



# EMPLOYMENT TRIBUNALS

**Claimant:** A

**Respondent:** Biesse Group UK Ltd

**Heard at:** Watford Employment Tribunal  
**On:** 4-5 September 2023

**Before:** Employment Judge Young (sitting alone)

## **Representation**

Claimant: Litigant in person

Respondent: Mr Fuller (CILEX legal executive)

**JUDGMENT** having been sent to the parties on 20 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Introduction

1. The Claimant was employed as by the Respondent from 12 August 2019 until 11 May 2022. The Claimant contacted ACAS initially on 2 March 2022 and the early conciliation certificate, R126663/22/65 was issued on 12 April 2022. R126663/22/65 was settled via a COT3 agreed on 21 April 2022 and signed 4 May 2022 by the Claimant. It is a reference that the Claimant was unhappy with forms part of that COT3 that led the Claimant to contacted ACAS again on 27 June 2022. The early conciliation certificate, R183110/22/31 was then issued on 7 August 2022. The Claimant then presented her claim form on 2 September 2022.

## Hearing & Evidence

2. The claim was listed for a public preliminary hearing for 2 days. The Claimant attended. Ms Manjit Garlick attended for the Respondent and was represented by Mr Thomas Fuller.
3. In Employment Judge Quill's order dated 1 June 2022, issues were discussed and the parties agreed those issues today.

4. I was provided with 2 bundles. One was the main evidence bundle, the other was a supplemental bundle. I was also provided with 4 audio/video recordings. 2 showing how the Claimant viewed the COT3 and the other 2 were of audio files of telephone conversations that the Claimant had with 2 ex directors of the Respondent. I heard evidence from the Claimant who provided a written witness statement which included the Claimant's written submissions as well. I had a chronology from the Respondent and one from the Claimant and I had written submissions from Mr Fuller on behalf of the Respondent.
5. At the end of day 1, the Claimant gave evidence that she had personal injuries resulting from the Respondent's alleged victimisation and harassment and failure to make reasonable adjustments. The Claimant was permitted with Respondent indicating they had no objection to rely upon medical evidence to substantiate her claim that she had a latent free standing personal injury claim. The Respondent sought to rely upon a disability impact statement that was produced following Employment Judge Quill's directions to contest the Claimant's assertion of personal injury. However, the Respondent withdrew that request and was content to rely upon the evidence presented by the Claimant following Mr Fuller's questioning.

### **Claims and Issues**

6. The Claimant's claim form included a claim for victimisation, harassment on the grounds of disability and failure to make reasonable adjustments.
7. The Claimant's case was that the reason the settlement agreement was not valid because there was fraudulent misrepresentation to induce the Claimant to sign the agreement.
8. The issues in the case were set out in the case management summary of preliminary hearing held on 26 April 2023 as follows:
  - 4.1 Did the parties execute a valid and binding COT3 agreement? If so, from which date?
  - 4.2. If there is a valid and binding COT3 agreement, does it have the effect of preventing the Claimant continuing with any of the complaints mentioned in the list of issues below. If so, which?
  - 4.3. Should there be a judgment dismissing any complaint as a result of the decisions on the preliminary issues?
  - 4.4. Should any of the complaints be struck out as having no reasonable prospects of success?
  - 4.5. Should any deposit order be made?

### **Findings**

1. I make the following findings of fact on the balance of probabilities.
2. I have had careful regard to all the evidence that I have heard and read about concerning the Claimant's personal circumstances. It is not necessary for me to rehearse everything that I was told in the course of this case in this judgment, but I have considered all the evidence in the round in coming to make my decision. All numbers in square bracket with "SB" next to the number are page references to the supplemental bundle, otherwise all reference to page numbers alone are a reference to the main evidence bundle.
3. In my assessment of the Claimant's evidence I took into account the Claimant's dyscalculia, for which no reasonable adjustments were required, the Claimant's tendency to have emotional outbursts arising from her PTSD (she had 2 during the hearing) and considered she was a vulnerable witness who may have trouble remembering dates.
4. On 2<sup>nd</sup> March 2022 the Claimant notified ACAS of a dispute under R126663/22 [83]. The Claimant said that this was in relation to her complaint about an assault. On 16<sup>th</sup> March 2022, the Claimant was invited to ask for settlement proposals by ACAS [84]. On 28<sup>th</sup> March 2022 – 5<sup>th</sup> April 2022, there were discussions between the parties about the terms of settlement [85]. The Claimant said that it was at this early stage that the Claimant obtained legal advice about the settling her claim.
5. On 11<sup>th</sup> April 2022 the Claimant resigned from employment [87]. On 13<sup>th</sup> April 2022 ACAS issued the EC Certificate to the parties [88-90]. The Claimant said that this was a mistake, but I find that the conciliation period had clearly expired and could not be extended any further under rule 7 (2) of the Early Conciliation Rules of Procedure contained in The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 (SI 2014/254).
6. By email dated 21<sup>st</sup> April 2022 at 08:47, ACAS emailed the Claimant [90], the Respondent's draft COT3 [92-95]. The draft document was four pages. On the fourth page was annex A which was a proposed agreed reference which said "*it is not company policy to provide a full reference for any ex employee*" [95]. The Claimant received the document. She read the agreement but did not see the reference attached. However, clause 10 of the agreement stated "*The Respondent will provide the Claimant with a reference in the terms agreed in the attached Annex A, and when responding to a written or verbal request for a reference from a prospective employer, will do so in a manner which is consistent with the agreed reference*" [93]
7. I accepted the Claimant's evidence that the Respondent did not discuss the reference with the Claimant before including it in the draft COT3, however I find that all drafts of the COT3 did have the reference included in the draft and the explicit mention of reference at clause 10 was a clear indication that the Respondent was not seeking to hide the reference.
8. The Claimant having read clause 10 knew that there was in existence a reference but she had not seen it as she did not scroll down to the last page

of the agreement where the annex A was contained. The Claimant said that she thought that a reference would be agreed later with her since she did not see the Annex A referred to.

9. In the ACAS' email dated 21<sup>st</sup> April 2022 at 08:47 with the draft COT3 attachment, the conciliation officer had offered to discuss the agreement with the Claimant if she was not sure about the terms of the agreement or if she wanted to make any changes [91]. The Claimant said that she did not think to ask ACAS about her query regarding the missing reference.. The Claimant gave evidence that she got legal advice early on in the ACAS conciliation process. I find the Claimant got legal advice on the agreement.
10. The Claimant replied back to ACAS by email at 13:46 on 21<sup>st</sup> April 2022 to say, "*Yes happy with everything thank you.*" [96]. At 14:08, 21<sup>st</sup> April 2022, ACAS replied back to the Claimant to confirm that there was a "*legally binding agreement*", and that Claimant was sent the final COT3 as provided by ACAS in the COT3 format. [95-100]
11. I find that the Claimant agreed the COT3 with annex A on 21<sup>st</sup> April 2022 by her email dated 21<sup>st</sup> April 2022 at 13:46 [96]. I find that the Claimant did read the agreement but did not read the annex A at the time and before agreeing the draft COT3 on 21<sup>st</sup> April 2022 at 13:46.
12. In the draft COT3 it had a general release at clause 2 which was replicated in the final COT3 of "*All other claims, complaints or proceedings (if any) whether under common law, contract, statute or otherwise and/or whether expressly contemplated or not and/or which may arise or of which the Claimant may become aware in the future under English, Scottish, Northern Irish and/or European Union law or otherwise, which the Claimant has or may have or have brought or may bring against the Respondent or any their group companies (as the case may be) or its or their respective current or former shareholders, officers or employees arising out of or in connection with their employment and/or offices held or its/their termination; but excluding, for the avoidance of doubt, any claim to enforce the terms of this COT3 Agreement and any latent free-standing personal injury claim, and any claim in respect of Accrued Pensions Rights*". This clause will be referred to as the general release clause and or clause 2 of the COT3.
13. It was only following receipt of the final COT3 copy did the Claimant notice the wording of the reference the final page of the final COT3.[101]. The Claimant emailed ACAS at 17:22 on 21<sup>st</sup> April 2022 that "*I don't believe the reference is fair as it doesn't mention anything about my skills, duties or my successes during my employment. I would like to agree on a reference that includes my high performance in marketing where engagements rates were far beyond average. I have done very well in this job and I don't believe the above reference refers this. Can we agree to a reference please? The starting date is incorrect. My start date was August 2019.*"[4 SB]. ACAS then responded to the Claimant on 22<sup>nd</sup> April 2022 at 08:45 that "*as the wording has been agreed and is now legally bound I am unable to make any amendments.*" [4 SB]
14. The Claimant emailed ACAS saying she hadn't signed the document and

that the date was wrong and that it was wrong to expect her to sign the document. [4 SB].

15. The Claimant responded quickly at 08:51 on 22<sup>nd</sup> April 2022 requesting ACAS to ask the Respondent to change the employment start date and to provide the Claimant with a genuine reference that reflected her role and responsibility and job performance [102]
16. In that email dated 22<sup>nd</sup> April 2022 at 08:51, the Claimant also referred to adding to the legally binding agreement. [102] In evidence the Claimant was asked what she meant by this in her email she accepted that it meant that the COT3 could not be changed, although she said she was not sure about the reference. I accepted the Claimant's evidence that she contemplated and agreed that all future claims would be settled by the COT3 agreement. I find that the Claimant knew and accepted by 22<sup>nd</sup> April 2022 that the COT3 was legally binding on her and that it could not be changed.
17. At 09:29 on 22<sup>nd</sup> April 2022 ACAS emailed the Respondent asking to change the start date and provide a further reference in the terms requested by the Claimant [103]. ACAS followed up their 09:29 email with an email at 09:52 explaining that they had told the Claimant that the agreement was legally binding. ACAS state in that email "*As it is the reference and not the actual COT3 agreement terms it is up to you whether you wish to make any changes. If the date is indeed wrong then this will need to be altered to ensure it is [sic] factually correct.*" [104] ACAS also said they will ask the Claimant for an outline of the wording. In the email to the Claimant [105], at 09:54 on 22<sup>nd</sup> April 2022 the ACAS officer said "*The Respondent has asked for wording which you would like included as part of the reference so that they can consider the request fully. They are also aware that the date will need to be altered to show as factually correct.*" The Claimant suggested in evidence the fact that the Respondent had asked her for characterful reference wording was misleading to her. I find that it was not misleading. The Respondent was asking for wording to see what specifically the Claimant was asking for.
18. At 10:39 on 22<sup>nd</sup> April 2022 ACAS sent the Respondent the Claimant's suggested wording for a reference [106]. The wording provided focused on what the Claimant considered her strengths to be. Once the Claimant confirmed her start date 16 May, the Respondent representative responded with "*My clients company policy is to only provide a factual references to all employees, therefore the original reference still remains unchanged. We have amended the start date as requested.*" [109] The Claimant relies upon this statement as being a fraudulent misrepresentation. However, I find the Claimant did not rely on this statement in respect of agreeing the COT3, since she had already agreed the COT3 with the reference on 21<sup>st</sup> April 2022.
19. On 26<sup>th</sup> April 2022, the Claimant asked for the reference policy from the Respondent, but the Respondent does not agree to provide the Claimant with the policy. It later transpired that the Respondent's policy is not written down.

20. On 26<sup>th</sup> April 2022 at 15:50, ACAS communicates with the Claimant that the Respondent would not be making any further amendments to the reference [111].
21. At 15:56 on 26<sup>th</sup> April 2022, the Claimant responded *“Nevermind. I’ll accept the agreement but it is a shame they can’t provide me with a policy.”* [112]
22. The Claimant’s evidence was that she signed the final COT3 because of the fraudulent misrepresentation of the Respondent when the Respondent stated that they only provide factual references to all employees. However, I find that the Claimant did not sign the COT3 because of this representation, the Claimant was not concerned about the policy that is why she stated *“Nevermind”* in her email when she was not provided with it.
23. On 27<sup>th</sup> April 2022 at 14:45 the Claimant emailed Rebecca Spencer (HR) formerly of the Respondent asking for a copy of its reference policies. [143] Later at 16:26 that day, Ms Spencer responds stating *“Unfortunately it is not a policy we have but is a procedure we follow. It is not company procedure to provide a full reference for any ex-employee, this is the standard company procedure for anyone who has left the business and how all reference requests are handled”*. [142]
24. Between 27<sup>th</sup> April-4<sup>th</sup> May 2022 the Claimant asked Ms Spencer directly multiple questions about the reference policy/procedure. Ms Spencer confirmed there was not a written policy in place and that the policy not to provide ex employees with full references had been in place for as long as she had been in her role. The Claimant says it was at this point that she started to suspect that the Respondent was not being honest with her about the factual reference policy. I accept the Claimant’s evidence on this point.
25. On 4<sup>th</sup> May 2022 at 15:10, ACAS emailed the Claimant the updated version of the COT3 with the amended date. [117-121]. The Claimant returned signed the updated COT3 by email dated 4<sup>th</sup> May 2022 at 15:26 [122-126]. On that version the start date of employment is stated as 16 May 2019 [126]. After having signed the final COT3 at 23:48 on 4<sup>th</sup> May 2022 [125], the Claimant emailed ACAS to say that the start date in the reference in annex A of updated COT3 was wrong and that her employment started in August 2019 [127].
26. At 15:38 on 4<sup>th</sup> May 2022, the Claimant emailed the Respondent to say she wanted to raise a grievance. Ms Spencer responded telling the Claimant that she could raise a grievance in line with the Respondent’s grievance procedure before the termination of the Claimant’s employment on 11<sup>th</sup> May 2022 as agreed in the COT3 [140]. The Claimant emailed Ms Spencer her grievance by email dated 10<sup>th</sup> May 2022 [139], although the Claimant’s grievance is dated 6<sup>th</sup> May 2022. The Claimant’s grievance was about the Respondent’s refusal to provide her with a characterful reference and that there was no written policy for references [144-145]. The Claimant was invited to attend a grievance hearing at the Respondent’s offices on 13<sup>th</sup> May 2022 [146]. However, the grievance hearing eventually took place on 18<sup>th</sup> May 2022 [147-149] convened by the Claimant’s line manager Mr Andrew Baker. Ms Spencer was also present at the grievance hearing. At the grievance hearing Ms Spencer explained that the factual reference

policy had been in place for at least 5 years and that the only reason why the Respondent would change that policy was if there was a need to. [148]. By letter dated 26<sup>th</sup> May 2022, the Claimant's grievance was not upheld [153-154]. Mr Baker's grievance outcome letter concluded that whilst there was no written policy in place for references there was a procedure in place where all reference requests needed to be submitted to HR. [153].

27. The Claimant explained in evidence that she had requested a reference from the Respondent in respect of a job that she was offered in the last year. The Respondent provided the factual reference, and the Claimant accepted the offer of role, although she says she did not stay in the role for any significant time. She admitted that the reason she left the role was because it was not right for her.
28. As the Claimant was suspicious about the Respondent's factual reference policy the Claimant contacted 3 ex directors of the Respondent. The Claimant's evidence was that it was as a result of what these 3 ex directors said that led her to believe that the Respondent fraudulently misrepresented that there was a policy that only factual references were given. The Claimant did not have any evidence from 1 of the ex directors, but the Claimant relied upon two recordings, 1 of Mr Chris Arends and ex Director of the Respondent on 1 June 2022 and Mr Paul Carlson another ex Director of the Respondent in December 2022 as evidence that the Respondent fraudulently misrepresented that there was a policy that only factual references were given. It was after having the first conversation with Mr Arend on 1 June 2022, that the Claimant said that she experienced depression.
29. Both Mr Carlson and Mr Arend say on that recording that they are not aware of a written policy of providing factual references and they are willing to provide characterful references for the Claimant and they have been asked to provide characterful references whilst at the Respondent. They don't say when they provided the characterful references and whether it was in the last 5 years. Neither ex director knew they were being recorded. The Claimant said in evidence that these ex directors would know what the policies were of the Respondent because they were on the board and they would have discussed the policy. Mr Carlson said that he had some training in law and had been involved in HR matters in the Respondent and had recruited Ms Spencer to her role. I find that neither ex Director say on that recording or in the transcript that they have seen the contents of a reference, in fact, Mr Carlson said that he definitely had not. The Claimant provides no evidence of what was contained in references provided by the Respondent rather than individual employees' providing references in their own right or when the characterful references written by either ex director was in the last 5 years.
30. I find the recordings demonstrate that either ex Director were involved in writing policies in the Respondent's business. I find that Ms Spencer as HR would know what the policy was regarding references and Mr Arend as a commercial director and Mr Carlson as a Finance director would not and did not have involvement in the reference policy of the Respondent. The Claimant accepted that Ms Spencer believed that there was a policy of only providing references, but that she was wrong. However, being wrong is not

the same as being fraudulent and I find that Ms Spencer did believe and did carry out the Respondent's policy by only providing factual references for ex employees. I find that it was the procedure of the Respondent to provide factual references for ex employees. This did not rule out for example a director providing a reference in their personal capacity rather than on behalf of the Respondent.

31. On 5<sup>th</sup> May 2022 at 18:27, ACAS emailed the Claimant to confirm that her dates of employment were 12 August 2019- 11<sup>th</sup> May 2022. The Claimant responded at 18:27 to confirm those were the correct dates [130]. ACAS sent out another COT3 which the Respondent signed on 11 May 2022 [134].
32. The Claimant immediately appealed the grievance outcome on 26<sup>th</sup> May 2022. By letter dated 27<sup>th</sup> May 2022 Mr Gerard Scrase, CFO of the Respondent invited the Claimant to attend an appeal hearing on 30<sup>th</sup> May 2022. Between 26<sup>th</sup> to 31<sup>st</sup> May 2022, there were emails between the Claimant and Respondent about the location of the appeal meeting. The Claimant wanted the meeting to be held online whilst the Respondent wanted the meeting in person. On 20<sup>th</sup> June the Claimant was invited to attend a grievance appeal hearing 23<sup>rd</sup> June 2022 at a hotel in Daventry. However, the Claimant refused to attend in person and so by letter dated 24<sup>th</sup> June 2022 the Respondent withdrew the grievance appeal hearing on the basis that the Claimant had settled all her claims under the COT3. [159-160]
33. The Claimant gave evidence that her victimisation, harassment and reasonable adjustments claims were excluded from being covered by the COT3. The Claimant put her victimisation claim as being victimised by being given a factual reference because she had made a complaint that would fall within the Equality Act 2010. The Claimant said other employees were given characterful references. The Claimant's harassment and reasonable adjustments were based upon the Respondent refusing to hear her grievance appeal online. She said that her victimisation claim was an enforcement of the COT3 terms and therefore was not included in the general release clause in the COT3 that settled all existing and future claims.. The Claimant gave evidence that all her claims also fell under the latent free standing personal injury claim which was also a "carve out" of the general release clause in the COT3. I find that it was the Claimant's intention and she accepted that all future claims were covered by the COT3 save as to claims what fell within the carve outs.
34. The Claimant said she had a new diagnosis of anxiety displacement and separately depression from 14<sup>th</sup> August 2023 and this was a latent free standing personal injury claim arising from the Respondent's victimisation, harassment and reasonable adjustments in respect of events that took place after the COT3 was agreed. The Claimant provided GP records from 14<sup>th</sup> August 2023 as proof of her personal injury of anxiety displacement as well as depression. The Claimant's GP records refer to mixed anxiety and depressive disorder on 13<sup>th</sup> August 2023 [13], not anxiety displacement and separately depression. Although the Claimant's claim does refer to depression arising out of the victimisation that the Claimant says she was subjected to [28] However, the GP records a new episode of mixed anxiety and depressive disorder not a new diagnosis. [13 SB]. There is a form



completed on 30<sup>th</sup> June 2022 [22 SB] that also refers to Claimant being prescribed Fluoxetine [23 SB]. The Claimant accepted in evidence that she was already experiencing PTSD and anxiety, but said she did not experience depression until 1<sup>st</sup> June 2022, she accepted in evidence she did have feelings of being low before June 2022 arising out of her assault in December 2021. I find that the Claimant was experiencing depressive episodes before June 2022 arising from her PTSD. Her depressive feelings were known to her before June 2022 following on from her assault in December 2021 before the agreement of COT3, though I accept that she experienced deeper and more intense feelings of depression after June 2022. I find there were no additional injuries arising out of the events that took place from April-June 2022 in respect of the Respondent's actions towards the Claimant leading up to and following the Claimant's signing of the COT3.

35. The Claimant gave evidence that relied on advice she says that both her own lawyers and ACAS gave her that she could bring a claims that arose after the agreement of the COT3 and that the reference was not part of the agreement. The Claimant says page 104 where ACAS says that the reference was not part of the agreement. I find that ACAS do say that reference was not part of the agreement but that it is up to the Respondent discretion if they wish to change their part of the agreement with the Claimant's consent since it is her that wants the change.

### **The Law**

36. The Court of Appeal authority of Hennessy v Craigmyle and Co Ltd and anor 1986 ICR 461, CA, provides clear support for the proposition that Employment Tribunals do have jurisdiction to deal with the validity of a COT3.
37. An agreement is invalid at common law if either party can show that it was induced to enter into the contract because of fraudulent misrepresentation by the other side. Where a party alleges bad faith during the course of negotiations, such allegations have to be backed up by cogent evidence in order to persuade the Tribunal to set aside the agreement on that basis. The EAT decision of Horizon Recruitment Ltd and anor v Vincent 2010 ICR 491, EAT was about a settlement agreement but is authority for the proposition that bad faith negotiations can apply to any contracting out agreement which would include COT3 agreements.
38. A general release will be construed according to ordinary contractual principles, that is, by the court ascertaining objectively the intention of the parties in the context of the circumstances in which the release was entered into: Bank of Credit and Commerce International SA v Ali [2001] IRLR 292, HL. In that case it was found that the mere fact of the Claimant's ignorance of his claims would not, as a matter of pure construction, prevent the release from binding him in respect of future claims as unidentified claims are by their nature those which the releasor did not know that he had.
39. In considering the appropriate form of words to be used, Lord Hoffman's judgment in BCCI v Ali can be summarised as:

- (a) In construing a release, courts will look to the wording of it and construe it against the context in which it was agreed.
- (b) In the absence of clear words, the context will be taken to mean the law as it stands and not as it may turn out to be; it will not be taken to include future changes in the law having retrospective effect.
- (c) In the absence of clear words, the scope of the claims covered will be narrowly confined; so if, for example, claims arising out of the whole of the employment relationship, and not just out of the termination of the relationship are to be covered, that must be spelled out; if PI claims are to be covered, that should be spelled out.
- (d) If the employer knows of an actual or possible claim that the employee does not know about, that will not be covered. If the employer wants to ensure it is covered, he is going to have to mention it to the employee to see if he will agree to release it. If he is prepared to release it, that claim will have to be spelled out in the release, for which no doubt, as a matter of practice, he may have to provide additional consideration.

### **Submissions**

Mr Fuller provided written submissions and the Claimant's submissions were contained within her witness statement. In summary the Respondent's submissions were there could be no fraudulent misrepresentation as the Claimant was not induced to agree to the COT3 because of any representations by the Respondent either because she did not see the representation in the reference because she didn't read it and or the misrepresentation she relied upon came too late as the agreement had already taken place. The Respondent relied on the case of Peninsula Business Services Ltd v Sweeney [2004] IRLR 49 that, once signed, written terms are binding whether or not they have been read or attention drawn to the clause. The Claimant could not be allowed to benefit from her own mistake that she had not read the entire COT3 including the reference.

The Respondent relied upon paragraph 9 of Judge J R Reid QC in Royal National Orthopaedic Hospital Trust v Howard [2002] IRLR 849 which states *"in our judgement, the law as to contracts for release is pretty straightforward. The Lord does not decline to allow parties to contract that all and any claims, whether known or not, shall be released. The question in each case is whether, objectively looking at the compromise agreement, that was the intention of the parties, or whether in order to correspond with their intentions some restriction had to be placed on the scope of the release. If the parties proceed to achieve such an extravagant result that they release claims of which they have and can have no knowledge, whether those claims have already come into existence or not, they must in language which is absolutely clear and leaves no room for doubt as to what it is they are contracting for. We can see no reason why is a matter of public policy our party should not contract out of some future cause of action. But we take the view that it would require extremely clear words for such an intention to be found."* Mr Fuller's submission was that the Tribunal was permitted to find that the claims that the Claimant sought to bring fell within the general release clause of the COT3.

Mr Fuller referred to s124(2) & s124(6) EA 2010 as statutory authority that

possibility of claiming damages for personal injury as a remedy arises out of discrimination. This meant that there was no jurisdiction to bring a stand alone PI claim under the Equality Act 2010.

The Claimant's oral submissions were that what she signed for was just sexual assault, but she accepted that the settlement included all other claims but not the carve out. There was no talk about an agreed reference before the signing of the COT3. They talked about the money, and she thinks that the reference should be discussed before there is a legally binding contract. The Respondent failed to provide evidence of a written policy of factual reference in place. The Claimant said at the grievance meeting, Ms Spencer failed to answer the Claimant's questions. The Claimant said how would they know about the reference? No one else had heard of the factual reference policy. The Claimant hadn't given thought to whether an offer of a factual reference was because without prejudice negotiations and that the employer would take a different view to her as compared to another employee. The Claimant didn't accept that was Respondent's motivation. The Claimant thought they weren't being nice to her because she made the complaint before the termination of her employment. The Claimant relies on the COT3 enforcement and says that the reference arose out of the COT3. She asked why the reference is separate from the COT3. The Claimant said that they said I could bring claims. Free standing means a separate claim. (See page 6 of witness statement). The Claimant said that the last 3 lines of clause 2 "*for the avoidance of doubt, any claim to enforce the terms of this COT3 Agreement and any latent free-standing personal injury claim, and any claim in respect of Accrued Pensions Rights*" should be treated it as 3 separate phrases: latent, free standing, personal. Her depression arose out of reasonable adjustments and victimisation. Her PTSD was affected by the reasonable adjustments and victimisation. She said she was not pursuing an argument about anxiety. The Claimant said it reads in the COT3 that they only provide factual references so that is why it is procedurally unconscionable. She felt like she should have an equal say about the contract. She didn't agree with the contract. It should have been communicated before hand. What was in the reference was not a fraudulent misrepresentation. She was told "Everyone at Biesse gets a factual reference" in grievance hearing, on 18<sup>th</sup> May. She was told to sign the COT3 because it was the only way she could get the monetary benefit. She signed the COT3 to end the assault claim. What has the representation to do with signing the COT3? The Claimant said she felt misled when found out it was not a written policy. ACAS said that reference not part of the COT3 this is in the email at page 104. She felt that reference should have been in the body of agreement.

I considered both parties oral and written submissions carefully and had regard to the authorities of Howard & Sweeney of which I was given copies.

### **Analysis and Conclusions**

40. The signing of the COT3 was not what made the agreement legally binding. The COT3 became binding when the Claimant agreed the document at 13:46 on 21 April 2022. However, the Claimant says that the COT3 is not a valid agreement because (1) the COT3 was illegal (2) there was a fraudulent misrepresentation (3) there was procedural unconscionability (4)

her claims fall within the carve out of the general release.

### Illegality

The Claimant presented no evidence of the illegality of the COT3. The Claimant said that the COT3 was formed illegally as the intention was for the Respondent to victimise the Claimant. The Claimant relied on the presence of annex A. This is essentially a new claim. However, as I have found that there was no misrepresentation by Ms Spencer. The statement of the factual reference being provided to employees I consider to be true. The inclusion of the reference was not being forced upon the Claimant the Claimant has not argued this. The Claimant was free to reject the COT3. She did not. There was no grounds for me to conclude that the COT3 was illegal.

### Fraudulent misrepresentation

41. The Claimant's argument that the Respondent made a fraudulent misrepresentation makes no sense at all. In the draft COT3 the reference does not say that only factual references are given but that full references are not given. However, the Claimant says that she did not read this reference and so she cannot also argue that she relied on the representation in the reference in order to induce her to sign the COT3. If she wasn't aware of the representation, she cannot now say that it induced her to sign the document. It plainly could not have induced her if she agreed it before seeing the annex, coupled with the fact that is undisputed that she raised an issue about it after having agreed the COT3. In those circumstances I consider that there cannot have been a fraudulent misrepresentation which induced the Claimant to agree to the COT3.
42. Furthermore, the Claimant does not rely on that statement in the reference about not providing full references but the statement in the email dated 26<sup>th</sup> April 2022 after the COT3 has been agreed that only factual references are provided for employees. It could not have had any effect on whether the Claimant agreed the COT3 as it came after the agreement of the COT3 on 21<sup>st</sup> April 2022.
43. The Claimant's evidence was that she signed the final COT3 because of the fraudulent misrepresentation of the Respondent not that she had agreed it. However, in the Claimant's submissions the Claimant said that she signed the final COT3 because of the representation of the Respondent. However, if found that the policy had nothing to do with the Claimant signing the COT3. The Respondent told the Claimant before the signing of COT3 that they were not going to provide her with a policy, and she said "nevermind", it therefore could not have been so important to her as to what the policy was. It was not an inducement of any sort. The Claimant submissions were that she signed the COT3 in order to get the money and because she wanted to end the assault claim. In any event I have found that it cannot be said that that representation was not true. There was no fraud at all. I conclude there was no fraudulent misrepresentation and what the Respondent stated as not untrue and the final COT3 was not signed because of it.

### Procedural Unconscionability

44. The basis of this argument appears to be that it was not fair for the Respondent to have put the reference on the last page of the draft COT3 as that was akin to hiding it. The Respondent did not discuss the reference with the Claimant before it was included in the draft. The Claimant also argued that the fact that she was asked to provide wording misled her and that she could have a characterful reference when the policy was that only factual references were provided.
45. It is certainly not unusual for there to be no prior discussion of including a reference in a COT3 or asking for the wording of a reference. In any event the express mention in clause 10 of the reference I have found meant that the Respondent was not hiding the reference. In the context of without prejudice negotiations it was open to the Respondent to negotiate anything (of course within reason and legality) outside of their policy. The Respondent's representative to ask for wording of that reference was so that it could be put to the Respondent for that very purpose. I conclude there was no unconscionability on the part of the Respondent by not first mentioning the reference or asking for wording.

Claims are not excluded as they are enforcement of COT3 terms

None of the claims are an enforcement of COT3 terms. The Claimant said that she was trying to enforce the reference, but the Claimant was plainly trying to do the opposite. Once the COT3 was agreed she wanted to undo the COT3 so that she could change the reference to a characterful one. There was no term of the COT3 that the Claimant could point to that she was trying to enforce. In those circumstances I conclude that none of the Claimant's claims amounted to enforcing the terms of the COT3.

Claims are not excluded as they are Latent Free Standing Personal Injury Claim

The Claimant says that her victimisation, harassment and reasonable adjustments claim are not caught by the general release clause but are contained in the carve out of a latent free standing personal injury claim. The Claimant said that she was advised by ACAS and her lawyers that the claims happened after the signing of the COT3 and so were not covered by the general release.

Dealing first with the general release point. The Claimant accepted that she contemplated and agreed that all future claims would be settled by the agreement. It seems to me that with that admission, I am bound to say that in accordance with Ali there was a clear intention of the parties to contract out of future claims. It is therefore irrelevant what ACAS or the Claimant's lawyers advised. In any event such advice does not bind me as the judge in these matters.

Then the question is whether the particular claims that the Claimant wishes to bring are covered by the general release clause. I conclude that they are for the following reasons. The Claimant agreed a reference, the point of including an agreed reference must be to settle any claim that could arise out of the content of the reference or the refusal to provide one or not. That

is the purpose of the wording in clause 10. It is to cover the eventuality of request for references as to what reference will be provided. In those circumstances, I agree with the Respondent an distinguish Howard on the facts a victimisation claim arising providing a particular type of reference is covered by the general release clause. The fact that the Claimant got such a reference from the Respondent and got a job out of it supports the Respondent's position that what was anticipated is what has happened. As for the harassment and reasonable adjustments claims I consider that they too are covered by the general release, they are future claims and that is covered by the general release.

I next considered notwithstanding the general release whether the claims were actually covered by the carve out. The Claimant put her case as the words latent, free standing and personal injury were 3 separate phrases. However, having regard to Ali on the fact of the words are clear to me and they refer to 1 phrase of latent free standing personal injury claim. Thus in order for a claim to fall within this carve out it had to fulfil all the words of that phrase; I conclude the Claimant's claim do not. Initially, the Claimant said that her claims led to anxiety displacement. The Claimant dropped this point in her submissions. Even if she hadn't I would have concluded that there was no medical evidence of a personal injury in the evidence provided. The evidence demonstrated anxiety but on occasions from December 2021 and so there was nothing latent about the Claimant's anxiety she knew about it when agreeing to COT3. The same was true of PTSD which the Claimant again withdrew as relying upon as a latent, free standing and personal injury. Although the Claimant only started taking medication after June 2022 for depression, the Claimant's depression is not a latent, free standing and personal injury. The Claimant knew of depressive symptoms when she agreed the COT3 too. Neither was the Claimant's depression a free standing claim. It arose according to the Claimant from her victimisation. There is no jurisdiction for the Claimant to claim right to claim personal injury in the Employment Tribunal without showing discrimination as the cause. Free standing claims of personal injury arise on a tortious basis and are properly brought in the county court.

46. The COT3 dated 4<sup>th</sup> May 2022 is a valid agreement and covers all the Claimant's claims. The Employment Tribunal has no jurisdiction to consider the Claimant's claim. The claim is therefore dismissed.

---

Employment Judge Young

Date 6 December 2023

REASONS SENT TO THE PARTIES ON  
22 December 2023

FOR THE TRIBUNAL OFFICE