EMPLOYMENT TRIBUNALS

Claimant: Ms Amelia Ross

Respondents: (1) Select Fashion Ltd
(2) Nicholas Bagrie

Heard at: Watford (by CVP) **On:** 26 October 2023

Before: Employment Judge McNeill KC

Appearances
For the Claimant: Mr A. Johnston, Counsel
For the Respondents: Ms K. Sonaike, Counsel

PUBLIC PRELIMINARY HEARING - RESERVED JUDGMENT

1. It is determined that the Employment Tribunal does have jurisdiction to hear the Claimant's claims.

2. Any further submissions that the parties wish to rely on in relation to the consequences of the Tribunal's findings should be exchanged and provided to the Tribunal in writing, for the attention of EJ McNeill KC, no later than 21 days from the date when this judgment is sent to the parties.

3. The case should be listed together with case no. 3308093/2023, presented by the Claimant to the Tribunal on 13 July 2023, for a two-hour preliminary hearing in private and by telephone to consider the issues in the case, case management and the listing of the claims.

REASONS

1. This preliminary hearing was listed at a case management hearing before Employment Judge Michell on 30 August 2023. It was listed to determine two preliminary matters and to make any directions needed both in relation to this case (the first case) and, potentially, a second case (3308093/2023) against the

First Respondent and the Department for Business and Trade, presented to the Tribunal by the Claimant on 13 July 2023.[1]

Issues

2. At this hearing, the parties agreed that the only preliminary issue now to be determined was whether the Employment Tribunal has jurisdiction to consider the Claimant's claims against the First Respondent in the first case. Those claims are all brought under the Equality Act 2010 (EqA). If the Tribunal does not have jurisdiction, it was agreed that the claims against the First Respondent in the first case should be struck out as an abuse of process.

3. This jurisdictional issue arises in the context of a Company Voluntary Arrangement (CVA) approved on 22nd May 2023. The Respondents contend that by reason of the terms and/or effects of that CVA, the Claimant is required to discontinue the first case against the First Respondent. An earlier contention that the first case should be discontinued also against the Second Respondent (the Claimant's line manager from February 2022 until her eventual dismissal), for want of jurisdiction, was no longer pursued by the Respondents.

4. A separate application, to strike out the Claimant's claim against the Second Respondent or to make deposit orders in respect of that claim, identified in the case summary following the preliminary hearing on 30 August 1993 as a preliminary matter to be determined, was also no longer pursued by the Respondents.

5. Both Counsel provided skeleton arguments, which they developed in oral submissions. I was greatly assisted by the clear manner in which the respective arguments were advanced by both Counsel in a case that was not straightforward and where the issue to be determined is one in respect of which there is no binding legal authority. I was referred to a number of documents in a 350 page bundle and read a witness statement, produced by the Respondents, from Mr Andrew Jagger (a Supervisor of the CVA).

6. There was insufficient time at the hearing for me to reach a judgment and give reasons for that judgment. Both parties made it clear that they wanted written reasons for the judgment. I therefore reserved judgment.

Background Facts

7. The background facts relevant to the preliminary issue that I was asked to determine were not in dispute.

8. On 20th November 2009 the Claimant's employment with Genus UK Limited (trading as Select Fashion) commenced.

9. On 1st June 2022 the First Respondent acquired Genus UK Limited. Following a TUPE transfer, the Claimant became an employee of the First Respondent.

[1] The second case was not before me at this preliminary hearing. I was provided with no details of that claim, save for an outline of the nature of the Claimant's claims, which include a claim for unfair dismissal, notice pay and holiday pay.

10. On 3rd March 2023, the Claimant presented a claim against the Respondents, claiming direct sex discrimination, harassment related to sex, and victimisation.[2]

11. On 25th April 2023, the Claimant was dismissed by the First Respondent.

12. On 27th April 2023, following a difficult period of poor trading due to the cost-of-living crisis, the Directors of the First Respondent formally proposed a CVA in respect of the First Respondent, pursuant to which creditors and shareholders would agree on how the company's debts would be paid and in what proportions.

13. On 5th May 2023, pursuant to the rules governing CVAs, notice of a proposed meeting on 22nd May 2023 to consider the proposed CVA was sent to known creditors of the First Respondent by a standard letter dated 27th April 2023. The notice sent included a link to download all relevant documents.

14. The notice was sent to the Claimant on or about 5th May 2023. She accessed the link and viewed documents including the reports, notices, proof of debt forms, and the proposal relating to the CVA. The CVA binds the Claimant (and indeed the CVA would have been binding on her even if she had not received notice of the meeting).

15. On 22nd May 2023, the First Respondent entered into a CVA with its creditors, following a decision approving a proposed voluntary arrangement being taken at a Creditors meeting held on that date.

Statutory Framework for CVAs

16. The relevant statutory framework applying to CVAs is set out in Part 1 of the Insolvency Act 1986 (IA 1986).

17. Section 1(1) of IA1986 provides that:

"the directors of company (other than one which is in administration or being wound up) may make a proposal under this Part to the company and to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs (from here on referred to as a "voluntary arrangement")".

18. Under the terms of Part 1 of the Act, it is necessary for the proposed arrangement to be considered and approved (with or without modifications) at an appropriately convened Creditors' Meeting. Where the CVA is so approved, pursuant to section 5(2)(b) of the Act, it is binding on all affected creditors, whether or not they actually had notice of the Creditors' meeting.

19. In contrast to the statutory administration process provided for in Schedule B1 of IA 1986, which provides for a statutory moratorium on the institution or continuation of legal proceedings, a CVA does not impose such a statutory

[2] The Claimant contends that, although she made no express reference to pregnancy discrimination in her claim form, she identified complaints of unfavourable treatment during the protected period in relation to her second pregnancy and that those complaints are properly characterised as complaints of pregnancy discrimination.

moratorium. Where there is a CVA, there may be an application for a moratorium pursuant to the provisions of section 1A and Schedule A1 of IA 1986, as amended by the Insolvency Act 2000, but there is no statutory moratorium. In the current case, application for a moratorium was considered but was not considered necessary.

Relevant provisions of the First Respondent's CVA

20. The relevant provisions of the CVA are as follows:

(i) **Paragraph 2.5:** This proposal is in full and final settlement of all claims by creditors against the Company except for the claims of HMRC as a secondary preferential creditor. Provided that the CVA is fully implemented, creditors bound by the CVA will not have any recourse against the Company for the balance of their claims that remains unpaid at the end of the CVA.

(ii) **Paragraph 2.15:** The Company does not propose to make any redundancies and the CVA shall not affect the rights of any existing employees either in respect of any employee preferential claim or any other liability owed to an existing employee. Such preferential claims or any other liability owed to an existing employee will continue to be paid by the Company. Such preferential claims or any other liability owed to an existing employee will continue to be paid by the Company. **However, on about 20 March 2023 [the correct date is 3 March 2023] a claim was made to an Employment Tribunal by an individual who was dismissed by the Company on 2 April 2023. Whilst the Company disputes this claim, if the CVA proposals are accepted, then pursuant to paragraph 5.1 of the R3 Standard Conditions for CVAs (attached at Appendix 1), the individual will be obliged to discontinue the proceedings. In such an event, the Supervisors will adjudicate the individual's claim. The individual's claim will be treated as a Non-Critical Creditor. If, however, an element of the claim is deemed preferential then this element will be paid as a preferential creditor's claim in priority to all other unsecured claims (including Critical Creditors).**

(iii) **Paragraph 10.1** (Employee Claims): Save as provided at paragraph 2.15 in respect of the individual who has brought an Employment Tribunal claim, no employee claims are expected to rank for dividend other than those employees whose contracts were determined prior to the date of the creditors' approving this Proposal.

(iv) **Paragraph 15.2:** ….a debt of an unliquidated or unascertained amount shall be valued at £1 for voting purposes unless the Chair decided to put a higher value on it. Subject to subsequent changes in case law precedent, the Chair shall base such a decision on the following….

Employees – the employees have been given notice of the Proposals, both as unaffected contingent creditors of the Company and because the CVA affects their right to be paid from the National Insurance Fund ("NIF") in the event that the CVA fails or is terminated. If the CVA fails or is

terminated within the CVA period and the Company subsequently enters administration or liquidation during the CVA Period then the employees may lose the right to claim statutory payments from the NIF. **The disputed claim of the former employee who has brought a claim before the employment tribunal will be treated as an unliquidated or unascertained amount.**

(v) **Paragraph 17.1:** This Proposal is in full and final settlement of all claims by creditors against the Company except for HMRC where the provisions of the TTPA shall apply. The issue of a Notice of Full Implementation by the Joint Supervisors as provided for in this Proposal will be accepted by creditors in full and final settlement of their claim, including claims which are liquidated, unliquidated, certain, uncertain or contingent.

(vi) **Paragraph 17.2:** Any creditor who has commenced a legal process or other remedy… shall, upon acceptance of this Proposal by the requisite majority of creditors, be deemed to have waived such a claim and will rank alongside other unsecured creditors bound by the terms of this Proposal.

(vii) **Paragraph 38:** If a Creditor is dissatisfied with the Supervisor's decision with respect to the Creditor's own Proof (including a decision whether the Debt is preferential), the Creditor may apply to the Court, within 21 days (or such longer period as the Court shall allow) of receiving the statement [admitting or rejecting the Proof] for the decision to be reversed or varied.

The highlighted passages above refer to the Claimant's first case.

21. The CVA also incorporates Standard Conditions, which include the following:

1(g) "Creditor" is a person bound by the Arrangement to whom a Debt is owed.
1(h) "Debt" has the meaning given to it in Part 14 of the [Insolvency Rules 2016] with the modifications necessary to refer to a voluntary arrangement and an HMRC Debt.
4(3) After the commencement of the Arrangement, no Creditor shall (save with the consent of the Supervisor), in respect of any Debt which is subject to the Arrangement:
(a) Have any remedy against the property of the Company
(b) Commence or continue any action or other legal proceeding against the Company.

Rule 14.1(3) of the Insolvency Rules 2016 defines *"debt"* as including any debt or liability to which the company is subject at the relevant date and any debt or liability to which the company may become subject after the relevant date by reason of any obligation incurred before that date.

Rule 14.2 of the Rules further provides that: *"all claims by creditors except as provided in this rule are provable as debts against the company…, whether they are present or future, certain or contingent, ascertained or sounding only in damages".*

5 Existing proceedings against Company
5(1) [Discontinuance of existing proceedings] Legal proceedings against the

Company in existence at the commencement of the Arrangement in respect of Debts which are subject to the Arrangement shall, unless they are of a type contemplated by Paragraph 4(5) or the Supervisor otherwise directs, be discontinued by the Creditor with no order as to costs as soon after the commencement of the Arrangement as is practicable.

Provisions of the EqA relating to the Jurisdiction of the Employment Tribunal in employment-related discrimination matters

22. Section 120(1) of the EqA provides that: *"an employment tribunal has…jurisdiction to determine a complaint relating to –*
(a) a contravention of Part 5 [of the Act] (work)….

23. Where a tribunal finds that there has been a contravention of Part 5 of the EqA, it may, pursuant to section 124(2):

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
(b) order the respondent to pay compensation to the complainant;
(c) make an appropriate recommendation.

24. Section 144 of the EqA provides that:

(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.

Some exceptions to that general provision are then set out, in particular relating to settlement agreements. Those exceptions make no reference to a CVA or other arrangements within the insolvency regime.

25. Section 144 of the EqA bears some similarity to section 203 of the Employment Rights Act 1996 (ERA) but the two provisions are not in identical terms.

26. Section 203 of the ERA provides that:

(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.

As in section 144 of the EqA, there are certain exceptions to this general provision in relation to settlement agreements.

EU Retained Law and the Principle of Effectiveness

27. The EqA is the statute in which the UK implements into domestic law the protections from discrimination guaranteed under EU law. The principle of equal treatment of women and men in employment matters is well-established in Community law. It is set out in Council Directive 76/207/EEC (the Equal

Treatment Directive) and, more recently, in the consolidating Directive 2006/54/EC (the Equal Treatment Directive 2006). The concept of discrimination includes direct discrimination, indirect discrimination and harassment.

28. By section 6(3)of the European Union (Withdrawal) Act 2018:

Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it –

(a) in accordance with any retained case law and any retained general principles of EU law, and
(b) having regard (among other things) to the limits, immediately before exit day of EU competences.

29. The explanatory notes to the 2018 Act set out the following in relation to the general principles of EU law (explanatory note 59);

The general principles are the fundamental legal principles governing the way in which the EU operates. They are a part of the EU law which the EU institutions and member states must comply with. The general principles are applied by the CJEU and domestic courts when determining the lawfulness of legislative and administrative measures within the scope of EU law, and they are also an aid to interpretation of EU law. Examples of the general principles include proportionality, non-retroactivity (ie that the retroactive effect of EU law is, in principle, prohibited) fundamental rights, equivalence and effectiveness.

30. The principle of effectiveness, relied on by the Claimant in the current case, requires effective judicial protection of rights derived from EU law and an effective remedy for breach of those rights. Member states are entitled to impose conditions or limitations upon the exercise of rights derived from EU law but such restrictions must not render virtually impossible or excessively difficult the exercise of those rights.

Relevant Case Law

31. Both parties referred me to the judgment of the High Court (Chancery Division) (HHJ Alastair Norris QC) in **Re Britannia Heat Transfer Ltd (In Administration)** [2007] BPIR 1038 in which HHJ Norris QC held that a CVA is not an agreement for the purposes of section 203 of the Employment Rights Act 1996 (the ERA) and that *"no provisions of a CVA are avoided simply because they affect the statutory rights of employees"*.

32. HHJ Norris QC summarised his reasoning at paragraph 25 of his judgment as follows:

"a) That a CVA is (on the authorities) to be construed and given effect in the general law as if it were an agreement does not itself determine the general law that must be applied to the CVA so construed. That general law (the true meaning of the ERA) must still be ascertained.

b) The word "agreement" as a matter of first impression would appear to contemplate a set of obligations arising from mutual consent. Its natural meaning contemplates actual individual bilateral or multilateral bargains not arrangements that are only hypothetically contracts and that emerge in the adjustment of class rights (as is the case in insolvency).

c) There is no clear indication in the ERA that some extended meaning is to be given to the term "agreement". Although the statute addresses the consequences of insolvency upon the statutory rights, the draftsman has not adopted the language of insolvency (by referring anywhere to "arrangements") or given any clue that the structure of the ERA is to accord statutory rights a status of inviolability in an insolvency.

d) In the absence of clear direction in the ERA there is no compelling policy reason to extend s.203 to IVAs or to CVAs. Purely contractual rights are inevitably bound by the CVA. The key statutory rights are in any event guaranteed by the state,[3] and it is difficult to see why non-guaranteed statutory rights (eg those in excess of the statutory cap) are sufficiently important to require protection under s.203 if they are not of sufficient importance to be underpinned by a guarantee in the first place….".

33. Earlier in his judgment (paragraph 22), HHJ Norris QC referred to the CVA being treated as a statutory contract*: "the fact that a CVA is to be treated as a statutory contract does not mean that statutory contracts are "agreements" for the purposes of section 203 ERA…".*

34. HHJ Norris QC did not find that the existence of a CVA ousts the jurisdiction of the Employment Tribunal but rather that a CVA was not caught by section 203 of the ERA because it did not amount to an *"agreement".* There was no reason why statutory claims that were not guaranteed by the state (as under sections 182-184 of the ERA) should require particular protection under section 203.

35. There was no dispute between the parties that the decision in **Britannia Heat Transfer** was binding on an Employment Tribunal. The Claimant contended, however, that it was binding only in relation to the interpretation of section 203 of the ERA and not in relation to section 144 of the EqA.

36. I was also referred to two first-instance decisions in which the jurisdiction of the Employment Tribunal was considered in cases where there was a CVA:

    (i) **Ms H. Parry v New Look Retailers Limited** case no. 2409303/2020, a case in the Manchester Employment Tribunal (EJ Dunlop); and
    (ii) **Ms S. Jackson v New Look Retailers Limited** case no. 1803618/2019, a case in the Sheffield Employment Tribunal (EJ Brain).

    Those cases are not binding on this Tribunal, but I have read them and considered the reasoning of the Employment Judges in both cases.

[3] This is a reference to Part XII of the ERA and the scheme for payment in respect of key statutory rights out of the National Insurance Fund.

37. In neither case did the Tribunal conclude that the CVA had the effect of ousting the jurisdiction of the Employment Tribunal, at least for the purposes of determining issues of liability. In both cases, the Employment Tribunal reached the decision, on the basis of an interpretation of the domestic legislation, that its jurisdiction was not ousted. The CVA was not caught by section 203 of the ERA, there was no statutory moratorium in relation to the claimants' claims and no moratorium was granted by the Court. The claims could therefore proceed.

38. In **Jackson** (paragraph 87), the Tribunal (EJ Brain) held additionally that it would be *"a breach of the principle of effectiveness to permit the use of a statutory procedure such as that in Part 1 of the 1986 Act to effectively abrogate the claimant's rights to have her harassment complaint adjudicated upon by a specialist Tribunal".*

The Parties' submissions

Matters that were not in dispute

39. The Claimant is a creditor within the meaning of the CVA and, on the face of the CVA, is bound by its provisions. The CVA was specifically drafted with her claim in mind. The CVA provides that, she is required to discontinue her claim against the First Respondent and to have her claim adjudicated by the Supervisors of the CVA.

40. The Claimant is the creditor of an unliquidated sum and is properly described as a contingent creditor. Her claims amount to a debt. Claims do not have to have a precise value and need not be a provable debt in order to amount to a debt within the meaning of Rule 14.1.(3)(b) of the Insolvency Rules 2016.

41. The CVA provides at paragraph 17.1 that it operates as a full and final settlement of all claims by all creditors (save for HMRC), including of unliquidated and contingent claims.

Respondents' submissions

42. The Respondents placed considerable emphasis on the purpose of the CVA scheme, as a scheme which enables companies to reach agreement with creditors and shareholders to restructure their debts to facilitate the survival and continued operation of the business. It gives a company the chance of redemption by fixing all of its debts, howsoever arising, according to the agreed formula contained within the CVA.

43. That purpose should be kept in mind when considering matters relating to a CVA. Undermining that purpose, such as by allowing claims to proceed in contravention of clear terms of a CVA, would render the CVA scheme toothless.

44. The question of whether the provisions of the CVA are caught by section 144 of the EqA, the Respondents submitted, has effectively already been determined and settled by the court in **Britannia Heat Transfer Ltd**. Although HHJ Norris QC was considering section 203 of the ERA in that case, the same reasoning should apply to the current case. HHJ Norris QC's reasoning that a CVA is not an *"agreement"* within section 203 of the ERA because it does not contemplate

a set of obligations arising from mutual consent, applies equally to a *"contract"* within the meaning of section 144 of the EqA. A contract not only involves mutual consent but also other features, such as consideration and certainty, which are not necessary elements of a CVA.

45. A CVA operates by virtue of the statutory impact of following the CVA process. It does not depend on the agreement or even the knowledge of the Claimant for its operation and force, a notion, which is antithetical to the concept of an agreement or a contract. Since section 144 EqA applies only where there is a *"contract"* and does not apply to a CVA, the provisions of the CVA are effective to oust the jurisdiction of the Employment Tribunal and are not caught by section 144.

46. The Judge in **Parry v New Look** (EJ Dunlop at paragraph 61) correctly considered that the rationale for excluding a CVA from the ambit of section 203 of the ERA would apply equally to section 144 of the EqA.

47. In the current case, the CVA specifically addressed the position of the Claimant herself. She had already brought her first claim at the time that the CVA was approved and under the provisions of the CVA was required to discontinue that claim.

48. In relation to the Claimant's submissions on effectiveness, the Respondents submitted that it is the rules of a member state (statutory or regulatory provisions) that must not render the exercise of an individual's EU law-based rights impossible in practice or excessively difficult. In the current case, the Respondents submitted, it is the provisions of a CVA, which are there to help save a company which is insolvent. that potentially prevent the pursuit of rights derived from EU law and not any statutory or regulatory provisions. The provisions of a CVA, the Respondents submitted, are not caught by the principle of effectiveness and the principle is therefore not engaged on the facts of the case.

49. The policy behind CVAs is to enable a company to be saved when it is effectively insolvent. A claimant who is prevented from bringing a claim by a CVA should be in no different position from a claimant affected by the statutory administration process in Schedule B1 of the IA 1986. Under the statutory administration process provided for in Schedule B1 of the IA 1986, there would have been a moratorium on legal proceedings and the Claimant would have recovered nothing. But there could also have been a moratorium if the Supervisors had applied for a moratorium in thus CVA process. As it is, the Claimant can pursue her claim in the administration. Section 183(3) of the ERA provides for the statutory payments out of the National Insurance Fund to be made not just in the case of employer companies which have been wound-up but also where a company is in voluntary administration, demonstrating how employees affected by a CVA are treated in the same way as employees affected by a winding-up.

50. The Claimant was not deprived of the ability to pursue her discrimination claims. She could submit a proof of debt to the Supervisors, who could admit or reject that proof. This was a matter for the Supervisors' discretion. If the proof were rejected in whole or in part, paragraph 38 of the CVA provided for an appeal to the High Court where the Supervisors' decision could be rejected or varied.

51. The existence of these processes, set out in the CVA, the Respondents submitted, mean that it is not impossible in practice or excessively difficult to pursue a claim if the terms of the CVA are applied. It is not contrary to the principle of effectiveness that there should be some costs associated with the enforcement of EU law derived rights. Although the Supervisors' process is more likely to be by an assessment than any form of mini-tribunal, that does not contravene the principle of effectiveness. It is a question of balancing competing rights. There is some redress available under the CVA. The Claimant may achieve some remedy for discrimination and an adverse decision by the Supervisors may be reversed or varied by the High Court. In the context of an insolvent company, the principle of effectiveness is not breached.

52. In conclusion, the Respondents submitted, the Claimant's claims against the First Respondent must be discontinued by the Claimant, pursuant to the requirements of the CVA by which she is bound. The Tribunal has no jurisdiction to hear her claims. The Respondents contended that, in the context of tribunal proceedings, discontinue meant withdraw. The parties were in agreement that if the Claimant was required to withdraw her claim, the proper outcome was that the claim should be struck out as an abuse of process.

Claimant's Submissions

53. The Claimant submitted that the starting point in considering this matter was the important distinction between the statutory administration process under Part B1 of the IA 1986 and the scheme in relation to CVAs. While a statutory moratorium was imposed by parliament in the former process, it was not so imposed in relation to the CVA process. If parliament had thought a moratorium was appropriate in relation to voluntary arrangements, it would have said so.

54. The reference made by the Respondents to section 183 of the ERA, guaranteeing certain core statutory rights in the context of dismissal, did not assist the Respondents. Section 183 existed to protect the statutory rights of an employee where an employer was insolvent. That is the converse of the Respondents' submission in the current matter where it is submitted that there is no protection save under the provisions of the CVA.

55. There was a clear distinction to be drawn between an Employment Tribunal determining liability on the one hand and how the CVA might operate in relation to the enforceability of any remedy on the other. In relation to the latter, the Claimant accepted that the CVA could be relied on. If the Claimant were successful in her claim, the CVA might preclude enforcement of the judgment on the basis that the Claimant's contingent claims are compromised in the CVA. That does not, however, mean that she has compromised liability issues and that the CVA can oust the jurisdiction of the Employment Tribunal to decide on the merits of the claim.

56. The Claimant accepts that as the CVA was specifically drafted with this claim in mind, she cannot avail herself of arguments as to whether or not she is, on the face of the CVA, caught by the provisions which purport:

    (i) to require her to discontinue the claim that she has brought against the First Respondent; and

(ii) to require her to have the substantive merits of her complaints (and the appropriate financial remedy, if they are found to have merit) adjudicated by the Supervisors of the CVA.

She plainly is caught by the provisions of the CVA as the document was specifically drafted in order to achieve that end.

57. The CVA Proposal sought unilaterally to impose upon the Claimant a requirement to discontinue her claim (which she self-evidently would not otherwise have agreed to do). Whilst the Claimant had the right to attend the Creditors' Meeting, the practical reality (as the First Respondent well knew) is that, even if she had done so, she would not have been able to prevent the CVA being approved.

58. The Claimant submits that the Respondents' contention that the jurisdiction of the Tribunal has effectively been ousted by the provisions of the CVA is objectionable on the following grounds:

(i) the relevant provisions upon which the Respondents seek to rely purport to exclude the jurisdiction of the Tribunal to determine complaints of discrimination, harassment and victimisation under section 120(1) of the EqA and should be regarded as unenforceable by virtue of section 144 of the EqA;
(ii) even if the CVA is not a contract within the meaning of section 144(1) of the EqA, the jurisdiction of an Employment Tribunal to determine a complaint falling within section 120(1) of the EqA cannot be properly ousted other than in accordance with section 144;
(iii) moreover and in any event, it would be a breach of the principle of effectiveness to permit the use of a statutory procedure in order effectively to abrogate the Claimant's right to have her discrimination, harassment and victimisation complaints adjudicated upon by a specialist Employment Tribunal.

59. In the Claimant's skeleton argument, the Claimant's Counsel submitted that the conclusion in **Britannia Heat Transfer Ltd** that section 203 ERA did not apply to a CVA was not binding as regards the effect of section 144 EqA and that section 144, which applied to discrimination cases rather than cases under the ERA, was distinguishable from section 203. Although the Claimant did not abandon this argument in oral submissions, greater focus was placed on how section 144 interacts with the principle of effectiveness.

60. As the Claimant's argument that section 144 was distinguishable from section 203 was not abandoned, I summarise it briefly here.

(i) Section 203 refers to an *"agreement"* whereas section 144 EqA uses the word *"contract"*. While a CVA is not an agreement, it is a statutory contract. It therefore falls within the express wording of section 144, where the word *"contract"* is used.
(ii) The right not to be discriminated against on the grounds of a protected characteristic is distinct from a key statutory right arising only in employment law in that it is a right that applies in other contexts also, such as in relation to the provision of services and in

other areas. There is a key statutory right to have such complaints determined by a tribunal with appropriate expertise in the field of equality law.[4] Those key statutory rights derive from EU law and are subject to the EU law principle of effectiveness.

(iii) Section 144 plainly ought to be found to apply to the relevant provisions of the CVA in the present case in circumstances where the statutory contract has been specifically drawn up in such a way as to include specific provisions which purport to impose contractual obligations upon this Claimant as distinct from anyone else.

(iv) HHJ Norris QC in **Britannia Heat Transfer Ltd** at paragraph 25 d) did not consider that there was any compelling policy reason to extend section 203 to CVAs where key statutory rights which were considered of sufficient importance to be guaranteed by the state were already protected under the ERA. A similar recognition should be given to the rights under the EqA that are sufficiently important to be underpinned by EU law.

61. Even if the Tribunal finds that section 144 EqA does not render the relevant provisions within the CVA unenforceable, the Claimant submitted, the jurisdiction of the Tribunal cannot properly be ousted by the purported inclusion within a CVA of a requirement on a claimant to withdraw proceedings.

62. Parliament has given the specialist Employment Tribunal a statutory jurisdiction under section 120(1) of the EqA to determine complaints within Part V of the EqA and it would manifestly be in breach of the principle of effectiveness to allow the CVA scheme under the IA 1986 to abrogate a claimant's right to have sex discrimination claims adjudicated upon by that specialist Tribunal. An employer should not be permitted to use a CVA to negate the ability of a specific individual to bring a specific claim under the EqA. There is no proper basis for asserting that the Tribunal cannot proceed (or should not proceed if she continues to pursue them) to determine her complaints. As observed by EJ Brain at paragraph 91 of **Jackson:** *"it is difficult to see any basis upon which the Tribunal's jurisdiction can be ousted other than as provided for by the 1996 Act and 2010 Act themselves in sections 203 and 144 respectively".*

63. The remedies available to a successful claimant in a discrimination, harassment or victimisation claim are not limited to a financial remedy (compensation) but include under section 124 of the EqA a declaration as to the rights of claimant and respondent in relation to the matters to which the proceedings relate and any appropriate recommendations. In relation to compensation, anything awarded to the Claimant would be a contingent debt within the CVA but a declaration is also an important remedy, which is not available within the CVA. A distinction should be drawn between the rights and wrongs of the claim and whether the Claimant can enforce any financial remedy.

64. Under the EqA, the only provision for ousting the jurisdiction of the Employment Tribunal is under section 144. It is to that provision that the Tribunal must apply the provision of effectiveness.

[4] Some EqA claims outside the field of work fall within the jurisdiction of the civil courts and not the Employment Tribunal.

65. The effect of a finding that the jurisdiction of the Tribunal has been ousted would be to bar the Claimant from having her complex complaints of discrimination, harassment and victimisation adjudicated upon by the Employment Tribunal, with members versed in equality law, and to compel her to have those complaints submitted to the dispute resolution mechanism provided for by the CVA, namely adjudication by those appointed to supervise the implementation of the CVA. This is a case in which the core facts upon which the Claimant's complaints are based are in dispute. There is no clear indication within the CVA as to the process by which a disputed claim in which the core facts are in dispute will be adjudicated. The Proposed Joint Supervisors (Mr Solomons and Mr Keley of Moorfields Advisory Limited) are accountants/insolvency practitioners, not employment lawyers, still less a specialist tribunal. They are not qualified to determine the Claimant's claims fairly. An appeal to the High Court against a proof of debt, where costs are likely to be incurred and where the unsuccessful party is likely to have to pay the costs of the successful party, is not analogous to a determination of discrimination claims by a specialist labour court.

66. The Claimant acknowledged that if any of her discrimination complaints were successful, the CVA might act as an effective bar to the enforcement of any judgment in her favour and might compel her to use the mechanisms provided for within the CVA. However, that did not mean, nor should it mean, that the CVA ousts the jurisdiction of the Tribunal to determine whether the complaints are well-founded. The correct legal position is that the Claimant, by her deemed acceptance of the terms of the CVA, has effectively compromised only her contingent claims under the 2010 Act. The contingency remains one which can, and should, properly by determined by the Employment Tribunal.

67. The purported requirement placed upon the Claimant to discontinue her Tribunal claim does not alter the position as to the Tribunal's jurisdiction. The Claimant adopted EJ Brain's analysis at paragraph 91 of **Jackson**, having determined the position in relation to a CVA that did not in fact include such a requirement: *"Had…Clause 4 of the CVA[5] generally [been] couched in wider terms purporting to waive the statutory claims and requiring discontinuance of them, then my conclusions would have been the same. The statutory rights cannot be ousted other than by compliance with sections 203 and 144, there is no moratorium imposed by a CVA and thus there is no exclusion of the Employment Tribunal's jurisdiction".*

68. The Claimant submitted in conclusion that the Tribunal ought properly to find that its jurisdiction has not, as the Respondents contend, been ousted by the CVA. The Claimant's claim should be permitted to proceed to a final hearing at which a determination could be made upon the substantive merits of the Claimant's various complaints.

Analysis and Conclusions

(i) <u>As a matter of ordinary domestic law interpretation, do the provisions of the CVA fall within the meaning of the word *"contract" in section 144 of the EqA?*</u>

[5] This is a particular reference to a Waiver and Moratorium clause in the relevant CVA.

69. I can see no principled reason for distinguishing between an *"agreement"* in section 203 of the ERA and a *"contract"* in section 144 of the EqA. The word *"agreement"* in section 203 of the ERA, as held in **Britannia Heat Transfer Ltd** (paragraph 25 b) of the judgment), contemplates *"a set of obligations arising from mutual consent",* which may be individual bilateral or multilateral bargains. A "*contract"* also contemplates similar obligations arising from mutual consent, with a contract requiring additional elements such as consideration and certainty.

70. The obligations within a CVA are not bilateral or multilateral bargains arising from mutual consent, but the consequence of arrangements made under the statutory insolvency scheme by which individual creditors may be bound without their consent or without even having notice of the Creditors' Meeting where the CVA is considered for approval.

71. The fact that a CVA may be described as a *"statutory contract"* does not alter its character so as to bring it within the meaning of section 144. The essential element of mutual consent is missing.

72. I therefore conclude that, as a matter of ordinary domestic law interpretation, the provisions of the CVA are not caught by section 144 of the EqA and that the provisions of the CVA are not rendered unenforceable by virtue of section 144.

(ii) <u>Is section 144 the only mechanism for ousting the jurisdiction of an Employment Tribunal to determine complaints under section 120(1) of the EqA?</u>

73. It is not explicitly stated either in section 144 or elsewhere in the EqA that the jurisdiction of the Employment Tribunal over claims falling within section 120(1) of the EqA can only be ousted in the specific circumstances set out in section 144(3)-(6) of the EqA. In the context of insolvency, although there is no statutory moratorium arising where there is a CVA, there is such a moratorium arising in the context of an IA 1986 Schedule B1 statutory administration process which has the effect of preventing the pursuit of claims for discrimination in the Employment Tribunal and therefore, it may be said, ousts the Employment Tribunal's jurisdiction.

74. The Respondents' arguments as to the purpose of the CVA scheme, which facilitates the potential survival and continuation of businesses, are powerful. The EqA does not include any term to the effect that the provisions of such a scheme are unenforceable if they exclude or limit claims under the EqA. The Claimant accepts in relation to her claim for a financial remedy that such a claim would be resolved within the CVA process. In that respect also, the Tribunal's jurisdiction is effectively ousted.

75. For the above reasons and as a matter of pure domestic law, I do not accept the Claimants' submission that the jurisdiction of the Employment Tribunal is only capable of being ousted by application of the provisions of section 144 of the EqA.

76. I do, however, accept and adopt the reasoning of EJ Dunlop and EJ Brain in the **Parry** and **Jackson** cases in finding that in the absence of any statutory

moratorium or any moratorium granted by the Court in the context of a CVA, as a matter of pure domestic law interpretation, the jurisdiction of the Employment Tribunal under section 120(1) of the EqA is not ousted by the provisions of the CVA.

(iii) Would it be a breach of the principle of effectiveness to permit the use of a statutory procedure (the CVA) in order to abrogate the Claimant's right to have her discrimination, harassment and victimisation complaints adjudicated upon by a specialist Employment Tribunal?

77. It is not in dispute that the principle of effectiveness applies generally to claims brought under the EqA. Pursuant to section 6 of the European Union (Withdrawal) Act 2018, general principles of EU law have been retained, including the prohibition of discrimination, including sex discrimination in relation to employment, as set out in Directive 2006/54/EC, the Equal Treatment Directive.

78. Some conditions or limitations may be imposed on the exercise of rights derived from EU law, such as time limits or territorial restrictions. However, such restrictions must not render virtually impossible or excessively difficult the exercise of those rights.

79. The Respondents' submission that the principle of effectiveness is not engaged in this case because the provisions of the CVA are not the sort of conditions to which the principle of effectiveness applies I did not find persuasive. The principle of effectiveness requires that there should be effective judicial protection for rights derived from EU law. The question of whether there is effective judicial protection is answered by looking at how the relevant rights are protected in domestic law. That may include whether any procedural conditions for exercising those rights, such as time limits, provided for under domestic law, render the exercise of the rights impossible in practice or excessively difficult. The provisions of the CVA do not amount to those types of conditions but that does not mean that the principle of effectiveness is not engaged. The question of whether there is effective protection is a matter the Employment Tribunal must still consider, in the context of the provisions of the CVA.

80. If the Respondents were correct, the important principle of effectiveness would be subject to an exception that is not envisaged in the EqA and is potentially contrary to EU law. The consequence of the Respondents' submission is that the protections provided by section 120(1) of the EqA, which require that discrimination claims relating to work be adjudicated upon by a specialist Employment Tribunal in accordance with conditions set out in the EqA, could simply be avoided by provisions in a CVA expressly ousting the Tribunal's jurisdiction.

81. On the basis that the principle of effectiveness is engaged, the next issue is whether the dispute resolution mechanism provided for in the CVA provides effective protection for the Claimant's rights derived from EU law. If it does not, the effectiveness principle is breached.

82. In relation to that question, the Respondents submit that the process provided for in the CVA means that the Claimant's rights are effectively protected. The

process involves a proof of debt and a process of assessment of the Claimant's claim, with a potential appeal to the High Court, if the Claimant is dissatisfied with the Supervisors' decision, where that decision could be revoked or varied.

83. I preferred the Claimant's submissions on this issue. There are disputes of fact on the core issues in the case; there is no process set out in the CVA as to the process to be applied in adjudicating the Claimant's complaints; the Supervisors, who would determine the complaints, are accountants/insolvency practitioners, not judges, let alone judges versed in equality law and are not qualified to determine the Claimant's complaints fairly; an appeal to a High Court will involve cost and is not analogous to a determination of discrimination claims by a specialist labour court.

84. I concluded that the dispute resolution process is not compliant with the principle of effectiveness and does not provide for effective protection of the Claimant's rights derived from EU law.

85. For all the above reasons, I find that the Employment Tribunal has jurisdiction to hear the Claimant's claims. That jurisdiction is not ousted by the provisions of the CVA, referring to the Claimant specifically or more generally.

86. In terms of the consequences of this finding, my provisional view is that section 144(1) of the EqA should be interpreted so as to comply with the principle of effectiveness so that the word *"contract"* includes the provisions of a CVA. Courts and Tribunals are obliged to interpret domestic legislation in accordance with EU law and the principle of effectiveness. I have not heard specific submissions on this matter and the parties are invited to provide such submissions in writing within 21 days of the date that this decision is sent to the parties should they disagree with this provisional view.

87. The case will now be listed for a further preliminary hearing together with the second case for the purposes of listing the two cases, defining the issues in the cases and making any case management orders.

Employment Judge McNeill KC

3 November 2023

Sent to the parties on:

…9 November 2023…….
For the Tribunal Office:

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