EMPLOYMENT TRIBUNALS

Claimant: Ms X Ju

Respondent: The Collective (Living) Limited (In administration) (1)
Irwell Insurance Company Limited (2)

Heard at: London Central (via CVP) **On:** 2nd March 2023

Before: Employment Judge Nicklin (sitting alone)

Representation

Claimant: Mr J Davies, Counsel

First Respondent: No attendance or representation

Second Respondent: Mr M Broomhead, Solicitor

RESERVED JUDGMENT ON A PRELIMINARY HEARING

It is the judgment of the tribunal that:

1. The Second Respondent, Irwell Insurance Company Limited, is not liable to the Claimant in respect of this claim under the Third Parties (Rights against Insurers) Act 2010.

2. The claim against the Second Respondent is therefore dismissed.

REASONS

Introduction

1. By a claim form presented on 21st July 2021, the Claimant brought claims of unfair and/or constructive dismissal, automatic unfair dismissal (protected disclosure), protected disclosure detriments and breach of contract (notice pay) against the First Respondent, her employer until around 27th May 2021.

2. In September 2021 the First Respondent (hereafter "the Company") went into administration and the claim against it was stayed on 4th November 2021.

3. On 10th February 2022, the Claimant applied to join Irwell Insurance Company Limited ("Irwell") to the claim. At the first case management hearing of this case before Employment Judge Spencer on 25th November 2022, Irwell was joined as Second Respondent because of a relevant issue between the parties, namely whether Irwell is liable for any award the Claimant might achieve against the Company pursuant to the Third Parties (Rights against Insurers) Act 2010 in respect of a policy of insurance covering tribunal claims in favour of the Company.

4. Irwell rejected the Company's claim for an indemnity on 13th September 2021 for apparent breaches of the terms of its policy of insurance. Irwell says that it is entitled to avoid the policy and, accordingly, as the Claimant can be in no better position than the Company as against the insurer, there is no liability to the Claimant and the claim should be dismissed. The Claimant contends that liability is engaged and Irwell may proceed to defend the claim on the basis so far advanced by the Company in its Grounds of Resistance.

5. This preliminary hearing was listed for one day to hear the evidence and submissions and decide the question of Irwell's indemnity as a preliminary issue. Owing to the time required to consider the submissions and authorities cited, I decided to reserve my judgment and send it to the parties as soon as possible. I apologise that this judgment could not be provided any sooner.

6. I had before me a bundle running to 174 pages, helpful skeleton arguments from the Claimant and Irwell and a corresponding bundle of authorities. Irwell's witness, Mr Martin Brady, who reviewed the Company's indemnity claim, gave sworn evidence via CVP during the hearing. He was a straightforward witness (who no longer worked for Irwell by the time of the hearing) and was doing his best to assist with questions about this case by reference to the documents and his memory.

7. The basis of Irwell's claimed avoidance is, principally, because it says that the Company failed to promptly notify and seek advice and because it proceeded to dismiss the Claimant against the advice of Peninsula Business Services ("PBS"). Irwell's initial report leading to this conclusion also records that not all of the claims are covered by the policy in any event (e.g. whistleblowing).

8. In the alternative, Irwell also rely on allegations raised by the Claimant at the grievance appeal hearing (concerning misuse of company funds) on the basis that Irwell would have been entitled to avoid the insurance policy in any event owing to a term of the policy concerning fraud or dishonest conduct (clause 2.8 of the general conditions). As this was not a reason relied on by Irwell to reject the policy at the time (as explained below) and there being very limited evidence provided on the point (Irwell's witness made a very brief reference to

clause 2.8 in his witness statement) it is not in accordance with the overriding objective to fairly consider this as a basis for rejection when it was not relied on by Irwell at the material time. Whilst I have therefore considered what the parties have said on this point, I have not decided it as a basis for Irwell to reject the Company's indemnity under the policy.

Issues

The issues for me to decide are:

1. Whether the relevant terms of the insurance policy amount to conditions precedent which must be complied with by the Company in order for Irwell to indemnify the Company for any relevant award made in favour of the Claimant?
2. If so, whether the Company complied with those conditions precedent?
3. If not, whether the Company is therefore in breach, and
4. If in breach, whether Irwell was entitled to reject the claim and avoid the policy of insurance.

   The 'relevant terms' are:
   a. Exclusions 1 and 2 in Section 2 of the policy concerning advice from PBS (see paragraph 12 below);
   b. Exclusions 4 and 5 in Section 2 of the policy concerning protected disclosure claims;
   c. General Exclusion 2.2 (see paragraph 13 below);
   d. General Condition 1 (see paragraph 14 below).

Facts

9. By a contract dated 20th July 2016, the Company (then named 'Share in the City Limited') agreed to purchase the professional employment services of PBS. These services included HR, employment law and payroll advice. The contract also included optional insurance cover provided by Irwell. On the contract [**48**], the ticked box says that this includes: "*Subject to the terms of the policy, provides cover for incidents occurring after the date of this contract, covering: legal costs, awards and settlements incurred defending employment/industrial tribunals, where advice is taken and followed*". The policy schedule [**62**] confirms that the Company is covered for the (relevant) period of 20th July 2021 to 19th July 2022.

10. The insurance policy summary [**49**] explains that, in respect of Employment Services (which is the type of contract the Company entered into with PBS), sections 1 and 2 of the policy apply.

11. The policy begins with a number of definitions. These include an 'Insured Event', defined as:

> *12. **The Insured Event** The issue or event that starts a train of events that leads to a matter which becomes the subject of a notified claim.*

12. However, an Insured Event is defined in various sections of the policy with reference to the terms set out in that section. As above, sections 1 and 2 apply. Section 1 is in broad terms and concerns the indemnity in respect of defending civil or criminal proceedings (including tribunal proceedings). The first exclusion in section 1 is broadly in the same terms as the first exclusion in section 2, which relates specifically to compensation and damages for

dismissal and/or discrimination of employees. At section 2 of the policy, it states:

> *An **Employee of The Policyholder** who brings a complaint against **The Policyholder** at an Employment Tribunal arising out of the Trade Union & Labour Relations (Consolidated) Act 1992, the Employment Rights Act 1996, the Employment Relations Act 1999, the Employment Act 2002, the Transfer of Undertakings (Protection of Employment) Regulations 2006 and the Equality Act 2010, or arising out of the equivalent Acts and Orders in Northern Ireland.*
>
> ***Indemnity:***
> *Basic awards (other than redundancy payments) and compensatory awards payable by The Policyholder to an Employee of The Policyholder determined by an Employment Tribunal (or recommended by a Rights Commissioner or Equality Officer or by arbitration).*
>
> *1. Unfair Dismissal*
> *Cover extends to awards for findings of unfair dismissal for a potentially fair reason for dismissal, these being conduct, capability (including competence) or qualifications, redundancy, statutory ban (contravention of a duty or restriction imposed under an enactment/illegality of employee's work) and some other substantial reason or grounds.*

13. It then sets out discrimination claims covered (and the cover for settlement of unfair dismissal and discrimination claims) and then provides for exclusions (set out as relevant) below:

> ***Exclusions:***
> *The Company shall not be liable for any claim for Indemnity in respect of, or arising from, or relating to:*
>
> *1. Any dispute, incident or event unless The Policyholder has **sought advice promptly** from Peninsula as soon as The Insured Event becomes known and before any action is taken and The Policyholder has **followed the advice given**, and also **unless** The Policyholder has **continued to seek advice** from Peninsula in respect of any developments relating to The Insured Event and has **followed the advice given**. This is a **continuing obligation for each dispute** requiring The Policyholder to take and follow advice at each stage until the conclusion of each dispute* [bold emphasis added].
>
> *2. If The Policyholder has not at any time given full and detailed information and facts or has failed to disclose any material information or fact to enable Peninsula to give relevant and pertinent advice as required by the Policy.*
>
> …
>
> *4. **Arrears of contractual payments such as wages properly payable** or redundancy pay or cases connected with the assertion of a statutory right, dismissal for health & safety reasons, **breach of contract complaints**, the Working Time Regulations, **Public Interest Disclosure**, Sunday working or substantially similar provisions provided in equivalent legislation in force in the Channel Islands. In addition, claims in respect of alleged dismissal for pursuing part time or fixed term proportional rights, time off for study or*

training, all other statutory time off rights, flexible working or dealing with dependants.

5. *Any dismissal that is found to be automatically unfair, or that does not comply with the potentially fair reasons for dismissal as defined above, namely: conduct, capability (including competence) or qualifications, redundancy, statutory ban (contravention of a duty or restriction imposed under an enactment/illegality of employee's work) and some other substantial reason or grounds.*

14. Under 'Exclusions Applicable to All Sections of the Policy' at 2.2, it says that Irwell shall not be liable for any claim for indemnity where the policyholder or any other person insured under the Policy:

> *Fails to cooperate fully and promptly and/or give proper instructions in due time to the Policyholder's Representative*

15. Under 'General Conditions Applicable to All Sections of the Policy' [**59**], at paragraph 1, it says:

> *The due and proper observance of the terms, conditions and endorsements of this Policy by The Policyholder and any Employee of the Policyholder and any other person insured under this Policy insofar as they relate to anything to be done or complied with by him/her shall be a condition precedent to any liability of* [Irwell].

16. There are some other general exclusions and general conditions which apply to all sections of the policy. However, I have not been specifically referred to these sections and neither party contends that consideration of these sections is important to resolve the issues concerning this preliminary issue.

17. Where an employee raises an employment tribunal claim, PBS prepare an ET3 to respond to the claim and where cover is in place with Irwell, the case is referred to a claims handler at Irwell only after the ET3 has been submitted.

18. Irwell was notified that the Company had submitted an ET3 (via PBS) in this case on 19th August 2021. This is the same date on which the tribunal received the ET3. The claim was then referred to Mr Brady on 4th September 2021. This involved PBS supplying him with an advice log on an internal PBS system called 'AV3', referred to in his witness statement as log reference: Jill Ju (F2F) – 5358068 ("the Advice Log"). The Advice Log was not in evidence before the tribunal.

19. Mr Brady reviewed the Advice Log and produced an initial report concluding that the Company had not complied with the conditions of the policy and he therefore decided to reject any cover. This was communicated to the Company in a letter dated 13th September 2021 in which Mr Brady said:

> *Having reviewed the initial claim documentation, and the advice taken, we must unfortunately advise that we are unable to accept your claim on this occasion as the terms of your insurance policy have not been met.*
>
> *Your insurance policy requires you to notify and seek advice promptly from Peninsula as soon as an employee event becomes known, before any*

action is taken against an employee and you are required to diligently follow the advice given and continue to seek and follow advice from Peninsula at each stage until the conclusion of each dispute.

In this case, I can see that no advice was sought after the initial two meetings where the Claimant raised whistleblowing concerns and that you went against advice when you dismissed the Claimant. As Peninsula's advice was not sought and diligently followed from the outset of your dealings with this Claimant, until the conclusion, unfortunately, we are unable to provide cover for this claim under your insurance policy.

20. The rejection was therefore for the following reasons:

    a. No advice was sought after two initial meetings where whistleblowing concerns were raised; and
    b. The Company did not follow the advice of PBS by dismissing the Claimant.

21. Mr Brady arrived at this decision for the reasons identified in his initial report. At [**64**], by reference to the Advice Log, he determined that:

    a. On 15th March 2021 the Claimant raised a grievance alleging whistleblowing. Mr Brady recorded that the dates of 25th February 2021 and 4th March 2021 were the dates of the alleged disclosures;
    b. On the same date, the Company sought advice regarding procedure and potential unfair dismissal and in respect of alleged conduct that had come to light which (insofar as the Company was concerned) could amount to gross misconduct;
    c. On 16th March 2021, it was recorded that the Company wanted to suspend the Claimant and the Company had been advised by PBS not to suspend;
    d. On 18th March 2021 a telephone call was recorded (listened to by Mr Brady) confirming that the Company had suspended the Claimant as a commercial decision against PBS advice. The Company knew about the grievance two weeks earlier but wished to settle the matter so had not informed PBS at that point.
    e. On 19th March 2021, reviewing the minutes of the grievance hearing, it is recorded that there was not much evidence of whistleblowing and the Company required 'lots of advice'. It was advised to revoke the Claimant's suspension.
    f. Following advice from PBS regarding the grievance process, it was recorded that on 24th March 2021, the Company had not taken advice following the investigation and the outcome letter provided to the Claimant was not satisfactory.
    g. On 14th April 2021, the Company told PBS that it wished to continue with a disciplinary hearing in respect of the Claimant and hold off on providing a grievance appeal outcome. The Company did not wish to follow PBS's advice to deal with the grievance appeal first. The note says: "Noted ***Indemnity*** NO".

h. By 12th May 2021, the Company had asked PBS about an SOSR dismissal (i.e. a dismissal for some other substantial reason within the meaning of section 98 of the Employment Rights Act 1996 "ERA"). The Company was advised against this. PBS advised against this again on 13th and 14th May.

i. On 28th May 2021, PBS were advised that the Claimant had resigned with immediate effect. This followed the Company dismissing the Claimant on notice on 19th May 2021 with 6 months garden leave.

22. Further, PBS wrote to the Company on two occasions to warn it about the risk to its insurance cover with Irwell. On 18th March 2021, Ms Grell wrote highlighting the concerns discussed that day. She wrote:

> *As you know, I have highlighted to you that I believe actions you have taken against our advice have been detrimental to resolving this case in your favour, these being you have elected to proceed with suspending Jill before investigating her grievance, where she has blown the whistle on the company. In addition to this, you also offered Jill a settlement under the grounds of a 'without prejudice' conversation, despite on on-going disputes being active at the time of the conversation.*
>
> *I have explained to you that by suspending Jill for actions that occurred 6 months ago and offering her a settlement without the benefit of a protected conversation, creates a high risk of a successful claim against you for constructive dismissal and discrimination.*
>
> *Although Peninsula has taken out an insurance policy on your behalf, I have explained that this particular case will not be underwritten if a claim is received and these issues have a significant impact on the case.*

23. On 13th May 2021, Ms Oulton of PBS wrote again:

> *As you know, I highlighted to you that I believe the actions you are intending to take against my advice will be detrimental to resolving this case in your favour. Further particulars being you intend to dismiss Jill for 'Some Other Substantial Reason' (SOSR) due to a breakdown in trust. This has come after you had previously suspended her after she raised a grievance and blew the whistle on the company, before fully investigating her concerns and then offered her a settlement under the grounds of a 'without prejudice' conversation, despite not having an on-going dispute active at the time of the conversation.*
>
> *I have explained to you that by dismissing Jill through SOSR following an allegation that occurred 6 months ago, while having no concerns over her work during this period, as well as the fact that Jill has provided evidence that your newly appointed CEO was aware and compliant in the process of helping her set up her new business, creates a high risk of a successful claim against you for standard unfair dismissal and potentially automatic unfair dismissal.*
>
> *Although Peninsula has taken out an insurance policy on your behalf, I have explained that this particular case will not be underwritten if a claim is received and these issues have a significant impact on the case.*

24. It is the Claimant's case that she did not, in fact, raise any protected disclosure until the grievance on 15th March 2021. This was put to Mr Brady in cross examination given that Mr Brady's report records two earlier dates for the disclosures in February and early March 2021. I accept Mr Brady's evidence that he was working with the information provided to him through the Advice Log. On the balance of probabilities, PBS had supplied Mr Brady with information showing that the Company had information prior to 15th March 2021 which it should have referred to PBS for advice. As is made clear in my conclusions, whether or not disclosures were made prior to 15th March or not does not ultimately affect the question of indemnity in this case and I accordingly do not need to make further findings about the information supplied to Mr Brady.

25. On or about the 15th September 2021, the Company went into administration.

Law

26. Section 1 of the Third Parties (Rights Against Insurers) Act 2010 provides:

> *(1) This section applies if—*
>
> *(a) a relevant person incurs a liability against which that person is insured under a contract of insurance, or*
>
> *(b) a person who is subject to such a liability becomes a relevant person.*
>
> *(2) The rights of the relevant person under the contract against the insurer in respect of the liability are transferred to and vest in the person to whom the liability is or was incurred (the "third party").*
>
> *(3) The third party may bring proceedings to enforce the rights against the insurer without having established the relevant person's liability; but the third party may not enforce those rights without having established that liability.*
>
> *(4) For the purposes of this Act, a liability is established only if its existence and amount are established; and, for that purpose, "establish" means establish—*
>
> *(a) by virtue of a declaration under section 2 or a declarator under section 3,*
>
> *(b) by a judgment or decree,*
>
> *(c) by an award in arbitral proceedings or by an arbitration, or*
>
> *(d) by an enforceable agreement.*
>
> *(5) In this Act—*
>
> *(a) references to an "insured" are to a person who incurs or who is subject to a liability to a third party against which that person is insured under a contract of insurance;*
>
> *(b) references to a "relevant person" are to a person within sections 4 to 7[(and see also paragraph 1A of Schedule 3)]1;*
>
> *(c) references to a "third party" are to be construed in accordance with subsection (2);*
>
> *(d) references to "transferred rights" are to rights under a contract of insurance which are transferred under this section.*

27. Section 2 provides:

(1) This section applies where a person (P)—

(a) claims to have rights under a contract of insurance by virtue of a transfer under section 1, but

(b) has not yet established the insured's liability which is insured under that contract.

(2) P may bring proceedings against the insurer for either or both of the following—

(a) a declaration as to the insured's liability to P;

(b) a declaration as to the insurer's potential liability to P.

(3) In such proceedings P is entitled, subject to any defence on which the insurer may rely, to a declaration under subsection (2)(a) or (b) on proof of the insured's liability to P or (as the case may be) the insurer's potential liability to P.

(4) Where proceedings are brought under subsection (2)(a) the insurer may rely on any defence on which the insured could rely if those proceedings were proceedings brought against the insured in respect of the insured's liability to P.

(5) Subsection (4) is subject to section 12(1).

(6) Where the court makes a declaration under this section, the effect of which is that the insurer is liable to P, the court may give the appropriate judgment against the insurer.

(7) Where a person applying for a declaration under subsection (2)(b) is entitled or required, by virtue of the contract of insurance, to do so in arbitral proceedings, that person may also apply in the same proceedings for a declaration under subsection (2)(a).

(8) In the application of this section to arbitral proceedings, subsection (6) is to be read as if "tribunal" were substituted for "court" and "make the appropriate award" for "give the appropriate judgment".

(9) When bringing proceedings under subsection (2)(a), P may also make the insured a defendant to those proceedings.

(10) If (but only if) the insured is a defendant to proceedings under this section (whether by virtue of subsection (9) or otherwise), a declaration under subsection (2) binds the insured as well as the insurer.

(11) In this section, references to the insurer's potential liability to P are references to the insurer's liability in respect of the insured's liability to P, if established.

28. In Irwell Insurance Company Ltd v Watson & Ors [2021] EWCA Civ 67; [2021] ICR 1034, the Court of Appeal determined that the tribunal is a court for the purposes of section 2(6) of the 2010 Act (above) and that a Claimant (as a 'third party') can, therefore, bring a claim against an insurer (pursuant to the Act) as well as their insured in the same action. Whilst that case concerns the same insurer as this case, the appeal judgment does not further assist on the issues

to be determined here (which turn on the facts as to any breach of the terms of the policy).

29. It is common ground between the parties that the Claimant can be in no better position against Irwell than the Company would have been had it being claiming directly under the policy.

30. Both parties referred me to the first instance decision of Employment Judge Horne in Durose v GT Realisations Limited and Hiscox Insurance Limited (2409723/2020) at the Employment Tribunal at Liverpool on 7th June 2022. This is not binding on the tribunal and itself concerns the (more common) question of compliance with a notification clause imposing an obligation on the insured to promptly notify the insurer of the event or claim. Nevertheless, the judgment is helpful as to the applicable legal principles and the Claimant's counsel has made significant reference to it in his skeleton argument.

31. In particular, the Supreme Court in Arnold v Britton and others [2015] UKSC 36; [2015] AC 1619 observed as follows at para 15-23:

> *When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101 , para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions…*

32. In Shinedean Ltd v Alldown Demolition (London) Ltd (in liquidation) and another [2006] EWCA Civ 939; [2006] 1 WLR 2696, the Court of Appeal considered the question of compliance with a 'cooperation clause' in a policy of insurance, holding that compliance depended on the facts of the case and there was no absolute principle that eventual prejudice to insurers should be included or excluded as relevant to the question. In Shinedean, it was held that the insurers were entitled to say that the provision of information by the insured company (by then in liquidation) was overdue and failure to provide it was a breach of a condition precedent to provide it in a reasonable time (the 'reasonable time' provision was decided as an implied requirement by the judge at first instance and not subject to appeal).

33. As to conditions precedent to liability, MacGillivray on Insurance Law, 15th ed., at 10-011 says:

> *…The modern drafting technique is to include a general clause which declares that the due observance and fulfilment by the insured of all the obligations cast upon him by the policy terms shall be conditions precedent to any liability of the insurers to make any payment under the policy. Breach by the insured of a term of the kind described above then provides the insurer with a defence to payment, regardless of whether it was either remedied before or causally connected with the loss…*

34. In George Hunt Cranes Ltd v Scottish Boiler and General Insurance Co Ltd [2001] EWCA Civ 1964[[2003] 1 CLC 1, the Court of Appeal considered a High Court decision on its construction of conditions precedent [at para 11]:

> *In this connection it is frequently pointed out that in relation to clauses of this kind, if the contract states that the condition is a 'condition precedent' or a 'condition of liability', that is influential but not decisive as to its status, especially when the label condition precedent is attached on an indiscriminate basis for a number of terms of different nature and varying importance in the policy. One may at once observe that that is not the case here. It is also the position that where, in a policy, individual terms are described as conditions precedent, while others are not, the label is more likely to be respected in relation to a clause expressly so identified; for instance, Stoneham v Ocean, Railway and General Accident Insurance Co (1887) 19 QB 237 per Kay J at 241.*
>
> *However, where one clause is labelled 'condition precedent', and a question arises as to the status of a clause not so labelled, the latter is not, ipso facto, precluded from being regarded as such. If, as in this case, the wording of the clause is apt to make its intention unambiguously clear, then in my view the absence of the rubric need not be fatal. As with any other contract, the task of construction requires one to construe the policy as a whole. However, in this respect, as it seems to me, if there is a clear expression of intention on the wording of the clause that it shall be treated as a condition precedent, that label or apparent intention cannot simply be ignored. It should at least be regarded as a starting point.*
>
> *I would adopt the further formulation in MacGillivray (9th ed), 19–35:*
>
> > *'Such clauses should not be treated as a mere formality which is to be evaded at the cost of a false and unnatural construction of the words used in the policy, but should be construed fairly to give effect to the object for which they were inserted, but at the same time so as to protect the assured from being trapped by obscure or ambiguous phraseology.'*

35. This passage was approved in Pilkington United Kingdon Ltd v CGU Insurance Plc [2004] EWCA Civ 23. Accordingly, the tribunal must construe the policy as a whole when considering the application and interplay between the relevant clauses.

36. The insurer carries the burden of proving that the insured has failed to satisfy a condition precedent and any doubt as to the meaning of an exclusion clause is to be construed against them (see Denso Manufacturing Ltd v Great Lakes Reinsurance (UK) Plc [2017] EWHC 391 at para 46 and Widefree Ltd (trading

as Abrahams & Ballard) v Brit Insurance Ltd [2009] EWHC 3671 (QB) at para 90).

Discussion and conclusions

Were the relevant terms conditions precedent to liability?

Exclusions 1 and 2 in Section 2: advice exclusions

37. In my judgment, considering these terms within the scope of the policy as whole, the wording is clear on its natural and ordinary meaning. Irwell "shall not be liable for any claim for Indemnity in respect of, or arising from, or relating to…" is clear and unambiguous. It provides, by way of introduction to the Exclusions section, the consequence in the circumstances set out in the following paragraphs.

38. The consequence (avoiding liability) applies to "*Any dispute, incident or event*". In Section 2, an event must include an insured event given the purposes of the policy. The event is not covered *unless*:

    a. The Company has sought advice promptly as soon as the Insured Event becomes known and before any action is taken; and
    b. The Company has followed the advice given; and, also
    c. The Company has continued to seek advice from PBS and followed the advice given. This is described as a continuing obligation.

39. The Claimant accepts, fairly, that the introduction to these exclusions suggests they are conditions precedent. However, the Claimant contends that the meaning of Exclusion 1 is such that *all* of the matters set out after the word 'unless' must be breached in order for the exclusion to operate. The recurring word 'and' is, the Claimant submits, indicative of an indivisible obligation.

40. In my judgment, the problem with that analysis is it would starve the exclusion of its real meaning in the context of the policy. It would not make sense for the insured party to promptly seek advice and then not follow the advice but expect to be able to claim its indemnity thereafter (by contending it did not breach everything in the paragraph). A breach of any one obligation (such as a duty to seek advice or a duty to follow advice) plainly engages the condition precedent. This is consistent with General Condition 1 ("…**anything to be done or complied with** by him/her shall be a condition precedent to any liability of The Company" – emphasis added).

41. Exclusion 2 is clear on its face. Where the Company has not, at any time, given full and detailed information and facts or has failed to disclose any material information or fact to PBS the exclusion will operate.

42. In my judgment, looking at General Condition 1 alongside the plain wording of these Exclusions, they are conditions precedent to liability and they are all relevant to Irwell's potential liability for losses sustained in respect of an insured event under Section 2 of the policy because the purpose and scope of these

provisions ensures that loss and risk is minimised. Irwell can avoid indemnity where the Company (the insured) has breached any obligation in those terms.

Exclusions 4 and 5: protected disclosures

43. I agree with the Claimant's submissions that these are not really conditions precedent because they are terms excluding certain types of tribunal claims from the coverage of the policy. They do not require something to be done by the insured. Whilst it may have been helpful if coverage exclusions were set out separately from conditions precedent, the meaning of the words remains sufficiently clear and can be properly read with the introduction to the exclusions before the numbered paragraphs.

44. It is apparent that some of the Claimant's claims are caught by these provisions and the Company would not have enjoyed cover in respect of any award for those claims. The description of the types of claim excluded is amply clear and, in my judgment, a case is "connected with" public interest disclosure (Exclusion 4) if it is a claim pursuing automatic unfair dismissal for this reason (which is not included within the definition of unfair dismissal covered) or a claim based on detriment. Read as a whole, the policy clearly does not intend to cover those types of claims.

General Exclusion 2.2

45. This exclusion can be read consistently with Exclusions 1 and 2 above. It says in plain words that Irwell "*shall not be liable for any claim for Indemnity…where the Policyholder or any other person insured under this Policy…fails to cooperate fully and promptly and/or give proper instructions in due time*…". In my judgment it does not extend the scope of Exclusions 1 and 2 albeit there could, potentially, be circumstances where there was a failure to cooperate for other reasons.

46. The term *promptly* may, as the Claimant submits, be considered from the perspective of whether something was done within a reasonable time. I shall return to this wording when considering the question of breach.

General Condition 1

47. This is also consistent with Exclusions 1 and 2. It is interpretative rather than operative because it is contingent on compliance with some other obligation in the policy (such as Exclusions 1 and 2).

Did the Company comply with the conditions precedent?

48. I accept Mr Brady's evidence and the chronology in his report that he had concluded that:
    a. On the information before him, supplied by PBS, there was evidence that the Company knew about the Claimant's initial whistleblowing concerns before seeking advice on 15th March 2021. Based on the dates provided to Mr Brady in the Advice Log (25th February and 4th March 2021) advice was not promptly sought because the Company

only contacted PBS about this issue when the grievance was lodged on 15th March 2021. Such delay could not be considered a reasonable amount of time given that the PBS contract entitled the Company to 24/7 employment law advice and the Company was in communication with PBS about a proposed redundancy. However, even if Mr Brady was wrong about these dates (i.e. the Claimant contends it was only when lodging a grievance on 15th March that the issues were raised), the events which followed amounted to a clear breach of the obligations in Exclusion 1 in any event;

b. The Company clearly failed to follow the advice of PBS, as recorded in Mr Brady's report, in the following respects:
    i. The suspension of the Claimant against PBS advice; and
    ii. The dismissal of the Claimant against PBS advice (given on several occasions).
c. The Company was also clearly warned about these two steps and the risk to its indemnity under the policy in the letters of 18th March 2021 and 13th May 2021.

49. Whilst Mr Brady cited the early advice concern as one of the reasons for rejecting the claim for indemnity in his letter of 13th September 2021, he also expressly referred to the dismissal of the Claimant against advice.

50. In my judgment, in the context of an indemnity which protects an employer in respect of unfair dismissal claims (amongst other things) there can be no more serious a step as the decision to dismiss. The ambit of Exclusion 1 plainly mitigates the risk and loss to which the Company and Irwell may be exposed by a dismissal decision by obliging the Company to follow advice. The Company's actions conflicted with the policy to such a degree that the warning letters were sent recording that which was communicated at the time.

51. Accordingly, the Company did not comply with Exclusion 1 as a condition precedent to liability because the Company did not follow advice given by PBS and continued to breach this obligation by ignoring further advice (after that given about suspension) when it proceeded to dismiss the Claimant.

52. For these reasons, it is unnecessary for me to consider any other potential breaches.

Breach and avoidance of the policy

53. It follows that the Company was in breach of the condition precedent in Exclusion 1 (as supported by General Condition 1) and, for the same reasons, General Exclusion 2.2.

54. The plain wording of Exclusion 1 is such that Irwell is not liable for "any claim for Indemnity" in respect of the insured event. This includes the entire claim which is brought in respect of the events of the 15th March 2021 grievance,

unfair dismissal and wrongful dismissal. All of those matters arise out of the same event starting with the report to Irwell on 15th March 2021.

55. Notwithstanding that conclusion, as the Claimant cannot be in a better position than the Company would have been, the indemnity (had it operated) would not have extended beyond the claim for unfair dismissal because the definition of the indemnity for unfair dismissal only defines a claim within section 98 of the ERA [**54**]. The policy provides that "*cases connected with…Public Interest Disclosure*" and arrears of contractual payments including breach of contract complaints are expressly excluded (Exclusion 4). As I have concluded above, those terms are sufficiently clear and accordingly restricted the coverage in this particular claim to unfair dismissal (section 98) in any event (had the condition precedent been complied with).

Outcome

56. For these reasons, Irwell was entitled to avoid the indemnity in this case and is accordingly not liable to the Claimant as a third party under the 2010 Act. This judgment will be a disappointment to the Claimant given what she has learned through this hearing about the advice given to the Company regarding decisions concerning her employment. However, as the Company would not have been indemnified in respect of her claim, she cannot be placed in any better position as against Irwell.

57. It follows that the claim against Irwell must be dismissed.

58. The claim against the First Respondent remains stayed.

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Employment Judge Nicklin

Date: 5th April 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.05/04/2023

FOR THE TRIBUNAL OFFICE