, or a disturbance in the functioning of the mind or brain within the meaning of section 2(1) MCA 2005, namely anxiety and depression at the time of the Judicial Mediation.

82. Despite the claimant's wish to add that she was also suffering such an impairment due to her blood sugar/ diabetes (referred to by both medical experts as '*diabetes mellitus*'), I do not accept this to be the case.

83. Having found that the claimant was suffering from an impairment of, or a disturbance in the function of her mind or brain within section 2(1) MCA 2005, it is necessary to go on to consider whether, because of that impairment, the claimant was unable to make a decision for herself in respect of entering into the COT3 agreement.

84. Turning to section 3 MCA 2005 for assistance, and having regard to the medical evidence from both experts, I am also satisfied that the claimant was able to retain the information relevant to the decision and that she was able to communicate her decision. In relation to these aspects, I note that the joint experts' medical report accept this to be the case, but, in any event, I consider that that must be so relying upon the following:

    a. The claimant asked about the return of her belongings before entering into the COT3 agreement, and agreed that she would collect them on Friday of the week of the Judicial Mediation, suggesting she knew that her employment would end should she sign the agreement;
    b. The claimant was, on her own evidence, able to recall what she had agreed to in the taxi on the way home from the mediation on 14 May 2019;
    c. The claimant told a colleague between 14 and 17 May 2019, that the University needed to find an alternative supervisor for her PHD student(s) as she was leaving the University;
    d. The claimant collected her belongings between 14 May and 17 May 2019, having understood that her employment was ending;
    e. She informed the respondents' medical expert of what had happened in the Judicial Mediation; and
    f. The claimant signed the COT3 agreement herself on 14 May 2019;

85. Also, I accept that the claimant was able to communicate her decision regarding the COT3 agreement on the day of the Judicial Mediation. She signed it herself and this fact was also agreed by both medical experts.

86. Turning to the remaining parts of section 3 MCA 2005, and on which the medical experts did not agree, I need to decide whether the claimant:
    a. was able to understand the information relevant to the decision; and
    b. was able to use or weigh that information as part of the process of making the decision.
87. On these, the medical experts disagreed. I have been asked by both sides to prefer the evidence of their own medical expert for reasons which I do not propose to rehearse here. On balance, I prefer the evidence of Dr Beezhold, the respondents' medical expert. His conclusions, as set out in part above, appeared to specifically relate to the claimant's abilities and conduct on the day in question and the surrounding days. Whereas, Dr Kumar's conclusions appeared, at least in part, to refer to established features of depression or clinical depression, and the fact that no competent professional had formally tested or recorded her mental capacity to make an informed decision, on, or immediately prior, to the day of the Judicial Mediation.
88. I note that the respondents' medical expert appeared to put some emphasis on looking for contemporaneous evidence of mental incapacity at the time of the Judicial Mediation, which I accept may not be available, however this does not affect my decision to prefer his conclusions to those of Dr Kumar.
89. Whilst I have taken into account and have considered all of the medical reports of both experts, I have come to the following conclusions (not set out in any order of importance) which helped form my decision on these remaining points relating to capacity:

a. The claimant was able to understand that the settlement agreement meant that she left her employer's employment. Something which she understood immediately prior to signing the COT3 agreement;
b. The claimant was able, on her own evidence, to recall what had happened shortly after the Judicial Mediation, in the taxi on the way home;
c. The claimant was able to explain what happened in the Judicial Mediation to the Tribunal and the respondents' medical expert;
d. The claimant had, in her statement of expectations prior to the Judicial Mediation, suggested the possibility of termination of her employment as part of the settlement package. She therefore understood this to be a possibility.
e. Prior to signing the COT3 agreement, the claimant asked her barrister whether the settlement meant that she would be leaving her job now;
f. The claimant had contacted the University to arrange cover for her PHD student(s) and had collected her belongings in the days following the Judicial Mediation;
g. The decision was not particularly complicated, as, in effect, it related to the termination of employment, payment of compensation and dismissal of her tribunal claims;
h. She was able to comment on the reference attached to the COT3 agreement prior to signature;
i. Noone, including the claimant, her daughter, the Employment Judge and the barrister representing her, raised any concerns

about the claimant's capacity, or ability to understand the information or weigh information as part of the decision making process at the Judicial Mediation;

j. The claimant is clearly intelligent, although was at the time suffering from an impairment of, or disturbance in the functioning of the mind or brain, namely anxiety and depression;

k. The claimant was able to contact her union the next day asking about the disciplinary proceedings which had been discussed in the Judicial Mediation.

90. I did consider the points put forward by the claimant's expert, and her counsel in his submissions, that mental capacity is issue specific and circumstance and event specific, so that the fact that the claimant had capacity on one day, does not mean that she did not have it another. However, there is insufficient evidence before me to conclude that she lacked mental capacity on 14 May 2019, such that she was unable to understand the information relevant to the decision or that she was unable to use or weigh that information in order to come to a decision.

91. I have taken into account that the claimant was clearly upset by the Judicial Mediation, that this was a stressful situation and that she was suffering from anxiety and depression at the time and may not have demonstrably shown exactly how she was feeling during that process. However, that does not provide me with sufficient grounds on the balance of probabilities to form a belief that she lacked mental capacity at the time she entered into the COT3 agreement.

92. I do not accept that the mentioning of the performance management or the ongoing disciplinary procedure could have come as a 'shock' to her. This

had been going on for some time, and the respondents had clearly indicated their intent concerning her alleged misconduct.

93. I am therefore satisfied that the claimant was able to understand the information relevant to the decision at the Judicial Mediation on 14 May 2019 and was able to weigh the information before coming to the decision she did.

94. Therefore, on balance of probabilities, I find that the claimant had mental capacity to enter into the COT3 agreement on 14 May 2019, and therefore reject the claimant's application for the COT3 agreement to be voided.

95. Turning to the misrepresentation point, I do not accept that the statement made by EJ Ahmed in the Judicial Mediation, namely "*you are under performance management and there is an ongoing disciplinary against you*" which was set out in the Claimant's witness statement in support of her application dated 1 July 2019 and confirmed in cross examination, was a misrepresentation.

96. I accept the evidence that the claimant had for some time, been managed for her performance due to the low scores she received in her PDPRs, even though I accept that she disputes that these low scores were justified. It is unnecessary for me to make any findings of fact on this. It is sufficient to know that the claimant was being managed for her performance. Also, the claimant had been informed that there was going to be an investigation in to a potential disciplinary matter by email dated 10 April 2019 [P626].

97. The claimant's counsel's suggestion that there was a difference between disciplinary proceedings which had been initiated and instigated and those which were possible or even probable, is in my view, semantics. The

claimant was clearly aware that she would be subject to a disciplinary investigation from the email on 10 April 2019 and the respondents had not resiled from this position prior to the Judicial Mediation on 14 May.

98. I accept that the respondents did not wish to send an invitation to an investigation hearing to the claimant prior to the Judicial Mediation, in order to try and ensure the claimant's attendance at it. I consider that it was open to the respondents to refer to the disciplinary process during the Judicial Mediation to say that this would continue should settlement not be reached. This is what was communicated to the claimant and I am satisfied that whilst this had the intention to induce the claimant to enter into the COT3 agreement, I do not find that this reference was an unambiguously false statement of fact. This should not have come as a surprise to the claimant, but even if it did, it was not untrue. I am satisfied that she knew what the disciplinary was about as evidenced by her email to her union representative on 15 May 2019 when she refers to "the disciplinary".

99. Therefore, the claimant's application to set aside the COT3 agreement on the basis that there was a misrepresentation is also refused.

100. The claimant's claims are therefore dismissed in their entirety as the COT3 agreement is valid and remains in force.

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Employment Judge Welch

Date 20 May 2022

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