Neutral Citation Number: [2023] EAT 142

Case No: EA-2022-000447-AS

IN THE EMPLOYMENT APPEAL TRIBUNAL

7 Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 24 November 2023

Before:

JUDGE KEITH

Between:

DR SARA AJAZ **Appellant**

- and -

HOMERTON UNIVERSITY HOSPITAL NHS FOUNDATION TRUST **Respondent**

- -
- -

Mr Stuart Brittenden, instructed by Rahman Lowe, for the **Appellant**
Ms Betsan Criddle KC, instructed by Hempsons, for the **Respondent**

Hearing date: 21 September 2023

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JUDGMENT

- -

SUMMARY

Practice and Procedure

The Employment Judge erred in concluding that rule 52 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** prevented the Appellant from raising new claims of detriments pursuant to section 47B of the **Employment Rights Act 1996, ('ERA')**, after an Employment Judge had dismissed, on the Appellant's withdrawal, an earlier claim of different detriments, but based on the same protected disclosures. The further claims alleging new detriments did not raise the same, or substantially the same, complaints. The EJ's analysis of whether issue estoppel applied in the context of a summary judgment was not sufficient.

However, while the EJ was incorrect in her conclusions on the effect of rule 52, the ET was correct in concluding that the new claims were an abuse of process, because they attempted to relitigate the issue of the same protected disclosures, which the Appellant had agreed were settled in a COT3 agreement. The terms of that agreement were not void because of section 43J **ERA**. This was because the terms of the COT3 did not preclude the Appellant from making protected disclosures or from instituting further proceedings. Rather, they settled the previously disputed issue of whether the Appellant had made protected disclosures. The EJ did not err in failing to consider whether the Appellant was no longer bound by the terms of the COT3, in circumstances where she had never claimed to have accepted repudiatory breaches of those terms.

JUDGE KEITH:

Introduction

1. This appeal raises the practical issue of the scope of rule 52 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, ('the ET Rules) and how that rule relates to the legal doctrines of 'issue estoppel' and other aspects of 'res judicata.' The facts of the appeal are simple.

2. In 2017, the Appellant brought claims of detriments contrary to section 47B of the **Employment Rights Act 1996** ('ERA'). After agreeing to settle her claims under a COT3 agreement, she withdrew her claims, which an Employment Judge dismissed. The Appellant remained, and remains, employed by the Respondent.

3. The Appellant later presented further claims in May and September 2021. These were also claims of detriments contrary to section 47B **ERA**, all said to have taken place after the COT3, and one of which was an alleged breach of the terms of the COT3. The Appellant alleged in her further claims that the new detriments to which she was subjected were done on the ground that she had made the same protected disclosures as in her first claim. The Respondent defended the claims and applied for them to be struck out. An Employment Judge agreed with the Respondent and struck out the claims, by reference to rule 52 of the **ET Rules,** and in the alternative, as an abuse of process. The Appellant contends that the EJ was wrong to do so, as otherwise, an employer may dismiss an employee or subject them to a detriment on the grounds of previous protected disclosures with impunity, because an employee can never

rely on those allegedly protected disclosures, if they were the subject of a withdrawn claim, which an Employment Tribunal then dismissed. The Appellant says that this cannot have been the intended consequence of rule 52, which should be read without gloss, as limited to the same, or substantially the same, complaint.

The litigation history

4. The Appellant appeals against the decision of Employment Judge Elgot, sent the parties on 19 May 2022 in which, following a Preliminary Hearing, she struck out two claims: claim number: 3204536/21, presented on 25 May 2021; and 3205965/21, presented on 17 September 2021 (the '2021 Claims,') on the basis that the Appellant was estopped from bringing the claims and the Tribunal had no jurisdiction to hear them.

5. The Appellant had presented an earlier claim on 20 April 2017, (3200366/17 – the '2017 Claim') alleging that she had been subjected to detriments done on the ground that she had made nine protected disclosures between July 2011 and 9 December 2016. She claimed that the Respondent subjected her to detriments from 2 August 2011 and on an ongoing basis until the presentation of the Claim Form in 2017.

6. The 2017 Claim was settled under an ACAS COT3 agreement. The parties reached settlement on 21 February 2018.

The relevant COT3 terms

7. The COT3 stipulated, at clause 1, that the Appellant would withdraw the 2017 Claim in full, by doing so orally before the Employment Tribunal on 21 February 2018. Clause 2 provided:

> **"2. In accordance with rule 52 of the Regulations the parties confirm their understanding that the Proceedings will, following withdrawal by the Claimant, be dismissed."**

8. Clause 4 stated:

> **"4. "The Claimant undertakes and agrees, subject to the exclusions from the waiver of claims in paragraph 7 [sic] hereof, that she will not reactivate by any process whatsoever the issues/complaints in the Proceedings or issue any further and/or new claim or claims of any nature against the Respondent or any of its current or former officers or employees in any forum arising from or in relation the issues/complaints in the Proceedings or her employment to the date of this Agreement."**

9. I pause here to add that the parties agree that the reference to clause 7, above, is a typographical error, and that they had intended to refer to clause 8.

10. The next relevant terms were in clause 6:

> **"6. The Claimant further agrees to withdraw and not reinstate any of her past or current grievances and/or appeals howsoever arising against the Respondent and/or any current or former non-executive directors, employees, officers or agents of the Trust…"**

11. Clause 8 continued:

> **"The terms of this Agreement are without any admission of liability and are accepted by the Claimant in full and final settlement of the Proceedings and any other claims anywhere in the world she may have and howsoever arising in connection with her employment up to the date of this Agreement. For the avoidance of doubt this clause 7 [sic] excludes any claims by the Claimant to enforce this Agreement, any latent personal injury claims which have not arisen and/or the Claimant could not reasonably have been aware of as at the date of this Agreement**

> **and any claims in relation to the Claimant's accrued pension rights/entitlements."**

12. The parties also referred to clause 9:

> **"Notwithstanding the waiver of claims in clause 7 [sic] of the Agreement the Claimant hereby warrants that she is not aware of any other facts or circumstances which might give rise to any claim by her other than those detailed in the Proceedings which she may have against either the Respondent or any of its current or former officers, or employees."**

13. Finally, clause 10 stated:

> **"For the avoidance of doubt, nothing in this Agreement shall prejudice any rights that the Claimant has or may have under the Public Interest Disclosure Act 1998 and/or any obligations that the Claimant has or may have to raise concerns about patient safety and care with regulatory or other appropriate statutory bodies pursuant to her professional and ethical obligations including those obligations set out In guidance Issued by regulatory or other appropriate statutory bodies from time to time."**

14. Shortly after the parties agreed the COT3, and on the Appellant's withdrawal of her claim, Employment Judge Brown dismissed the proceedings 'following a withdrawal of the claim by the claimant', in a judgment stated 21 February 2018. Whilst it was not stated as such, it is clear that this judgment was pursuant to rule 52 of the **ET Rules**, about which I say more later. The EJ's judgment was without consideration of the merits of the 2017 Claim or the issues or complaints within it.

15. A dispute subsequently arose between the parties about the Respondent's implementation of an agreed action plan for the Appellant, referred to in detail in clause 5 of the COT3, which it is unnecessary to repeat. The gist of the dispute is that the Appellant, a medical doctor who seeks to progress in her career, returned to clinical practice, as part of a reskilling process. The

Appellant has alleged that three consultants refused to cooperate in ensuring that she had sufficient practical experience and that this was done on the ground of the original disclosures relied upon in the 2017 Claim.

The 2021 Claims

16. In the 2021 Claims, the Appellant relied on the same nine disclosures as in the 2017 Claim, as amounting to protected disclosures for the purposes of Part IVA, **ERA**. The Respondent disputed that eight of the nine disclosures amounted to protected disclosures. As noted earlier in these reasons, all of the alleged new detriments post-date the COT3. While the Respondent entered responses disputing the claims, it did not initially dispute whether the new claims amounted to an abuse of process, whether by virtue of rule 52 or otherwise.

17. However, on 16 December 2021, the Respondent applied to strike out the 2021 Claims, or in the alternative, that the Appellant be ordered to pay deposits as a condition of continuing them. The Respondent's primary submission was that the 2021 Claims were an abuse of process as the 2017 Claim had been dismissed on withdrawal by the Appellant and the Appellant had agreed not to relitigate those issues and complaints in subsequent proceedings. The 2021 Claims relied on the same nine allegedly protected disclosures, which were a 'necessary ingredient' of the 2017 Claim, the dismissal of which resulted in the doctrine of estoppel applying. Alternatively, the Appellant's reliance on them was in breach of the COT3.

18. The Appellant responded on 7 February 2022, denying that she was estopped from relying on the same protected disclosures. She argued that if this were

correct, the Respondent could subject her to detriments in the future on the ground that that she had made those disclosures, with impunity. She denied that in presenting the 2021 Claims, she had breached the terms of the COT3, as clause 10 stated that her rights under the **Public Interest Disclosure Act 1998** were not prejudiced, and any interpretation to the contrary was void by virtue of section 43J (1) **ERA** (which renders void terms which purport to preclude a worker from making a protected disclosure).

The Preliminary Hearing

19. It is necessary to repeat some of the submissions made, including the skeleton arguments submitted to EJ Elgot. This is because in submissions before me, Ms Criddle KC submitted that some points now relied on by the Appellant had never been raised before the EJ.

20. In her skeleton argument on behalf of the Respondent before the EJ, Ms Criddle argued primarily that issue estoppel applied and that the 2021 Claims amounted to an abuse of process because they breached the terms of the COT3. In the alternative, cause of action estoppel applied. The doctrine of estoppel applied regardless of the fact that the EJ had not considered the underlying merits of the 2017 Claim, or the issues or complaints within it, and regardless of the judgment dismissing the 2017 Claim being without detailed reasons, provided there was a judgment dismissing that claim – see **Staffordshire County Council v Barber** [1996] ICR 379. The protected disclosures were necessary ingredients of both the 2017 Claim and the 2021 Claims, and could not re-opened. The

Respondent relied on **Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd,** [2014] AC 160, per Lord Sumption (p 180C to p 184A).

21. In the alternative, the 2021 Claims were in breach of clause 4 of the COT3. Clause 10 related to future disclosures and did not allow the Appellant to relitigate whether there had been protected disclosures in the past. Section 43J(1) **ERA** was not engaged, as nothing prevented the Appellant from making protected disclosures.

22. In his skeleton argument on behalf of the Appellant before the EJ, Mr Brittenden referred to rule 52 of the **ET Rules** and argued that the further claims did not raise the same, or substantially the same, complaint, which prevented the Appellant from starting the 2021 Claims. The effect of EJ Brown's dismissal of the 2017 Claim did not extinguish the fact of earlier protected disclosures. The Appellant reiterated the policy implications of the Respondent's interpretation of the scope of rule 52.

23. In terms of the COT3, clause 8 only waived claims up to the date of the Agreement, not any future claims. Clause 10 preserved any rights that the Appellant had or 'may have', i.e. not future claims. The Appellant reiterated that any interpretation to the contrary infringed section 43J(1) **ERA**.

24. The Appellant also argued that the Respondent had fundamentally breached the terms of the COT3 agreement, which would operate to release her from its terms, although the Appellant indicated that it would not be appropriate for the EJ to address this issue at the Preliminary Hearing.

The EJ's decision

25. In her written reasons, at paragraph 7, the EJ noted that it was 'axiomatic' that unless a concern about possible wrongdoing amounts to a qualifying disclosure, the alleged detriments cannot be said to be done on 'the ground of' those disclosures. The EJ recorded, at paragraph 9, Ms Criddle's submission that such disclosures were a 'necessary – indeed an essential – ingredient in [the Appellant's] first claim.' While no evidence or argument was heard on the 2017 Claim, for estoppel to apply, a reasoned decision on the issues of fact and law was not necessary – a judicial decision was enough. The EJ accepted the Respondent's submission that the effect of the rule 52 decision was to bring the necessary elements of the 2017 Claim to an end, which gave rise to estoppel; and also that the effect of the COT3 was to compromise the 2017 Claim and to prevent the 2021 Claims. While the EJ noted the Appellant's submissions on the implications of interpreting rule 52 as preventing future claims, which would allow an employer to subject those who had made protected disclosures to future detriments with impunity, the Appellant could make further protected disclosures. Having cited rules 51 and 52, the EJ concluded at paragraph 19:

> **"Mr Brittenden, on behalf of the Claimant, argues that she is not raising the 'same or substantially the same complaints' in the second and third claims because the alleged detriments are plainly different'.**
>
> **First, Rule 51 refers clearly to the ending of any claim which is withdrawn. I am satisfied, as stated above, that the claims in the first claim have two inextricably inter-linked components (the qualifying disclosures and the consequent detriments). The claims consisting of both components have come to an end under Rule 51. Consequently, the withdrawal under Rule 51 means that a mandatory judgment under Rule 52 prevents a further claim,**

> **consisting of both such necessary components, from being lodged."**

26. The EJ went on to consider the terms of the COT3, as an alternative to estoppel. At paragraph 22, the EJ concluded that the effect of clause 4 was that it would be an abuse of process if the Appellant were permitted to relitigate the issues of whether her disclosures were 'protected.' In relation to clause 8 of the COT3, it was open to the Appellant to make further claims after the date of the COT3, but not ones which relied on issues which had already been decided, namely the original disclosures (paragraph 25). Clause 10 did not discuss the Appellant's ability to bring further claims about matters set out in clause 4. Rather, it confirmed the Appellant's right to make further disclosures. The effect of the COT3 was to make a 'clean sweep' of 'each and all of the constituent parts of a detriment claim' under section 47B **ERA** including 'the requirement for disclosures to qualify for protection' (paragraph 28).

The Appellant's Appeal

27. In a Notice of Appeal received on 14th November 2022, (p 10 onwards) the Appellant raised four grounds of appeal. I summarise their gist.

28. Ground (1) - the EJ erred in failing to considered that a 'complaint' in rule 52 was defined in rule 1 of the **ET Rules** as: 'anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal'. As HHJ Tayler pointed out at paragraph 15 of **Opalkova v Acquire Care Ltd** UKEAT/0056/21/RN, a claim form could include a number of claims, each a statutory cause of action or 'complaint'. The fact of having made a protected disclosure was not a 'complaint', and the 2021

Claims were not the same or substantially the same complaint as the 2017 Claim. Instead, the complaints in the 2021 Claims were of new detriments, which were entirely different from the 2017 Claim. The Appellant reiterated the wider implications of the EJ's interpretation of rule 52.

29. Ground (2) – the EJ had erred in the her analysis of the terms of the COT3. The settlement provision (clause 4), was expressly subject to clause 8, which limited settlement to claims up to the date of the Agreement. The term in clause 4 prohibiting 're-activation' of issues in the 2017 Claims was therefore subject to clause 8 and allowed the Appellant to reactivate issues provided that detriments post-dated the COT3. Any compromise of future claims had to be absolutely clear and leave no room for doubt – see: **Royal National Orthopaedic Hospital Trust v Howard** **[**2002] IRLR 849 and **Hilton Hotels Ltd v McNaughton** EATS/0059/04**.** Clause 10 preserved the Appellant's rights that she may have not to suffer a detriment, and the first part of clause 10 needed to be read separately from the remainder of the clause, with the divider from the second part of the clause, which needed to be read disjunctively, being the phrase, 'and/or'.

30. Ground (3) – alternatively, the EJ's interpretation of the COT3 was incompatible with Section 43J (1) **ERA**, as it would otherwise retrospectively preclude the Appellant from relying on having made protected disclosures previously.

31. Ground (4) - alternatively, the Respondent had fundamentally breached the terms of the COT3, which meant that the Appellant was no longer bound by its terms. The EJ had failed to address this issue.

32. His Honour Judge Barklem granted permission on 15 October 2022. The grant of permission was not limited in its scope.

The hearing before me

33. For the sake of brevity, I do not recite the Respondent's Answer to the Notice, or the skeleton arguments and oral submissions of each party. Instead, I summarise the parties' respective positions and explain why I have reached my decision in respect of each of the issues. I have nevertheless considered the submissions in full.

Ground (1)

The Appellant's submissions

34. The Appellant submitted that rule 52 was introduced to provide a mechanism whereby respondents avoided the inconvenience of having to apply for a dismissal of claims, on withdrawal, which had been a substantial proportion of Tribunal claims generally. Historically, respondents had needed to do so as they could not otherwise benefit from cause of action estoppel, as per **Ako v Rothschild Asset Management Ltd & Anor [**2002] ICR 899 and there was no mechanism for discontinuance of proceedings and limits on further proceedings analogous to those in the Courts under the **Civil Procedure Rules, ('CPR'),** Part 38.7. Rule 52 provided a mechanism for dismissal without the need for a

respondent's intervention, subject to certain safeguards and limits. As the House of Lords had made clear in **Arnold v National Westminster Bank plc** [1991] 2 AC 93 (at p 104), and as later endorsed by the Supreme Court in **Virgin Atlantic Airways Ltd v Zodiac Seats Ltd** [2014] AC 160, the scope of 'cause of action' estoppel was limited to where the cause of action was 'identical.'

35. While rule 52 results in mandatory dismissal of a claim, unless a claimant has expressed at the time of withdrawal a wish to reserve the right to bring a further claim which raises the same, or substantially the same, complaint, and the Tribunal is satisfied that there would be legitimate reason for doing so (rule 52(a)) or the Tribunal believes that to issue such a judgment would not be in the interests of justice (rule 52(b)), dismissal prevents a claimant raising the same, or substantially the same complaint, without gloss. The wording: 'the same, or substantially the same complaint' in rule 52 was analogous to the wording of **CPR** Part 38.7(1)(b) on discontinuance:

> **"(b) the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim"**

36. While there was sparse authority on rule 52, the facts of **Biktasheva v University of Liverpool** UKEAT/0253/19 were very different from the Appellant's circumstances, as both of Ms Biktasheva's complaints were for pay parity and there was significant overlap in the pay periods on which she relied in her two claims. No new detriment arose after Ms Biktasheva withdrew her first claim. In contrast, the 2017 Claim and the 2021 Claims involved complaints of different detriments. In no sense were the Appellant's protected disclosures the 'complaints'. The disclosures were necessary preconditions.

Rule 52 merely codified the common law position on estoppel, a proposition with which Ms Criddle agreed, and as HHJ Tayler had suggested at paragraph 15 of **Biktasheva**.

37. The Appellant argued that the limitations in the scope of rule 52 are illustrated by the procedural safeguard for a claimant, (rule 52(a)) to express at the time of withdrawal a wish to reserve the right to bring 'such a further claim', which mirrors the same, or substantially the same complaint in the first part of rule 52. No claimant could be expected to express such a reservation about future detriments which had yet to occur. The EJ's error was to treat the issue of a protected disclosure as a complaint in its own right.

38. Contrary to the Respondent's assertions on the effect of rule 52, it reflected the greater flexibility in the doctrine of issue estoppel, where, in contrast to the absolute bar (absent fraud or coercion) in cause of action estoppel, it was possible '*to reargue in materially altered circumstances an old point which had previously been rejected,'* (see Lord Keith's decision in **Arnold,** cited at p 182B - 184B of **Virgin Atlantic Airways Ltd**). While the doctrine of issue estoppel barred the raising, in subsequent proceedings, of points which had been raised unsuccessfully in the past, there was an exception for special circumstances, where this would cause injustice. In terms of that injustice, while there was a public interest in the finality of litigation, there was also a public interest in the legal rights of those making protected disclosures.

The Respondent's submissions

39. On the EJ dismissing the 2017 Claim under rule 52, cause of action estoppel and issue estoppel applied. The 'same complaint' element of rule 52 encompassed cause of action estoppel, while the 'substantially the same complaint' element reflected issue estoppel. Moreover, for cause of action estoppel to apply, the evidence relied on to advance the claim need not be the same, provided the cause of action was the same (see paragraph 33 of **Biktasheva)**. The Appellant was unable to advance the new complaints without relying on the 2017 Claim, which had been dismissed. The bar which cause of action estoppel applied was absolute in relation to all points decided in the 2017 Claim – see p 182D of **Virgin Atlantic Airways Ltd.** Alternatively, issue estoppel arose where in different causes of action, one of the parties sought to reopen a particular issue which formed a necessary ingredient in an earlier cause of action which had been decided. Estoppel applied once there was a judgment on withdrawal, just as much as where there was a judgment after a full consideration of the merits – see **Lennon v Birmingham City Council** [2001] IRLR 826, CA, paragraphs 26 and 30.

40. HHJ Tayler's view in **Biktasheva** that the words in brackets in rule 52 were designed to be explanatory, providing the gist of the common law, was consistent, by analogy, with the proposition in **PF v Disclosure and Barring Service [**2020] UKUT 256 (AAC) that the **ET Rules** did not confer jurisdiction, but were the powers and duties conferred on Tribunals and Judges in the exercise of that jurisdiction.

Conclusions on ground (1)

41. I refer to rules 51 and 52 of the **ET Rules 2013**:

> **"End of claim**
>
> **51. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.**
>
> **Dismissal following withdrawal**
>
> **52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—**
>
> > **(a)the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or**
> >
> > **(b)the Tribunal believes that to issue such a judgment would not be in the interests of justice."**

42. The reason for the introduction of rule 52 was to avoid the need for respondents to apply to dismiss withdrawn claims, which, prior to its introduction, comprised a significant proportion of all resolutions. Rule 52 addressed the issue identified in **Ako** of the gap in the **ET Rules** for finality in litigation or constraints on relitigation, in circumstances where there was no equivalent in the **ET Rules** of **CPR** Part 38.7 on discontinuance, which does not result in estoppel, but where a party seeking to make another claim may need the permission of the court to do so.

43. I bear in mind HHJ Tayler's view in paragraph 15 of **Biktasheva** that the part of rule 52 in brackets (beginning, 'which means that the claimant may not commence…') explains to parties the gist of the general common law, namely that of 'res judicata', '*including cause of action estoppel*'. HHJ Tayler was only considering a case of cause of action estoppel (see paragraph 13 of **Biktasheva**). He did not suggest that rules 51 and 52 limited a Tribunal's jurisdiction to consider the common law principles of 'res judicata.' As Lord Sumption made clear in **Virgin Atlantic Airways Ltd**, 'res judicata,' a portmanteau term, encompasses cause of action estoppel, issue estoppel and the principle in **Henderson v Henderson** (1843) 3 Hare 100, that a party should be prevented from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. There will be situations within the scope of res judicata, such as **Henderson v Henderson** scenarios, that do not fall within rule 52, as raising the same, or substantially the same complaint. Moreover, where a judge or Tribunal has dismissed a claim after considering its merits (so not on withdrawal of the claim, or part of it) the full scope of res judicata is open to a later judge or Tribunal to consider, in deciding whether a claim is vexatious or has no reasonable prospect of success (rule 37(1)(a)).

44. Within the context set out above, I conclude that rule 52 applies in circumstances which are far narrower than a Tribunal's general powers to consider and apply res judicata.

45. The first reason for my conclusion is the plain wording of rule 52. As HHJ Tayler made clear in paragraph 15 of **Opalkova**, the references to 'complaints,'

is a term which is defined in rule 1, as 'a claim, complaint, reference, application or appeal.' It is not a part or ingredient of a claim, but the claim in its entirety (noting that a Claim Form may contain multiple claims). To equate the word 'complaint' with a 'necessary' or 'essential' 'ingredient' expands it beyond the ordinary meaning of the word; and it is not included in the definition of the term in rule 1.

46. This can be seen when contrasting the narrow wording of rule 52 with Lord Keith's formulation of issue estoppel in **Arnold**, (p 105E):

> **"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."**

47. Lord Keith went on to cite Diplock LJ in **Thoday v Thoday** [1961] P 181, p 198:

> **"There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."**

48. Just as a cause of action may contain many different conditions which need to be fulfilled, so a very different cause of action, which contains a common

condition, cannot be correctly described as 'substantially the same complaint'. To pick just one of Mr Brittenden's examples, a claim of automatically unfair dismissal may have, as a necessary ingredient, an issue of a protected disclosure, which may be in common with a claim of pre-dismissal detriment. The two complaints are not substantially the same.

49. The second reason is the context of the introduction of rules 51 and 52, and what they were seeking to avoid. Prior to their introduction, the **ET Rules** said nothing about ascertaining a party's intention in withdrawing a claim, and as a result, the Court of Appeal advised in the headnote of **Ako** that it was advisable for Tribunals to ask claimants who were withdrawing claims for a statement of the circumstances of their decision to withdraw, before deciding whether to make an order dismissing the proceedings. Rules 51 and 52 took away that need and allowed Tribunals to focus on whether the criteria in rule 52 were met, subject to the two exceptions in rule 52(a) and rule 52(b), which give limited protection to claimants who wish to preserve claims from being dismissed. The need to examine whether a particular issue is a 'necessary ingredient' does not sit easily with the process of a summary judgment on withdrawal, in which an ET dismisses a claim without consideration of its underlying merits. With perhaps very limited knowledge of the underlying facts, an ET's ability to consider whether it would not be in the interests of justice to issue a judgment would also be limited, so that the potential safeguard in rule 52(b), if rule 52 were to apply to cases of issue estoppel, is correspondingly weakened. Similarly, as Mr Brittenden identified, a claimant seeking to rely on the alternative safeguard in rule 52(a) would also have the practical difficulty of

considering what was, and was not, a 'necessary ingredient', and if in doubt, would be faced with having to express a written reservation in potentially broad, list-like terms, encompassing every potential ingredient or stage in the litigation. The value of the trade-off, facilitated by rule 52, of an efficient way of disposing finally of proceedings while subject to limited safeguards, would be reduced, or would in many cases, disappear, if it had such broad application.

50. The third reason is the risk of a perverse outcome, if, as contended for by the Respondent, the explanation in brackets in rule 52 comprises cause of action estoppel and issue estoppel entirely. In general, where an estoppel potentially applies, a Court or Tribunal may nevertheless consider material relevant to a correct decision, on a point involved in the earlier proceedings, if it could not by reasonable diligence have been adduced in those proceedings (see Lord Keith in **Arnold**, p109). That is one of the narrow "special circumstances" which Lord Sumption had recognised in **Virgin Atlantic Airways Ltd**, which would otherwise result in an injustice. Unless a claimant had referred to such material, of which he or she might even be unaware, in expressing a wish to reserve, or the ET was so aware before reaching its decision, neither exception under rule 52 would apply. The Respondent's interpretation of rule 52, as including issue estoppel, would have the effect of putting a claimant who had withdrawn their claim, which was dismissed under rule 52, without consideration of its merits, in a worse position than someone who had had an issue decided against them, following an ET considering the issue on its merits.

51. In summary, the Appellant's ground of appeal that the EJ erred in concluding that she was prevented from commencing the 2021 Claims because rule 52 gave rise to an estoppel, on the facts of this case, succeeds.

52. I turn to consider whether, regardless of the application of rule 52, the EJ's conclusion on issue estoppel was correct, such that the EJ was bound to reach the same conclusion, regardless of rule 52. I conclude that the EJ's conclusion was not sufficiently explained. I do not go so far as to say that it was not permissible for the EJ to have reached a conclusion that issue estoppel applied, but the EJ's analysis on estoppel, beyond adopting and accepting Ms Criddle's submissions, at paragraph 12 of the reasons, was very limited. The EJ referred to accepting that the 2021 Claims derived from the 'same source' (paragraph 12) and she stressed the importance of the 'inter-linked' components (the disclosures and detriments) in the context of rules 51 and 52, at paragraph 19. The need for a more detailed analysis of issue estoppel was particularly important, given its potentially draconian effects. As the parties accept, issue estoppel may still apply even where a judgment was reached without consideration of a claim on its merits (see **Lennon v Birmingham City Council**). However, before concluding that issue estoppel applies, a Court or Tribunal needs to be satisfied as to whether the effect of a judgment has been to decide that a particular condition has, or has not, been met. It remains important to identify, through analysis of legal submissions, the actual ground on which the existence of a claim was previously rejected. To pick one example, if a claimant had succeeded in an earlier claim that she had been subjected to a detriment done on the ground of a protected disclosure, a respondent would be

estopped from disputing the positive decisions on disclosure and detriment, as both are 'necessary ingredients' of that claim. In contrast, a claimant might lose such a claim on a number of bases. One might be that she succeeds in establishing a protected disclosure, but fails to establish detriment. A second is that she succeeds in establishing both a protected disclosure and a detriment, but fails to establish that the detriment is done on the ground of the disclosure. A third is that the claimant fails to establish a protected disclosure. In just those three scenarios, a claim may be rejected in a judgment, but on differing bases of whether the claimant was successful in establishing a protected disclosure. There remains the problem, not grappled with by the EJ, of identifying the actual ground on which the existence of claim was negatived in a summary judgment, and as to which the application of issue estoppel may, (and I stress may) as a consequence be limited. I have formed no view, except in my conclusion that there is more than one answer to the question of what the EJ could have decided, had her analysis been more fully explained. Instead, it was focussed, in a large part, on rule 52.

53. Finally, Mr Brittenden sought to argue before me that the EJ failed to carry out a 'broad, merits-based judgment', which takes account of the public and private interests involved and which also takes account of all the facts of the case, in considering whether a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before, as per the authority of **Johnson v Gore-Wood & Co** [2002] 2 AC 1. I accept Ms Criddle's submission in response that the principle of a 'broad, merits-based judgment', was applied by Lord Sumption in **Virgin Atlantic Airways Ltd** in

the context of **Henderson v Henderson** (see p 184C - 185A) and no submission was made to the EJ on that basis. While cause of action estoppel and issue estoppel are concerned with preventing abuses of process, their focuses are necessarily narrower.

54. In summary, the appellant's appeal succeeds on ground (1). The EJ erred in concluding that the effect of rule 52 was to give rise to estoppel on the facts of this case; and her general analysis of issue estoppel was not sufficiently explained. The EJ nevertheless considered, in the alternative, whether the 2021 Claims were an abuse of process, because of the terms of the COT3, to which I now turn.

Ground (2)

The Appellant's submissions

55. In summary, Mr Brittenden raised two distinct arguments. The first was that the terms of the COT3 could not be interpreted as compromising future claims, as the statutory provisions regulating settlement agreements stipulated that the agreement 'must relate to the particular proceedings' (section 203(3)(b) **ERA**). The COT3 could not, to the extent that it purported to settle unforeseen and potential future complaints, following this Tribunal's decision in **Bathgate v Technip UK Ltd and others** [2022] EAT 155.

56. The second was that the EJ had misconstrued the terms of the COT3. In particular, the settlement terms in clause 4 were expressly qualified by clause 8. Clause 8 made clear that it only settled claims up to the date of the COT3. This was consistent with clause 9, in which the Appellant warranted that she was not

aware of any other facts or circumstances which might give rise to any claim. It was also consistent with clause 10, which confirmed that nothing in the COT3 prejudiced any rights that the Appellant 'has or may have', not to suffer detriments as a result of her previous allegedly protected disclosures. Alternatively, any valid compromise of future claims had to be in language which was absolutely clear and left no room for doubt (see: **Royal National Orthopaedic Hospital Trust v Howard** [2002] IRLR 849).

The Respondent's submissions

57. Taking each of the Appellant's points in turn, the Respondent argued that section 203(3)(b) **ERA** and **Bathgate v Technip UK Ltd** are not relevant, as they relate to compromise agreements, not COT3 agreements, to which different statutory provisions apply. There is no corresponding limitation for COT3s based on 'particular proceedings.' Whether a COT3 can settle future claims is a matter of construction, see: **Arvunescu v Quick Release (Automotive) Ltd [**2023] ICR 271 CA.

58. On the construction of the COT3, the exclusions under clause 8 were irrelevant to the 2021 Claims, as they were within the scope of the issues/complaints in the 'Proceedings,' which the Appellant had agreed not to 'reactivate by any process whatsoever' (clause 4). Clause 10 confirmed the Appellant's right to make further disclosures, but did not affect the construction of clause 4. The Appellant did not raise the interrelationship between clauses 4 and 9 at the Preliminary Hearing before the EJ.

Conclusions on ground (2)

59. Turning to the Appellant's first argument that the COT3 was not capable of compromising potential future claims, I agree with Ms Criddle's submission that this is unsustainable for three reasons. First, section 203(3)(b) **ERA** applies to settlement agreements, not COT3s. This is because section 203(3) sets out the conditions for regulating settlement agreements under subsection (2)(f):

> **"(3) For the purposes of subsection (2)(f) the conditions regulating settlement agreements under this Act are that—**
>
> **….. b) the agreement must relate to the particular proceedings…"**

60. The requirements for COT3s are entirely different. These are governed by section 203(2)(e):

> **"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"**

61. Sections 18A to 18C of the **Employment Tribunals Act 1996** sets out the duties of an ACAS conciliation officer. None of those duties includes any requirement that a COT3 relates to particular proceedings.

62. Second, this Tribunal in **Bathgate v Technip UK Ltd** was considering a settlement agreement under section 147 of the **Equality Act 2010,** which has conditions analogous to section 203(3) **ERA**.

63. Third, to impose the requirements of section 203(3) **ERA** on a COT3 would be inconsistent with the Court of Appeal's decision in **Arvunescu**. At no stage of that case was it suggested that a COT3 must relate to particular proceedings. Instead, the Court had considered whether a later claim was caught by a clause

which applied to claims '*arising directly or indirectly out of or in connection with the claimant's employment'* Had there been a requirement for particular proceedings, such an analysis would have been irrelevant.

64. Next, I turn to the interpretation of clauses 4, 8, 9 and 10. I accept Ms Criddle's submission that clause 4 settled not just the complaints but the issues in the 'Proceedings,' which had been defined in clause 1 as the 2017 Claim. That was reflected in the Appellant's agreement not to reactivate those issues and complaints by any process, or to issue any further or new claim arising from or in relation to the issues and complaints. Whether the Appellant's disclosures were protected, was plainly and unambiguously an 'issue' in the 'Proceedings' (as made clear in paragraph 37 of the Respondent's response form) and Mr Brittenden does not suggest that it was not. In contrast to the definition of 'complaint' in rule 1, as applied in rule 52 of the **ET Rules**, the settlement additionally referred to 'issues'.

65. Mr Brittenden's argument instead focussed on the part of clause 8 which refers to settlement of claims up to the date of the COT3, which he submitted excludes any complaints, if they include events after the date of the COT3. In rejecting that argument, I accept that the first sentence in clause 8 merely recites, and is consistent with, the settlement of the Proceedings and the issues and complaints within them, as already indicated in clause 4. The operative exclusion term is in the second sentence of clause 8, which excludes claims to enforce the COT3, any latent personal injury clams which had not arisen or of which the Appellant could not reasonably be aware of at the date of the COT3 and accrued pension rights. I take judicial notice that all three exclusions are standard in both

COT3s and settlement agreements. The Appellant may, of course, bring future claims, but not to the extent that they reactivate the issues in the Proceedings, as clause 4 makes clear. The EJ did not err, in concluding at paragraph 25 of her reasons, that it was not sufficient that such claims post-dated the COT3 for them to be excluded from settlement. Rather, claims which repeated 'integral parts' (i.e. contested issues) of the 2017 Claims were settled.

66. I also accept that clause 9 does not qualify, nor is it inconsistent with clause 4. As with clause 8, it is a 'boilerplate' warranty that the Appellant is not aware of any claims other than those detailed in the Proceedings. While it may be true that the Appellant cannot have been aware of the alleged detriments which post-dated the COT3, she was aware of the issues, which included the contested allegations of protected disclosures in the Proceedings, which she had committed not to reactivate.

67. Finally, I do not accept that the EJ erred in her analysis of clause 10, which relates to the Appellant's ability to make further protected disclosures and raise other specified professional concerns. I do not accept that clause 10 could be fairly read disjunctively, so that the first part of it, before the phrase, 'and/or' (see paragraph 13, *supra*), preserves any rights that the Appellant has under the **Public Disclosure Act 1998**. First, that would render the whole of clause 4 ineffective. Second, the phrase 'and/or' simply extends the circumstances in which the Appellant can raise future concerns beyond the strict limits of protected disclosures under Part IVA **ERA** to where she was professionally obliged to raise issues with regulatory bodies. That did not amount to a right to relitigate issues within the 2017 Claim. Ground (2) discloses no error of law.

68. I deal with grounds (3) and (4) more briefly, as did the parties before me.

Ground (3)

The Appellant's submissions

69. Mr Brittenden submitted that the EJ's interpretation of the COT3 was incompatible with section 43J **ERA,** because that interpretation purported to preclude the Appellant from making a protected disclosure (subsection (1)) and it was, as a consequence, void because it amounted to an agreement to refrain from instituting or continuing proceedings (subsection (2)). The effect of the EJ's interpretation was that the disclosures in the 2017 Claim were treated as though they had never been made and the Appellant was prevented from repeating them.

The Respondent's submissions

70. The Respondent's position is that the EJ was correct in concluding, at paragraph 27 of the reasons, that section 43J **ERA** was not relevant. Clause 4 of the COT3 did not prevent the Appellant from making a protected disclosure. It prevented the Appellant from relitigating whether the disclosures in the 2017 Claim were protected.

Conclusions on ground (3)

71. Section 43J **ERA** states:

> **"(1) Any provision in an agreement to which this section applies is void in so far as it purports to preclude the worker from making a protected disclosure.**
>
> **(2) This section applies to any agreement between a worker and his employer whether a worker's contract or not), including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract."**

72. The EJ had reminded herself, at paragraph 19, of the importance of the policy implications in relation to protected disclosures. The EJ concluded that the Appellant,

> **"Can and may make new (or renewed) disclosures about what she believes to be ongoing public interest concerns where she also believes that she has suffered detriment as a consequence. She has agency in this respect. Paragraph 10 of the COT3 permits her to do this…"**

73. The EJ continued, at paragaph 26:

> **"….Paragraph 10 simply preserves, in accordance with sensible public policy as well as protection of the individual claimant, that if she discovers additional matters of concern over and above the original disclosures, she is entitled to raise them and it is still open to her to do so (subject to jurisdictional time limits)."**

74. It is therefore not correct, as the Appellant contended, that the EJ's analysis was limited to saying, at paragraph 27, that section **43J** ERA was not relevant. What the EJ's analysis makes clear is not that the alleged disclosures in the 2017 Claim are treated as never having occurred and she cannot repeat them; rather, that an expressly contested issue in the 2017 Claim, namely whether the Appellant had made protected disclosures, has been settled under the COT3 and cannot be relitigated, as it would be an abuse of process to do so. I accept Ms Criddle's submission that that is not the same thing as precluding the Appellant from continuing to make disclosures or reiterating the previous ones, which may

or may not be protected. The fact that that any claim for detriment on the ground of such disclosures may not succeed, is not as a result of any term preventing such disclosures, but rather the Appellant's acceptance that the disputed issue as to whether the disclosures in the 2017 Claim were protected, has been resolved. The EJ was therefore correct, in her conclusion, and she adequately explained why section 43J **ERA** was not relevant. Ground (3) discloses no error of law.

Ground (4)

The Appellant's submissions

75. The Appellant contends that the EJ erred in striking out her claims when she had raised, as an issue before the EJ, that the Respondent had acted in fundamental breach of the terms of the COT3, in relation to the reskilling exercise, as to which the Respondent had made commitment in clause 5. This entitled her to regard herself as no longer bound by the other terms of the COT3. The Appellant accepts that she did not include this as a claim, because the EJ would not have jurisdiction to hear a breach of contract claim while she was still employed, but she had raised it in response to the Respondent's strike-out application. Mr Brittenden submitted that in failing to consider this issue before striking out the 2021 Claims was to 'put the cart before the horse'.

The Respondent's submissions

76. The Respondent makes three points in response. First, there was no claim of a breach of the COT3 such that the Appellant was no longer bound by its terms.

77. Second, the Appellant had never specified the manner in which the Respondent had breached the reskilling commitment, by analogy to the case of **Johnson v Unisys Limited** [2001] UKHL 13.

78. Finally, a potential repudiatory breach, without the Appellant's express acceptance of that repudiatory breach was, Ms Criddle argued, a thing 'writ in water'. The Appellant had never identified how or when she had accepted the repudiatory breach.

Conclusions on ground (4)

79. The EJ's understanding of the issue is reflected in paragraph 24, where she states:

> **"In brief, part of the second claim is that the Claimant has been subjected to a detriment because she says that the Action Plan was not properly implemented according to the Objectives. She has not so far as I am aware sought to enforce the COT3 Agreement and obtain remedy by means of any breach of contract claim."**

80. Having reviewed the submissions to the EJ, in particular Mr Brittenden's skeleton argument to the EJ, while it refers to a fundamental breach in relation to the manner in which the re-skilling process was conducted (paragraph 22 of the written submissions dated 12 March 2022), the submissions continue:

> **"That the fundamental breach would operate to release C from the restrictions in the COT3 Agreement. However, it would be inappropriate to address this at this P/h as it would involve consideration of evidence. It is also not appropriate to deal with that as a preliminary issue given the overlap with the other claims."**

81. The Appellant did not suggest that she had purported to accept any repudiatory breach. I also accept that the manner of the repudiatory breach is not expressly

pleaded. The Appellant also did not wish the EJ to resolve the issue at the Preliminary Hearing. Presumably, the implication was that if the Respondent's strike out application was refused, this additional issue would be considered at the full hearing. However, nowhere was it suggested to the EJ that she could not strike out the 2021 Claims at the Preliminary Hearing. I also accept Ms Criddle's submission that the Appellant has not actually stated that she has accepted any repudiatory breach of the COT3. If anything, the EJ was considering the possibility that she may yet seek to enforce it. In the circumstances, the EJ cannot be criticised for not deferring her decision, when it was never contended that she ought to do so for the reasons now contended; where the Appellant has never argued that she has elected to accept what she says are repudiatory breaches of the COT3. Ground (4) also discloses no error of law.

Summary

82. While the EJ erred in her analysis of the effect of rule 52, she had carefully considered, in the circumstances, the issue of whether the 2021 Claims were an abuse of process. She did not err in that analysis (ground (2)); or in relation to the application of section 43J **ERA** (ground (3)). She did not fail to consider arguments about whether the Appellant was no longer bound by the terms of the COT3 (ground (4)). In the circumstances, the EJ's error on ground (1) is not such that her decision to strike out the 2021 Claims is unsafe and should be set aside.

83. The Appellant's appeal is therefore dismissed on the basis that, grounds (2) to (4) having failed, there is no basis for setting aside the EJ's judgment.