EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000111/2022

Held in Glasgow by Cloud Video Platform (CVP) on 19 April 2023

Employment Judge: R McPherson

Ms Katrina Williamson	**Claimant** **In Person**
British Gas Trading Ltd	**Respondent** **Represented by:** **Ms L Badham - Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the jurisdiction of the Tribunal is excluded by COT3 agreement, and this claim is dismissed.

REASONS

Preliminary matters

1. The claimant appeared in person. The respondent was represented by Ms Badham Barrister.

2. The claimant presented her claim to the Employment Tribunal on Saturday 15 October 2022. Presentation of the ET1 followed upon ACAS conciliation which commenced Wednesday 3 August 2022 and in respect of which ACAS certificate was issued Wednesday 14 September 2022.

3. In case management Preliminary Hearing on 28 February 2023 (Note of which was dated and issued to the parties 1 March 2023; the **PH Note**) it was identified that the respondent argued in its grounds of resistance appended to the ET3, as a preliminary point that a COT3 prevented the claimant from pursuing this claim and appointed this Open Preliminary Hearing to consider

that matter, noting that the parties would be making submissions at this hearing, as to how the COT3 should be read and interpreted. The respondent was directed to prepare a Joint Bundle, and the Tribunal intimated that the bundle should be limited to the documents relevant to the COT3.

4. In accordance with the PH Note direction the claimant had provided a document headed COT3 setting out her position.

5. The respondent further sent a skeleton argument to the Tribunal and the claimant's email late in the preceding afternoon. For technical reasons, the claimant had not received the same and at the outset of this hearing provided an alternate email address via which the claimant successfully received the same. The commencement of the hearing was initially delayed to allow the claimant to read the same, having reviewed the same the claimant intimated that she wished to proceed.

6. A discussion took place prior to the commencement of the hearing in that the Joint Bundle did not include a document which the claimant asserted was of importance to her position, on that document being provided it was clear it was a communication via ACAS and the respondent confirmed it did not consent to the use of same. Having regard to s18 (7) of the Employment Tribunals Act 1996 (ETA 1996) which provides "*Anything communicated to a conciliation officer in connection with the performance of his functions … shall not be admissible in evidence in any proceedings before an employment tribunal except with the consent of the who communicated it to that officer*" and separately s18 (c) Conciliation after institution of proceedings ETA 1996, I concluded that document was not admissible.

7. In this claim, from the ET1, the claimant asserts two separate heads of claim:

    1. *s13 Equality Act 2010 (EA 2010) Direct Disability Discrimination; in respect of which the claimant relies on both her own asserted disability status and/or asserted associated disability (neither status being conceded by the respondent); and*

    2. *s27 EA 2010 Victimisation.*

8. For this hearing, I had regard to the relevant issues in respect of each asserted claim which I set out below.

9. For **s13 EA 2010:** direct disability discrimination because of a protected characteristic of disability (or associated disability), the issues for a Tribunal would be as follows:

   a. Has the respondent treated the claimant in the particular manner asserted? The claimant gave notice of events complained as being the respondent advising on 24 June 2022 the claimant, that her application for the CSA role would not proceed further.

   b. Was that treatment "*less favourable treatment*", i.e., did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances – the comparators relied upon were those who had not signed a COT3 (that is someone who had not brought a claim which culminated in a COT3).

   c. in her Response to List of Issues, the claimant identifies two specific comparators and is also understood to rely on hypothetical comparators.

   d. If so, was this because of the claimant's disability (whether actual or associated) and/or because of the protected characteristic of disability more generally?

10. For **s27 EA 2010**: victimisation, the relevant issues would be:

   a. The protected act the claimant relied upon was the 2020 ET claim in terms of the s27 (2) (a) EAT 2010.

   b. Did the respondent subject the claimant to detriment complained of, being the respondent advising on 24 June 2022 the claimant, that her application for the CSA role would not proceed further?

   c. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done the protected act relied upon?

Findings of Facts

11. The claimant was previously employed by the respondent as a Retention Team Manager from 1 November 205 to 31 January 2020 when her employment terminated, the respondent argued by reasons of redundancy. The claimant had presented a Tribunal claim 4103359/2020 (the 2020 ET claim) asserting claims of unfair dismissal and claims in terms of the Equality Act 2010 of disability discrimination, sex and pregnancy and maternity discrimination. The respondent disputed all allegations.

12. It was not in dispute that separate from the 2020 ET claim and COT3, the respondent operated a policy at the material time which provided that the respondent would not re-employ a member of staff who has been made redundant and paid redundancy pay, as either an employee or a contractor. The reason for the operation of such a policy was said to be due to HMRC guidelines and potentially adverse tax consequences relating to redundancy. The operation of the policy was said to allow for exceptional circumstances where there had been a break in service of at least 24 months *and* where the work was significantly different from what they were previously employed to do.

13. The 2020 ET claim was settled via a COT3 agreement which identifies that settlement was reached on 17 September 2021 and which was signed by the claimant on 5 November 2021 and for the respondent on 2 December 2021 (the September 2021 COT3).

14. It was not in dispute that prior to the September 2021 Settlement agreement, the claimant was aware that some employees had returned to employment. The claimant had set out her knowledge of the same in Claimant Response to List of Issues under heading 2.2 Direct Discrimination while identifying two specific comparators describing that both returned from redundancy at the same site and the same leadership team arguing they applied for the same position as the claimant, further described that it was "*very difficult to know exactly how many redundant employees and they have rehired despite their*

own re-employment terms it is widely known by the business and employees they do and have rehired redundant employees historically and recently."

15. The September 2021 COT3 sets out that it is in full and final settlement of the Tribunal claim; and describes that.

> *"5. The Claimant will accept the above sum in full and final settlement of:-*
>
> *5.1 the Tribunal claim* [the 2020 case]*; and*
>
> *5.2* ***all*** *claims of* ***whatever nature*** *which the Claimant* ***has or may have against the Respondent*** *or against any other company in the group of companies of which the Respondent is a member ("Group Company") or against any employee, worker, agent or officer of the Respondent or Group Company* ***arising out of or connected with the Claimant's employment by the Respondent and/or its termination*** *whether or not any such claim exists or is known to or contemplated by the Parties or is recognised by law at the date of this Agreement and whether such claim arises at common law, under statute or otherwise and whether it falls within the jurisdiction of an employment tribunal or not."* [emphasis added].

16. Between **4 March 2022** and **19 April 2022**, the claimant applied for various roles with the respondent including for the role of Customer Service Advisor within the respondent's Sales and Retention Team which was in essence the Team from which the claimant had been made redundancy and which application was initially progressed by the respondent (the CSA role)

17. On **24 June 2022** the respondent advised that the claimant that her application for the CSA role would not proceed further.

18. The claimant asserts two claims as set out above asserting that she is a disabled person within the meaning of s6 of the Equality Act 2010 and the respondent's intimation on 24 June 2022 amounted to an act of victimisation within the meaning of s27 EA 2010. The claimant argues in effect that the detriment is the respondent's notification on 24 June 2022, the claimant

relying upon the 2020 ET claim as the protected act within terms of s27 EA 2010. The act of direct discrimination for s13 EA 2010 relied upon also includes that notification.

Submissions

19. The claimant had provided detailed outline arguments in advance. The respondent provided a skeleton argument shortly before the hearing.

20. **The claimant** had set out her position in a document contained within the joint bundle "*COT3 Position,* which the claimant had updated for this hearing describing her position over 17 numbered paragraphs referencing her position both in fact and law including reference to case law. In addition, the claimant had already provided a document headed Claimant Response to List of Issues.

21. In addition, the claimant had requested that an email dated 24 June 2022 issued to her be attached to her COT3 Position document and the signed COT3.

22. The claimant described that there was no clause of the statement within the COT3 advising that she could never apply to work for British Gas/ Centra again and referenced her position regarding discussions around the COT3. The claimant further set out her description of the history of events and described that the respondent re-hired other employees, whom the claimant relies upon as comparators noting that they *"did not have a COT3 agreement"* asserting victimisation.

23. The claimant noted that in the respondent's email of 24 June 2022, the respondent raises the possibility of tax implications from settlement arising observing that in terms of the COT3 the claimant had indemnified the respondent against any tax risk.

24. The claimant described that it was *impossible* that she could have known that she would encounter the situation (the post-redundancy recruitment) when signing the COT3. The claimant describes that the respondent was downsizing due to cost savings, and it was *"unclear when the Respondent*

would ever be in a position to take on new staff" and references EAT decision **Bathgate v Technip UK** (2022) EAT 155 (**Bathgate**).

25. The claimant argues, in response to the respondent having referenced the 2022 Court of Appeal decision **Arvunescu v Quick Release (Automobile) Ltd** EWCA Civ 1600 (**Arvunescu**), that it can in effect be distinguished on the facts, noting that that case the further mistreatment occurred *before* that claimant had signed the COT3.

26. The claimant argues that **DWP v Brindley** [2016] EAT 0123/016 (**Brindley**) on the facts is closer to the claimant's position.

27. **The respondent** set out that the COT3 was expressed as being reached as a result of conciliation action, a Conciliation Officer has therefore taken action under **s18C** of the Employment Tribunals Act 1996 thus allowing parties to contract out of the ability to bring further proceedings under **s203(2) (2) (e)** of Employment Rights Act 1996 and **s144(4) (a)** of EA 2010.

28. The respondent referenced **Livingstone v Hepworth Refractories Plc** [1992] IRLR 63 **(Livingstone)** arguing that by reference to para 12, this COT3 specifically excluded bringing claims under other jurisdictions (those which did not govern the 2020 claim), and was thus capable of barring the bringing of claims which were not in the presumed contemplation of parties at the time of the signing and the questions is, therefore, one of construction of the COT3.

29. The respondent argued that the Tribunal is required to determine the construction to decide whether it effectively bars this claim following the approach in **Bank Credit and Commerce International SA v Ali** [2001] HL 292 HL (**BCCI**)**,** by ascertaining objectively the intention of the parties in the context of the circumstances in which the agreement was entered in into and argues that this claim arises out of and/or is connected with the claimant's employment and /or its termination.

30. The respondent argues that the exclusion clause covers events not only caused or materially contributed to by the claimant's employment and/or termination but sharing a factual connection or nexus with it/them. The

respondent describes that the claimant's attempt to seek re-employment was caused by and arise out of the termination and further the respondent's policies in respect of rehire of those previously made redundant would be a key factor in the current claim.

31. The respondent by reference to **Royal National Orthopaedic Hospital Trust v Howard** [2002] IRLR 849 (**Howard**) argued that as a matter of public policy, there is no reason why parties should not be able to contract out of claim which they have and can have no knowledge, whether or not such claims have already come into existence as the date of the agreement.

32. The respondent argues that the settlement is plain and broad in its exclusion, it covers claims which would not exist at the time of signing "*whether or not such claims exist*", which is an express provision going beyond the COT3 considered in **McLean v TLC Marketing Plc and others** EAT/0430/08 (**McLean**) and meets the requirement of "***absolute clarity"*** by reference to **Howard**. The language here is clearer and goes further than that seen in **Arvunescu**. In summary, the respondent argues that the claimant is barred from her pursuit of this claim by the agreement.

33. **Relevant statutory provisions**

34. s203 (1) and (2) of ERA 1996 provides.

203 Restrictions on contracting out*.*

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

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

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

(2) Subsection (1)—

. . . . . .

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

35. s144 of EA 2010 provides:

"144 Contracting out

(1) A term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act.

(2) A relevant non-contractual term (as defined by section 142) is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act, in so far as the provision relates to disability.

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

*(4) This section **does not** apply to a contract which settles a complaint within section 120 if the contract—*

*(a) **is made with the assistance of a conciliation officer**, or*

(b) is a qualifying settlement agreement.

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

Relevant Case Law

36. In **Livingstone**, in 1990 the claimant signed a COT3 following the termination of his employment which set out that *"We the undersigned have agreed: that the respondent pays to the applicant the sum …. in full and final settlement of all claims which the applicant may have against the respondent arising from his employment with the respondent or out of its termination, except for any*

benefits due to the applicant under the rules of the company's pension scheme or any claim that may arise in the future resulting from industrial injury or disease contracted during the applicant's employment with the respondent."

37. The EAT in **Livingstone**, in 1991 held that the ET had erred in finding that it had no jurisdiction as the COT3 as set out did not cover claims under the relevant equality legislation. The EAT set out at para 12 "*The provisions tend to support our view that a COT 3 agreement under the 1978 Act does not cover a claim under the 1975 Act or the 1970 Act unless expressly stated so to do. We cannot say, as Mr Cavanagh would have us say, that a conciliation officer when acting under the 1978 Act is wearing 'any number of hats' and dealing with all other matters which could possibly arise. It is of course helpful for parties to be able to 'wipe the slate clean', but the agreement must relate to those matters which are within their presumed contemplation at the time. We therefore hold that the agreement of 9 April 1990 is no bar to Mr Livingstone's claim under the Sex Discrimination Act and that an Industrial Tribunal is entitled to hear his claim. Whether the claim has any merits or whether there are other defences is not a matter for us."*

38. In **Bank Credit and Commerce International SA v Ali** [2001] HL 292 HL (**BCCI**) as subsequently referenced by the Court of Appeal in **Arvunescu,** Lord Bingham at para 8 sets out the approach for construing such provisions (set out below).

39. In **Howard** the EAT in 2002, were considering a 2001 COT3 agreement, entered after the bringing of a claim for discrimination and constructive dismissal, which set out

> *"1 That the Respondent will pay to the Applicant within 28 days the sum of …. in full and final settlement of these proceedings and of all claims which the Applicant has or may have against the Respondent (save for claims for personal injury and in respect of occupational pension rights) whether arising under her contract of employment or out of the termination thereof on 29 November 1998, or arising under*

the Employment Rights Act 1996, the Sex Discrimination Act 1975 or under European Community Law. This payment is with no admission of liability.

2 That the proceedings be dismissed."

40. The EAT in **Howard** described at para 9:

"9. In our judgment the law as to contracts for release is pretty straightforward. The law does not decline to allow parties to contract that all and any claims, whether known or not, shall be released. The question in each case is whether, objectively looking at the compromise Agreement, that was the intention of the parties, or whether in order to correspond with their intentions some restriction has to be placed on the scope of the release. If the parties seek to achieve such an extravagant result that they release claims of which they have and can have no knowledge, whether those claims have already come in existence or not, they must do so in language which is absolutely clear and leaves no room for doubt as to what it is they are contracting for. We can see no reason why as a matter of public policy a party should not contract out of some future cause of action. But we take the view that it would require extremely clear words for such an intention to be found."

41. In **McLean,** the EAT in 2008 were considering whether a COT3 precluded a new claim of post-termination and post-COT3 victimisation. The COT3 signed by the claimant in early 2008 set out:

"1) Without any admission of liability the Respondents will pay the total sum of … to the Claimant who will accept it in full and final settlement of her Employment Tribunal claims against the Respondents and of any other claim whatsoever arising out of or connected with her employment with the Respondents and its termination.

2) By 25 April 2008, following receipt of the COT3 duly signed by the Claimant or her representative the Respondents will pay the above

settlement sum to the Claimant by cheque for …. payable to the Claimant and sent to the Claimant's representative.

3) [A confidentiality clause.]

4) The 1st Respondent, TLC Marketing Plc, will on its headed note paper immediately furnish to the Claimant directly an open testimonial addressed 'To whom it may concern' with wording as set out in the accompanying schedule.

5) The 1st Respondent, its employees, officers and agents will respond to enquiries about the Claimant from any prospective or actual employer of the Claimant in a manner consistent with the wording of the above agreed testimonial and not otherwise."

42. The EAT noted, considering whether the agreement can be read to allow a contract claim to enforce the agreement but precludes a victimisation claim, at para 26 that *"Clause 1 of the COT3 does not include words "precluding claims, save for proceedings for the enforcement of the terms of the agreement", which would be required if such a result were to be achieved."*

43. In **Brindley,** the EAT in 2016 upheld a 2015 Tribunal decision which held that it had jurisdiction to consider a 2015 claim, notwithstanding a 2014 COT3 which settled an earlier specified 2014 ET *"and all other Relevant Claims arising* ***from the facts of the Proceedings*** *up to and including the date this Agreement…"*the relevant claims being set out as *"… claims related to the Claimant's employment with the Respondent, whether at common law, under Statute, or pursuant to European Union law either against the Respondent, or any officer or employee of the Respondent including without limitation any claim relating to equal pay, discrimination, harassment, and claims under the Employment Rights Act 1996, or any other claim which might be made by the Claimant in relation to her employment to a court or tribunal provided that nothing herein contained shall affect the Claimant's accrued pension entitlement or any claim for latent personal injury".* Critically and while both claims arose from the application of an attendance management policy, the COT3 had not set out that it settled all *other* claims up to the date of signing.

The relevant claims caught were only those arising from the specific factual matrix of the 2014 proceedings.

44. In **Bathgate**, the EAT in March 2022, was considering a claim for direct and/or indirect age discrimination presented after a 2017 voluntary settlement agreement following upon which the respondent decided not to make an Additional Payment. The EAT at para 2 set out that the appeal was not permitted to proceed in relation to the efficacy of the agreement at common law describing that the Tribunal "*was clearly correct in concluding that the Agreement was wide enough and specific enough to compromise a future claim for age discrimination (para. 78 and 79) on ordinary principals of contractual construction."*

45. The EAT set out that when determining whether a qualifying Settlement Agreement existed for the purposes of the EA 2010 s.147 (Meaning of qualifying Settlement agreement), the conditions set out at s147(3) (b) that the contract relates to "*the particular complaint*" anticipated the existence of an actual complaint or circumstances where the grounds for a complaint existed; they were not apt to describe a potential future complaint. The EAT was referred, in the context of construing s147(3) to an excerpt from Hansard and at para 25 describes:

"*25. First, it is contrary to the statement of Parliamentary intention referred to above. Viscount Ullswater said that the agreement must be one "…which settles a particular complaint that has already arisen between the parties to that complaint". The words "already arisen" indicate that a right of action has emerged. These words indicate that possible future causes of action were not in view. Second, it is a construction that is contrary to the broad purpose of the section. In Hinton Mummery, LJ stated in connection with the parallel provision of the ERA –*

"On general principles of statutory interpretation the conditions should be construed, so far as is possible, to promote the purpose for which they are imposed, that is to protect employees when agreeing to

relinquish the right to bring proceedings under the 1996 Act in the employment tribunal (para 17(4)).”

In the same case Smith LJ stated –

“…the purpose of section 203 is clear. It is to protect claimants from the danger of signing away their rights without a proper understanding of what they are doing.”

In this case the Claimant signed away his right to sue for age discrimination before he knew whether he had a claim or not. While that may be possible at common law, ***the Act*** *restricts parties’ ability to do so. Third, it would appear to me that the inclusion of a claim in a compromise agreement defined merely by reference to its legal character or its section number does not satisfy the language of* ***s. 147.*** *The words “the particular complaint” suggest that Parliament anticipated the existence of an actual complaint or circumstances where the grounds for a complaint existed. I do not consider that the words “the particular complaint” are apt to describe a potential future complaint. I accept that language can be used loosely and* ***that ordinarily a complaint might include a potential complaint. But in my opinion the precision of the statutory language excludes this possibility****.* ***The Act uses the definite article in combination with the words “particular complaint****”. I consider this does not permit clauses that list a series of types of complaint by reference to their nature or section number. It does not seem to me that there is any difference in principle between a “rolled up” waiver and a waiver which lists a variety of possible claims by reference to their nature or section number. Both are general waivers. All that distinguishes them is the particularity with which they have been drafted. I do not consider that one provides any more protection than the other. I consider that both approaches fall foul of the guidance given by Mummery LJ and Smith LJ in Hinton.”* [emphasis added]

46. The claim did not succeed for unrelated jurisdictional reasons related to the claimant's employment as a seafarer.

47. In **Arvunescu** the Court of Appeal considered in November 2022 a 2018 COT3 which so far as relevant provided that

> *"The claimant agrees that the payment set out in paragraph 1 is accepted in full and final settlement of all or any costs, claims, expenses or rights of action of any kind whatsoever, wheresoever and howsoever arising under common law, statute or otherwise (whether or not within the jurisdiction of the employment tribunal) which the claimant has or may have against the respondent or against any employee, agent or officer of the respondent arising directly or indirectly out of or in connection with the claimant's employment with the respondent, its termination or otherwise. This paragraph applies to a claim even though the claimant may be unaware at the date of this agreement of the circumstances which might give rise to it or the legal basis for such a claim.*
>
> *For the avoidance of doubt, the settlement in paragraph 2 includes but is not limited to:*
>
> - *the claimant's claim presently before the employment tribunal case number 2700958/2014;*
>
> *…"*

48. In **Arvunescu** the claimant had settled claims via COT3 on 1 March 2018. The claimant brought new proceedings alleging victimisation in May 2018 alleging victimisation having been rejected for a post by a wholly owned subsidiary of the respondent in February 2018.

49. In the context of interpretation and construing contract, **Arvunescu** at para 13/14 helpfully summarises the approach to be taken:

> *13. In the present case, the Court is concerned with interpreting the terms of a contract settling claims…. In general terms, as Lord Hoffmann observed in Investors Compensation Scheme Ltd. v West Bromwich*

Building Society [1998] 1 WLR 896 at pages 912 to 923, the process of interpreting contracts involves:

"… the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

14. In the context of construing settlement agreements such as the COT3 agreement in this case, Lord Bingham observed in Bank Credit and Commerce International SA v Ali [2002] 1 A.C. 251 at paragraph 8 that:

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

Discussion and Decision

50. This was an agreement made with the assistance of a conciliation officer. It was a COT3. It was not a Settlement Agreement as considered in Bathgate, as such, **s147 (3)** of EA 2010 has no application.

51. The COT3 was expressed as being reached as a result of conciliation action, a Conciliation Officer had taken action under **s18C** of the Employment Tribunals Act 1996 thus allowing parties to contract out of the ability to bring further proceedings under **s203(2) (2) (e)** of Employment Rights Act 1996 and **s144(4) (a)** of EA 2010.

52.

53. The COT3 in **Livingstone** was narrower in its terms than the current COT3.

54. While it may reasonably be said that the factual matrix in **Arvunescu** is not directly on point with that in the present case, in that what was asserted as the unlawful act occurred before Mr Arvunescu signed that COT3, however, that does not mean that the principles of construction of contract do not apply.

55. In **Bathgate**, the appeal was not permitted to proceed in relation to the efficacy of the Agreement at common law, the issue was the requirements of s147 EA 2010 for a Settlement Agreement, rather than the consideration of a COT3. S147 EA 2010 does not apply to a COT3.

56. The Tribunal does not agree with the claimant's analysis of the position at the time, while the claimant may reasonably assert that she was unclear when signing the COT3 as to when the respondent would be in a position to take on new staff, that is no more than a statement there was what the claimant describes as a downsizing exercise at that time. The claimant accepts she knew prior to and as of the date of the COT3 that employees had previously departed employment and had re-joined. It was not in dispute that the respondent operated a policy as set out above.

57. In ascertaining the meaning the COT3 would convey to a reasonable person having all the background knowledge which would have been available to the parties in the situation they were in at the time of the COT3, it would have been reasonably foreseeable to an employee considering such a COT3 that a future recruitment exercise could occur. Further, it would have been reasonably foreseeable that the respondent would operate its policy set out above.

58. A reasonable employee would have had those possibilities in their mind. The COT3 expressly sets out the agreement between the parties that there was a settlement not only of current claims but "***all claims*** *of whatever nature which* ***the Claimant*** *has or* ***may in the future have****…* ***arising out of or connected with the Claimant's employment by the Respondent and or its termination whether or not such a claim exists or is known to or***

contemplated *by the Parties … **as at the date of this Agreement**…* " . The current COT3 thus goes further than that seen in Brindley.

59. The claimant set out her position that the COT3 does not permit employers to "*commit completely new 'Mistreatments'*" and describes that a COT3 should not mean that employees should accept same "*regarding a different and separate situation and could not know or reasonably expect to be mistreated in the future".*

60. The Tribunal understands the respondent does not insist that its COT3 would necessarily operate to preclude all future claims of any nature as the claim would require to arise out of or connected with the Claimant's employment by the Respondent and or its termination. The respondent argues that the words adopted by the parties and set out above should be given meaning in the context of the current claim.

61. The object is to give effect to what the contracted parties intended and to do so the Tribunal reads the terms of the COT3, giving the words used their natural meaning and ordinary meaning in the context of the COT3, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties making an objective judgment based on the materials identified.

62. The claimant's approach, in contrast to that of the respondent, would be to disregard the words that the parties had agreed to including rewriting the COT3 to remove "**whether *or not such a claim exists or is known to or contemplated*** *by the Parties … **as at the date of this Agreement**…".* Such an approach is not permissible in the context of construing this COT3.

63. While the claimant in the COT3 Position paper suggests that there was no clause within the COT3 advising that she would never be able to work for the entire of British Gas/Centrica ever again and no discussion was had to suggest that would ever be the case, this claim concerns only the claim that is brought to Tribunal. The claimant did not set out in her COT3 Position paper that she did not know that she would not be re-employed in the context of her actual application.

64. Further the Tribunal notes that the direct discrimination claim is based on the claimant having brought her 2020 claim in respect that she relies upon a comparison with employees who had not brought equivalent claims. She agreed, by the COT3 to bar herself from relying on that 2020 claim.

65. The action relied upon is also argued to be rendered unlawful for the s27 EA 2010 claim by reliance upon the ET claim (as the protected act) which was settled and excluded by the COT3 here. She agreed, by the COT3 to bar herself from relying on that 2020 claim.

66. The critical issue here for the s27 EA 2010 victimisation claim is that this requires a protected act, that act relied upon is the bringing of the 2020 ET. The COT3 clearly excludes claims and the reliance upon the 2020 ET from future claims.

67. In relation to the s13 EA 2010 Direct Discrimination (whether disability or associated disability) that relies upon the claimant signing the COT3 as she relies upon those who did not sign equivalent COT3s as her comparators.

Conclusion

68. I have had regard to the parties' detailed positions and the cases referred to and have concluded that the COT3 operates to exclude the claimant from pursuing the current claims.

69. In those circumstances the Tribunal does not have jurisdiction to consider those claims and they are dismissed.

Employment Judge: **R McPherson**
Date of Judgment: **05 May 2023**
Entered in register: **12 May 2023**
and copied to parties