Case Number: 1802110/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr S Abusalama	v	(1) Sheffield Hallam University (2) Mr R Calvert

Heard at: Sheffield (by video link) **On**: Tuesday 5 March 2024

Before: Employment Judge James

Representation

For the Claimant: Mr M Sprack, counsel

For the Respondent: Ms S Fraser-Butlin, counsel

JUDGMENT

(1) The claimant's request for a postponement is refused (Rules 2 and 30A Employment Tribunal Rules of Procedure 2013).

(2) The claims made by the claimant were compromised in a COT3 agreement between the claimant and the first respondent dated 14 October 2023 and are therefore struck out because the tribunal has no jurisdiction to deal with them.

REASONS

The proceedings

1. The claimant's claim form was issued on 14 April 2023. The response form and Grounds of Resistance were filed on 19 May 2023.

2. A preliminary hearing for the purposes of case management took place on 21 June 2023. A Final Hearing was set down for a period of seven days between 13 and 21 November 2023. Case Management Orders were made and the issues were identified.

3. Ms Fraser-Butlin helpfully summarised the claimant's claims, as set out in the list of issues, as follows:

3.1. The appointment of Akua Reindorf KC to conduct an investigation into the Claimant. Pleaded as indirect discrimination (issue 5.2(a)), harassment (issue 6.1) and whistleblowing (issue 10.1.2).

3.2. Pursuing the investigation up to the notification of its outcome to the Claimant on [24 October 2022] pleaded as indirect discrimination (issue 5.2(b)), harassment (issue 6.1) and whistleblowing (issue 10.1.2).

3.3. Having contact with / giving information to / engaging publicly with the Jewish Chronicle on or around 8 November 2022 regarding Ms Reindorf KC's investigation. Pleaded as direct race and or belief discrimination (issue 4.2), indirect discrimination (issue 5.2(c)), harassment (issue 6.1), victimisation (issue 7.2.2) and whistleblowing (issue 10.1.2).

3.4. Refusing to provide the Claimant with a copy of Ms Reindorf KC's report. Pleaded as victimisation (issue 7.2.3).

Mr Sprack accepts that summary. For ease of reference, they are referred to below as Claims One, Two, Three and Four respectively.

4. Both parties applied to amend their respective pleadings, in October and November 2023. The amendments were considered at a preliminary hearing on 20 November 2023 by Employment Judge Jones. The respondent's amendment was allowed, entitling the respondent to argue that all of the claims raised in the claim form were covered by the COT3 agreement dated 14 October 2022, not just Claim Two. (The COT3 is discussed in more detail below.) The claimant's amendments were allowed, subject to the qualifications set out in the order; and save for the proposed amendment to paragraph 39, i.e. the addition of the words *'without limitation'*, which was refused.

5. In the skeleton argument prepared by the respondent for the purposes of the 20 November hearing, it was stated that Ms Reindorf's report had been received by the first respondent in September 2022, before the COT3 agreement was finalised.

6. This hearing was arranged on 20 November 2023 and the Notice of Hearing was sent to the parties the following day. Related case management orders were made.

7. For the purposes of this hearing, I had before me a 272 page bundle prepared by the respondent; a supplementary bundle prepared by the claimant, to which the claim form and particulars of claim in a related claim in the County Court was added during the hearing; the authorities bundle for the hearing on 20 November 2023; a further bundle of authorities for the purposes of today's hearing; and skeleton arguments from both counsel. I am grateful to the parties for all of the preparatory work carried out.

Brief background facts

8. The claimant was employed as an Associate Lecturer by the first respondent between January and October 2022. Not long afterwards, allegations were made against the claimant, the end result of which was that no further action would be taken.

9. In June 2022, the claimant was informed that there would be an independent investigation into allegations that the claimant had made anti-Semitic

comments. The respondent decided to appoint Akua Reindorf KC to investigate these allegations. Ms Reindorf conducted an investigation. Unbeknown to the claimant at this time, Ms Reindorf KC's report (The Report) was provided to the first respondent during September 2022.

10. During September and the first two weeks of October 2022, without prejudice negotiations took place regarding the terms of a COT3 agreement, the purpose of which was to settle any potential claims the claimant had against the University, including any claims arising out of the investigations mentioned above. The COT3 agreement became binding on 14 October 2022. The terms of that agreement noted that the claimant's employment relationship with the first respondent ended on 10 October 2022.

11. Clauses 2.1.1 and 2.1.2 of the COT3 agreement confirm that the payment made by the first respondent to the claimant under clause 1 was in full and final settlement of:

> *2.1.1 the claim brought by the Claimant against the Respondent in the Employment Tribunal under early conciliation number R200341/22 (Claim); and*
>
> *2.1.2 all and any claims of any kind whatever, wherever and however arising which the Claimant has or may have in the future against the Respondent or any of its associated companies or its or their officers or employees anywhere in the world whether arising directly or indirectly out of or in connection with the Claimant's employment with the Respondent, its termination on 10 October 2022, from events occurring after this Agreement has been entered into or otherwise, whether under common law, contract, statute or otherwise, whether such claims, including, but not limited to, the circumstances giving rise to them or their legal basis, are, or could be, known to the parties or in their contemplation at the date of this Agreement in any jurisdiction and including, but not limited to, claims under contract law, the Equality Act 2010, the Trade Union and Labour Relations (Consolidation) Act 1992, the Employment Rights Act 1996 … excluding any claims by the Claimant to enforce this Agreement, any personal injury claims which have not arisen as at the date of this Agreement and any existing personal injury claims of which the Claimant is not aware and any claims in relation to the Claimants accrued pension entitlements.*

12. Clause 6 states:

> *6. The Respondent shall, within 14 days of receiving a copy of this form signed by the Claimant and her withdrawing the Claim, whichever is the later, provide the Claimant with the outcomes in writing following the recent investigation into her as conducted by Ms Akua Reindorf. It will also provide the Claimant with any and all documents considered by the University and Ms Reindorf in reaching the investigation outcome. The Claimant and Respondent agree to keep the details of these outcomes confidential and acknowledges their respective ongoing obligations under clauses 8 and 9 below. The Respondent confirms that on signing this COT3 it considers any and all investigations and disciplinary procedures lodged or pending against the Claimant to be closed.*

13. Clause 8 states:

8. The Claimant agrees that she will not, whether directly or indirectly, make, publish or otherwise communicate any disparaging or derogatory statements, whether in writing or otherwise, concerning the Respondent, or any of its current or former officers, employees or workers, or do anything which will bring the Respondent or any of its current or former officers, workers or employees into disrepute. The Respondent agrees that it will use reasonable endeavours to ensure that no director, employee, officer, or member of its will, whether directly or indirectly, make, publish or otherwise communicate any disparaging or derogatory statements, whether in writing or otherwise, concerning the Claimant, or do anything which will bring the Claimant's reputation into disrepute.

14. As noted above, the claimant's Employment Tribunal claim form was issued on 14 April 2023. The response form and Grounds of Resistance were filed on 19 May 2023.

15. The claimant subsequently issued a claim in the County Court on 15 January 2024, alleging breaches of the COT3 Agreement and of the equitable duty of confidence.

16. On 22 January 2024, an application was made on the claimant's behalf to stay the Employment Tribunal proceedings, pending a determination of the County Court claim. The application was opposed by the respondent. It was refused by Employment Judge Miller on 2 February 2024.

17. An application for the postponement of today's hearing was made on the claimant's behalf on 22 February 2024. The application to postpone is related to the ongoing tragic situation in Gaza, following the 7 October 2023 attacks by Hamas in Israel. Following the commencement of military action by Israel, the claimant's family, including her mother, father, brother, his wife and children were forced to flee from the Jabalia Refugee Camp to the Nuseirat Refugee Camp on 13 October 2023.

18. The claimant's mother was able to leave Gaza in early December. In December 2023 but the rest of her family fled from Nuseirat to Rafah, following further sustained military action by Israel. The claimant has lost dozens of members of her wider family and social circle as a result of the conflict. Further sustained military action by Israel in Rafah continues to be threatened.

19. Against this background, the claimant's mental health has deteriorated significantly. In support of the postponement application, the claimant provided a letter from her GP which confirms:

    The above patient is due to appear in court on the 5th March 2024.

    Currently due to an acute deterioration in mental health secondary due to acute stress the patient is not medically fit to attend on this date. It is unclear at present when her medical condition will improve.

    I would suggest that it be delayed for at least six months if possible.

20. The respondent does not dispute that the claimant is unwell and is not able to attend/give instructions. The tribunal notes that the claimant was at least able to observe the proceedings remotely; but that fact does not suggest that the claimant is not seriously unwell.

Relevant law

21. I gratefully adopt the helpful summary of the law set out in the skeleton arguments of both counsel, as follows.

Postponement

22. Rule 2 of the Employment Tribunal Rules of Procedure 2013 requires a tribunal to deal with cases fairly and justly. This requires cases to be dealt with in ways which are proportionate to the complexity and importance of the issues; avoiding delay so far as compatible with proper consideration of the issues; and saving expense. Rule 30A(2) is not applicable, since the application to postpone was made more than seven days before the hearing.

23. The ET has a broad discretion whether to grant or to refuse an application for a postponement or adjournment (*Teinaz v LB Wandsworth [2002] EWCA Civ 1040*, at para 20 per Peter Gibson LJ).

24. It is an exceptional course for an ET to refuse such an application made on unchallenged medical grounds (*O'Cathail v Transport for London [2013] EWCA Civ*, para 40 per Mummery LJ ; *Khan & Uzayr v BP Plc UKEAT/0017/21/JOJ*, para 23, per Choudhury P).

Undue influence

25. A contract is voidable – or capable of rescission – in whole or in part, by a party to that contract, on the grounds of 'undue influence', if and only if that party can establish that their entry into the contract '*cannot fairly be treated as an expression of their free will'* (*RBS v Etridge (No 2) [2001] UKHL 44*). It is not necessary to prove misconduct, or 'unlawful' conduct (*Jennings v Cairns [2003] EWCA 1935*; *Progress Bulk Carriers Ltd v Tube City IMS LLC [2012] EWHC 273 (Comm)*, at para 41 to 43). Contracts can be set aside even where the influencing party is shown to have been acting in the influenced party's best interests (*Cheese v Thomas [1994] 1 WLR*).

26. The right to rescind on the grounds of undue influence may be lost where the influenced party has affirmed the contract, but only if that affirmation was made after the influence had ceased to operate (*Moxon v Payne (1873) LR 8 Ch App 881*, at 885). Mr Sprack argues that affirmation, if established, is not an absolute bar, but simply a relevant factor – every case will turn upon its own facts as to what is equitable (*Progress Bulk Carriers*, at para 33 – citing *DSND Subsea Ltd v Petroleum Geo Services ASA [2000] EWHC 185 (TCC)*, para 131).

COT3 agreements and the settlement of future claims

27. COT3 agreements are contracts and the normal principles of contractual interpretation apply. Generally, the interpretation of contracts involves "*the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*" – see *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 at 912-923*. This applies equally to COT3 agreements. The House of Lords in *BCCI v Ali [2002] 1 AC 251* confirmed that:

> *In construing this provision, as any other provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified (at [8]).*

28. In relation to the settlement of future claims, the EAT in *Royal National Orthopaedic Hospital v Howard [2002] IRLR 849 at [9]* has made clear that:

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

29. In the circumstances of *Howard,* the phrase "*all claims which the Appellant has or may have against the Respondent … whether arising under her contract of employment or out of the termination thereof*" was insufficiently precise to exclude a claim of victimisation under the Sex Discrimination Act when, sometime later, the claimant was refused permission to work at the hospital for one day in a private capacity. In the context of that agreement, it was not accepted that the words '*has or may have*' were designed to preclude future claims which the applicant might seek to assert. Rather, the expression '*has or may have*' was considered to be apt to cover existing claims, whether known to the potential claimant or not.

30. The Court of Appeal in *Arvunescu v Quick Release (Automotive) Ltd* [2023] ICR 271 held that:

> *Read as a whole, Howard is dealing with the interpretation of a settlement agreement in the context of future claims, that is, claims arising out of conduct occurring after the settlement agreement. Howard was not seeking to define what constitutes conduct 'arising indirectly … in connection with … employmen*t' [24].

31. In a recent case, before the Court of Session (Inner House), *Bathgate v Technip Singapore PTE Ltd* [2023] CSIH 48, the claimant brought a claim for post-employment discrimination, following a decision by the respondent not to pay to him a additional redundancy payment referred to in a settlement agreement because he was aged 61 or over and therefore was not eligible, under the terms of the relevant collective agreement. Paragraph 6.1.2 of the settlement agreement terms included a general waiver of:

> *…. all claims, demands, costs and expenses of whatever nature (whether past, present or future and whether under contract, statute, regulation, pursuant to European Union Law or otherwise) which the employee has or may have against the Company, its directors and employees or any of them or any other Associated Company and/or their directors and/or employees in any jurisdiction arising out of, or in any way connected with, the Employee's employment with the Company, or the holding of any office with the Company and/or the termination thereof…*

32. The Court of Session held that "*a future claim of which an employee does not and could not have knowledge, may be covered by a waiver where it is plain and unequivocal that this was intended"*. Consequently, in the case before the court, an agreement was upheld where "*it was clear that the agreement was intended to cover claims of which the parties were unaware and which had not accrued"*: At paragraphs 31 and 32*,* the court stated:

> *31. … For the following reasons we consider that the various protections for the employee built into s147 [Equality Act 2010] do not exclude the settlement of future claims so long as the types of claim are clearly identified and the objective meaning of the words used is such as to encompass settlement of the relevant claim. The requirement that the contract must 'relate to the particular complaint' does not mean that the complaint must have been known of or its grounds at least in existence at the time of the agreement. The EAT suggested that the words 'the particular complaint' were not apt to describe a potential future complaint (para 25). However in our view these words simply require one to ask whether the complaint being made is or is not covered by the terms of the contract. They import no temporal barrier to post-employment claims of the kind now being pursued against the respondents.*
>
> *32. It would seem that the EAT accepted that s 147(3)(b) would be met if, though unknown at the time, the complaint was based on facts and circumstances which pre-dated the agreement. We can identify no logical or principled basis for giving effect to an agreement in these circumstances but not those of a case such as the present. [My emphasis]*

33. In the case of *Sheriff and Klyne Tugs (Lowestoft) Ltd [1999] EWCA Civ 1663,* negotiations took place in December 1995 to settle the claimant's Employment Tribunal claims of race discrimination. On 9 January 1996, the case was settled on payment of £4,000. The Respondent did not admit liability. A formal agreement was entered into, paragraph 4 of which states:

> *The Applicant accepts the terms of this Agreement in full and final settlement of all claims which he has or may have against the Respondent arising out of his employment or the termination thereof being claims in respect of which an Industrial Tribunal has jurisdiction.*

34. On 2 February 1996, the Employment Tribunal issued a formal decision dismissing the application on its withdrawal by the Appellant. Mr Sheriff then commenced an action in the County Court for damages for personal injury caused by Klyne Tugs' alleged negligence. He relied on virtually the same factual allegations relied on in the ET claim. The respondent applied to strike the claim out as an abuse of process and that application was granted. The claimant appealed to the Court of Appeal. Paragraphs 21 and 22 of the Court's judgment state:

21. In my judgment both the Employment Tribunal under s56 and the County Court under s57 have jurisdiction to award damages for the tort of racial discrimination including damages for personal injury caused by the tort. The question, which may be a difficult one, is one of causation. It follows that care needs to be taken in any complaint to an Employment Tribunal under this head where the claim includes, or might include, injury to health as well as injury to feelings. A complainant and his advisers may well wish in those circumstances to heed the advice of the editors of Harvey, just referred to [see paragraph 20], to obtain a medical report. This has particular relevance as the time within which to make a complaint is only 3 or 6 months and, unless an adjournment is obtained, an adjudication may follow quite shortly.

22. But is the present claim one to which paragraph 4 of the Agreement applies? Mr Buchan submits that it is not, because the cause of action is different. The claim in the action is based upon the tort of negligence. The Claimant will have to prove not only the conduct of the master, but that it was reasonably foreseeable to a reasonable employer that this might cause psychiatric injury. I merely comment in passing that this might in any event prove a difficult hurdle to surmount. One can reasonably appreciate that such harassment may cause injury to feelings; but psychiatric injury is a different matter. The advantage of the statutory tort, from the Claimant's point of view, is that this requirement does not need to be established; all that needs to be established is the causal link. But in any event, in my judgment, the claim does fall within paragraph 4. It is a claim for compensation for injury sustained by the Appellant arising out of his employment with the Respondent (i.e. through the master's conduct) and in respect of which the Industrial Tribunal has jurisdiction.

The parties' submissions on postponement

Claimant's submissions

35. Mr Sprack argues that the claimant has an arguable case that she is entitled to recission of the COT3 agreement because it was entered into as a result of undue influence by the respondent. In particular, because the first respondent failed to inform the claimant of the outcome of the investigation and/or to disclose The Report, prior to the COT3 agreement being finalised. So there was a period of up to a few weeks when the first respondent failed to tell the claimant she had been exonerated.

36. The Problem Resolution Framework, which is the policy under which the claimant was investigated, states in part:

All parties must be open, honest and committed to working in partnership as a means to resolving issues and maintaining the positive Employee Relations climate.

All parties will commit to resolving issues as quickly as possible in order to minimise any impact on individuals.

Until a solution has been achieved or the procedure has been exhausted, the status quo shall normally prevail.

37. Mr Sprack accepts that it is not necessarily unlawful conduct to fail to follow a policy. He argues however, on the basis of *Blackburn v Aldi Stores Ltd [2013]*

ICR D37, that failure to follow a policy can amount to a breach of the implied term of trust and confidence and that this is what happened here.

38. On the question of affirmation, Mr Sprack notes that the respondent relies on the County Court Particulars of Claim, paras 1 and 2 (see below). He argues however that the pressure only ends when the undue influence is released. Since the respondent still has not provided the claimant with a copy of The Report, the undue influence is ongoing. He argues further that affirmation is not a strict bar to rescission; it is only a relevant factor, when a court is deciding whether to rescind an agreement due to undue influence - see paragraph 131, *DSND Subsea Ltd v PGS Offshore Technology AS [2000] All ER (D) 1101*. (Whilst that paragraph relates to the doctrine of duress, it is understood that the same principle would apply to the question of undue influence.)

Respondent's submissions

39. In response, Ms Fraser-Butlin first put on record her sympathy for the position the claimant is in and confirmed that she does not seek to challenge the medical evidence. She argues however that the key question is whether the undue influence point is arguable. It is accepted that witness evidence would need to be considered in relation to the question of undue influence at the time the COT3 agreement was entered into, in order for that question to be properly determined. However, regardless of any such evidence and arguments, the undue influence point must fail for two reasons.

40. First, because the claimant has affirmed the COT3 agreement. She does so in paragraph 4 of the Grounds of Complaint before the Employment Tribunal. The claimant has also sued on the basis of alleged breaches of the agreement in the County Court claim. On page 1 it is stated:

> *Brief details of claim*
>
> *The Claimant brings claims against her former employer in (a) breach of contract, in particular a COT3 agreement entered into on 14 October 2022, and (b) breach of equitable duty of confidence.*
>
> *The Claimant seeks general, special, aggravated and exemplary damages, as well as specific performance of the relevant provisions of the COT3 agreement itself*

41. Paragraphs 1 and 2 of the Particulars of Claim state:

> *1. This claim is issued by the Claimant without prejudice to any other claim, cause of action, right, remedy or relief which the Claimant has against either Respondent, their employees or agents, any associated natural or legal person or any third party or parties. The Claimant reserves all rights.*
>
> *2. In particular the Claimant has issued and pursues proceedings in the Leeds Employment Tribunal (Claim No 1802110/2023 - 'the ET Claim')) against the Defendant and its former Vice Chancellor Mr Richard Calvert. The Claimant avers that the instant claim does not constitute an abuse of process.*

42. Paragraphs 21 and 22 set out the specific clauses of the agreement relied on in the claim, including clause 2.1.2 – the clause relied on by the respondent

to argue that the claims raised by the claimant in the claimant's Employment Tribunal claim have been compromised.

43. Paragraphs 30 to 33 of the particulars of claim set out the alleged breaches by the first respondent of the terms of the COT3 agreement.

44. In the claims section at the end of the Particulars of Claim, the claimant seeks a perpetual injunction requiring compliance by the respondent with the terms set out at clauses 8 and 9. In addition, the claimant seeks 'further or other relief' (b. and c., respectively). Ms Fraser-Butlin thus argues that the claimant is not seeking rescission as an alternative; rather, she is asking the County Court to enforce the terms of the COT3. All of the above makes it clear that the COT3 agreement has been affirmed by the claimant.

45. Specific reliance is placed on paragraphs 147 and 148 of the judgment in *DSND* in which Dyson J states:

> *147. In my judgment, even if PGS were subjected to illegitimate pressure on 25 September, they were free from it by late October when Mr Darby had his conversation with Mr Greville. By that time, the contract with Rockwater for the Semi 2 was in place. This vessel was capable of doing riser installation work. If PGS had terminated the Contract under Article 16.3, DSND would have been required to assign the benefit of the subcontract to PGS (as they did following the termination on 19 November). Other vessels could have been procured as eventually happened. PGS had time to make alternative arrangements, and, they could have terminated under Article 16.3 once these had been made. PGS did not waive legal professional privilege. It is clear, however, that they were in receipt of legal advice during the period between 25 September and 19 November. I infer that, since Mr Darby raised the issue of duress with Mr Greville on 21 October, PGS must have been aware of their right to avoid the MOU on that ground. Instead of taking that course, they continued to rely on the MOU, and complained that DSND were not observing its terms. Eventually, they decided to terminate the Contract on the grounds that DSND were in breach of the terms of the MOU.*
>
> *148. Accordingly, if I had held that PGS entered into the MOU under duress, I would have declined to set aside the agreement on the grounds that they affirmed it. Another way of putting it is to say that it would be inequitable to allow PGS to avoid the MOU after they had relied on it in the way that I have mentioned for their own benefit, after (as I have held) they ceased to be subject to any duress.*

Decision on the postponement application

46. The key question is whether postponement is necessary in order to deal with the issues before the Employment Tribunal fairly and justly. The context of the application is that if the postponement is refused, the tribunal will go on to consider the question as to whether the claimant's claim should be struck out because is covered by the COT3 agreement and thus the tribunal has no jurisdiction to deal with it. The arguments in that respect are limited to submissions by both parties. No evidence is required, from any witness/party. However, if a decision is made to strike out the claimant's claim, the claimant will no longer have the opportunity of arguing that the COT3 agreement should be set aside. That could be of benefit to her, in that

even if it was decided that the claims before the tribunal are caught by the terms of the COT3 agreement, those terms will potentially not apply if the agreement is set aside because of undue influence.

47. In deciding whether to postpone today's hearing, I have accepted, for the purposes of this hearing, that the claimant is not currently able to take advice about or to give clear instructions to her legal advisers about the undue influence issue. If she did give such instructions, the County Court claim would presumably need to be amended. The claimant may not be able to give such instructions for months. Further, until her health improves, the claimant would not be able to give evidence regarding that issue.

48. Mr Sprack acknowledged the potential difficulties concerning the undue influence issue, but submits that it is at least arguable. As is the argument that although the claimant has potentially, in both the ET1 and the current claim before the County Court, affirmed the terms of the COT3 agreement, affirmation is not an absolute bar, particularly where the undue influence continues. It does in this case, Mr Sprack argues, because The Report has not been disclosed.

49. Initially, in balancing the competing arguments of the parties and the prejudice to each party, were this hearing to be postponed or not, I decided that, whilst the issues were very finely balanced, the balance was in favour of the claimant. That was on the basis that I had understood that the claimant did not discover that The Report had been provided to the first respondent in September 2022, until she received the skeleton argument for this hearing. However, as noted above, that is not the correct position, as Ms Fraser-Butlin pointed out, once I had given my initial decision. That fact has been known, at least by the claimant's legal advisors, form on or about 20 November 2023.

50. Once this was pointed out, I decided on my own initiative to reconsider my decision. Given how finely balanced the exercise of the discretion had been, I concluded that the interests of justice required such a reconsideration. I heard brief submissions from both counsel in relation to the proposed reconsideration. On reconsideration, I decided that the balance had now shifted, on the basis of the corrected factual background, in favour of the respondent.

51. In arriving at that decision, I was aware that the consequence of that could be, if I subsequently decided in favour of the respondent in relation to the strike out application (that question having not been determined at that stage), that the claimant would lose the option of pursuing the claims in the employment tribunal at all. In deciding that nevertheless, the balance was in favour of the respondent, I took into account the following factors.

52. First, the claimant still has the option of pursuing the County Court claim, to enforce the terms of the COT3 agreement. In that claim, the claimant seeks compensation of up to £50,000, a not inconsiderable sum of money. She therefore still has an alternative means of seeking legal redress.

53. Second, I note that the claimant's legal advisers had in fact known in November 2023 of the facts which the claimant now seeks to rely on in relation to the argument of undue influence. This is before the County Court claim was issued, the date of issue being 30 January 202. The Particulars of

Claim were signed by the claimant on 15 January 2024, nearly two months after the 20 November hearing. It was open to the claimant's legal advisers to advise the claimant about the potential arguments in relation to undue influence, prior to the County Court claim being issued. Legal privilege has not been waived, and I do not know therefore whether any such advice was given to the claimant, prior to the County Court claim being issued. It may not have been. Nevertheless, it could have been given, had that argument been considered and raised by the claimant's legal advisers once the relevant information came to light.

54. Third, whilst I acknowledge that the potential argument regarding undue influence is arguable, I conclude that the arguments in that respect are weak. Whilst noting that affirmation is not an absolute bar, I consider that it does represent a high hurdle for the claimant to get over in this case. This case may be partially distinguished from the facts of the *DSND* case, in that the claimant's legal advisers may not have considered the undue influence point, prior to the County Court claim being considered. Whereas in DSND, the question of duress had been raised in correspondence between the parties. Nevertheless, it could have been considered, and the claimant advised about that, prior to the County Court claim being issued. Further, I am far from convinced that the claimant's argument that the undue influence is continuing, simply because The Report has not been disclosed. It must be within the claimant's knowledge and the knowledge of her legal advisers, that The Report is broadly supportive of the claimant, given she has been told that the report exonerated her.

55. Fourth, it is entirely unclear at this stage whether the undue influence point is going to be run at all. I have noted that the claimant is not able at present to give instructions, and it is not clear by any means, when she will be fit to do so. But in these circumstances, postponing this hearing will delay the potential resolution of this claim, potentially by months. Further, the costs of today's hearing will be incurred without any progress having been made, the hearing having been arranged over three months ago, at a time when the claimant's legal advisers were aware that The Report had been received by the first respondent.

56. Fifth, as already noted, Mr Sprack is able to make all necessary submissions in relation to the strike out application, without receiving any further instructions from the claimant; and nor is there any requirement for the claimant to give evidence in relation to that application.

57. Given the matters outlined above, I conclude that avoiding delay, and saving expense by dealing with the strike out application today is a more fair and just way of dealing with the matter, in the light of all the circumstances, then granting the postponement.

Submissions on the strike out application

58. Having decided to refuse the application to postpone, I invited counsel to address me in relation to the strike out argument. By this stage, although it had been suggested in Mr Sprack's skeleton argument that an application would need to be considered to admit without prejudice correspondence, Mr Sprack, on further consideration, decided that it was not necessary to pursue that application.

Submissions for the respondent

59. On behalf of the respondent, Ms Fraser-Butlin argues that it is clear from *Arvunescu* and *Bathgate*, that parties can agree to contract out of future claims. The real question in this case is whether the claims before this tribunal arise directly or indirectly out of the claimant's employment. The words *arising directly or indirectly out of or in connection with the Claimant's employment with the Respondent* in clause 2.1.2 of the COT3 agreement in this case reflects the wording of s.108 Equality Act 2010, which states:

> *A person (A) must not discriminate against another (B) if—*
>
> *(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, …"*

60. That is sufficient to cover all of The Claims raised by the claimant in this case. Unless the current claims arise out of or are closely connected to the former employment relationship, The Claims cannot be pursued at all before the Employment Tribunal under Part 5 (Work). The respondent does not seek to argue that The Claims do not arise out of or are not closely connected with the former employment relationship. Therefore, they must be covered by the clear wording of clause 2.1.2.

61. Were the agreement only intended to settle those claims brought up by the claimant during the ACAS early conciliation process, prior to the COT3 agreement being finalised, clause 2.1.2 would not be necessary, because clause 2.1.1 would have been sufficient. Clause 2.1.2 is clearly intended to settle more.

62. Turning to the claims, Claims One first relates to the appointment of Ms Reindorf KC, who was appointed in April 2022 and completed her investigation report in September 2022. Both those events pre-date the COT3, are clearly related to the claimant's employment and are caught by its terms.

63. Claim Two, relating to the pursuance of the investigation into the claimant's conduct up to the notification of its outcome to the Claimant, also fall within clause 2.1.1 and again, are clearly related to the claimant's employment.

64. As to Claim Three, regarding the engagement etc of the respondents with the Jewish Chronicle, this is clearly connected with the claimant's employment. This argument is reinforced by the claimant amending her claim to expand this issue by including information disclosed to third parties "*about the Claimant and the circumstances leading up to the termination of her employment*".

65. As for Claim Four, the refusal to provide the report, this claim also inevitably falls within the ambit of the COT3. The respondent disputes the claimant's argument that the disclosure of the report is necessary to comply with clause 8. That question will turn on the interpretation of Clause 8. In any event, the County Court claim seeks disclosure of the report and argues that a failure to disclose it amounts to a breach of the COT3 terms. As is entirely usual, the terms of the COT3 agreement do not prevent legal action to enforce its terms.

Submissions for the claimant

66. Just before making his submissions, Mr Sprack sent a further authority, the case of *Hampshire County Council v Wyatt* *UKEAT/0013/16*. This he relies on as authority for the proposition that in Equality Act 2010 proceedings, a claimant can claim for personal injury. Since personal injury claims are not excluded by the terms of the agreement, he argues, then to the extent that the current claims include a claim for personal injury, the settlement agreement terms do not exclude those claims.

67. Mr Sprack submits that the current claims for personal injury had not arisen by the date of the agreement, and in any event the claimant was not aware of them. Further, he argues that the wrongs that the claimant relies on post-date the COT3 agreement. The claims are for personal injury or in respect of a personal injury. The clear words required by *Howard* to compromise such claims are therefore not present in this case, and any personal injury claims are not caught.

68. As for clause 2.1.2, that is too broad, since it refers to associated companies of the first respondent, as well as to its officers or employees. There is a fundamental difficulty with vagueness. That part of the clause cannot be severed, and therefore the whole clause is unenforceable.

Decision on strike out

69. In relation to Claims One and Two, as defined above, I conclude that these are caught by the terms of the COT3. As at the date of the COT3, the claimant knew that Ms Reindorf KC had been appointed to investigate the allegations against her, and assumed that the investigation was ongoing, up to the date of the COT3 agreement. Clause 8 clearly states that the first respondent considered all investigations and disciplinary procedures that were still pending against the claimant would be deemed to be closed, as at the date of the COT3. Any claims relating to the investigation were therefore compromised.

70. Further, clause 2.1.2 covers any claims against the second respondent, referring as it does to officers or employees of the first respondent. Whilst Mr Sprack sought to argue that the reference to any associated employers could not be severed, and therefore the whole clause was not enforceable, I am not aware of any such authority on non-severability which relates to settlement agreements. My understanding is that such principles relate to covenants in restraint of trade. To the extent to which it would have been necessary to do so, which I do not consider is made out in the circumstances in any event, I would have considered it just to blue-pencil the words associated employers from clause 2.1.2, if the inclusion of those words would otherwise make the whole of clause 2.1.2 unenforceable.

71. As to the arguments about personal injury claims, I respectfully disagree with Mr Sprack's arguments in respect of the same. The exclusions in the COT3 are standard terms. The reference to personal injury in the exclusion clause is in my judgment a reference to claims for personal injury arising out of alleged negligence. Such claims cannot be brought in the Employment Tribunal - see Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The Court of Appeal's decision in *Sheriff* does not seek to negate the effect of Article 3. It simply confirms that

compensation for personal injury which has allegedly been caused by an act of discrimination (or for that matter, by whistleblowing detriments short of dismissal – see *Melia v Magna Kansei Ltd [2005] EWCA Civ 1547*, *[2006] IRLR 117*), can be claimed in employment tribunal proceedings.

72. Clause 2.1.2 of the COT3 compromise all of the claimant's claims under the Equality Act, and the Employment Rights Act 1996, whether or not the claimant could potentially make a claim for compensation for personal injury which has been caused by a breach of the relevant provisions of those acts.

73. As to Claim Three, such claims would not have been in the contemplation of the parties at the date of the agreement. Such claims could therefore only be compromised, to the extent that clause 2.1.2 compromises future claims, which could not have been known to the parties at the date of the agreement. Whilst strictly speaking, I note that I am not bound by the decision of the Inner House of the Court of Session in *Bathgate*, I consider it to be a persuasive authority. It is also in line with obiter comments in *Howard*, that, if the wording is sufficiently clear, future claims arising post-COT3 can still be settled. I find that the wording is sufficiently clear, and that therefore clause 2.1.2 settles the third and fourth claim. Further, the wording of clause 2.1.2 is clearly wider than the clause in, for example, *Howard*.

74. I must confess to feeling a sense of unease, initially, with that conclusion. For example, could it mean that if the claimant applied to the University for a job in future, and believe that a decision not to appoint her to the role was an act of discrimination/victimisation, that such a claim could not be brought? Or what if the claimant, in 10 years time, commenced work with the first respondent again – would the terms of the COT3 agreement prevent any such claims being brought? Or what if the claimant became a student of the University and claimed that a subsequent decision to exclude her from the course was unlawful discrimination? On reflection however, I assume that the answer to those questions is that COT3 agreements containing the types of clause used in this case, are intended to represent a 'clean break', such that it is not envisaged that there will be any future employment (or educational) relationship between the parties. If that is not the parties' intention, then such clauses would need to be amended accordingly.

75. Further, in relation to Claim Three, I am heartened by the fact that, since the claimant can take claims to enforce the terms of the agreement, then to the extent that the conduct of the University breached the non-derogatory statements clause in clause 8, the claimant potentially has an alternative remedy. Any potential discrimination claims in that regard, can be pursued instead as breach of contract claims.

76. Similarly, in relation to Claim Four, the refusal to provide the claimant with a copy of The Report, that depends on the interpretation of Clause 6 of the agreement. Either, pursuant to that clause, the claimant is entitled to a copy of the report; or she is not. The answer to that question depends on the interpretation of it. Either way, the claimant has an alternative remedy in relation to that matter, since she is entitled to take a claim to the County Court to seek to enforce her interpretation of that term of the agreement.

77. For all of the above reasons, I conclude that the claimant's claims have been compromised by the terms of the COT3 agreement, that Clause 2.1.2 is intended to and does compromise future as well as existing claims, and that

therefore the tribunal does not have jurisdiction to hear them and they should be struck out.

78. In reaching that conclusion, I have not taken into account the potential merits of the claimant's claims against the respondents, nor do I seek to express a view about the merits. In deciding the question before me, I have not considered it appropriate or necessary to do so.

Employment Judge James

Employment Judge James
North East Region

Dated 14 March 2024

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