EMPLOYMENT TRIBUNALS

Claimant: **Mr M Bebbington**

Respondent: **Civil Rail Solution Ltd**

Heard at: **London South Employment Tribunal**

On: **16.10.2024**

Before: **Employment Judge Dyal**

Representation:

Claimant: **in person**

Respondent: **Mr Wayman, Counsel**

WRITTEN REASONS

Introduction

1. This matter came before me to determine whether the claim should be struck-out because it had been compromised in a settlement agreement. The Claimant did not dispute that he had entered a settlement agreement nor positively aver that the complaints he now pursued were excluded from its scope. Rather, his case was that the settlement agreement should be set aside.

2. At the outset of the hearing I invited a discussion of what complaints the claim form raised. We agreed it raised the following:

    a. Unfair dismissal;
    b. Religion or belief discrimination/harassment;
    c. A claim for notice pay;
    d. A claim for payment in lieu of accrued holiday. The Claimant says he was entitled to 14 days whereas he was only paid for 9.5 days.
    e. A claim for the difference between the Claimant's usual salary and the amount he was paid in sick pay during an extended period of absence immediately prior to dismissal. This was put as a breach of contract claim,

and/or a wages claim and/or as part of the remedy for discrimination/ harassment.

f. A claim for unpaid employer's pension contributions which the Claimant now valued at £66.24. This was put as a breach of contract claim.

3. Documents before me:

   a. Core bundle running to 518 pages;
   b. Supplemental bundle running to 37 pages. The respondent refused to add these documents to the core bundle.
   c. Respondent's summary costs schedule.
   d. Mr Wayman's opening note.
   e. Claimant's opening note.
   f. Witness statements of: the Claimant; Mr Cheeseman; Ms Rutherford.

4. I heard live evidence from the witnesses named above each of whom was cross-examined. I heard oral closing submissions from both sides.

Documents dispute

5. The Respondent took two points in relation to the content of the supplementary bundle:

   a. In relation to p17 – 25, it asserted that they were not admissible by reason of legal advice privilege. I considered that this was a matter that needed to be resolved at the outset. Certainly these documents would normally be covered by that privilege as they are correspondence between the Respondent and its solicitor in which the Respondent seeks legal advice. However, they were disclosed to the Claimant in answer to a DSAR long ago (I do not know the exact date, but before the ET1 was presented in December 2023). The Respondent now says that was an error and presumably it was. However, privilege was not asserted until recently in negotiations over the bundle. I expressed the preliminary view that privilege had been waived given the long delay in asserting privilege. Moreover, the key document had been specifically pleaded in the claim form and privilege had not been asserted in the response. I indicated however that I was open minded and was happy to hear argument and rule on the matter if necessary. However, Mr Wayman conceded the point.
   b. In relation to all documents (including the above) that they were not relevant. I took the view that the sensible course was to admit the documents and take them into account if I found them relevant but not otherwise. We were very hard pressed for time and considered this to be not only a permissible approach (per *HSBC v Gillespie [2011] ICR 192*) but also the best one in the circumstances.

Chronological narrative

6. I make these findings of fact on the balance of probabilities.

7. The Respondent is a rail and construction recruitment specialist. The Claimant was employed by it as a Finance Officer from 30 June 2014 to 7 July 2023.

8. The most material events began when Mr Dave Aram became the Claimant's line manager in April 2023 taking over from the outgoing Finance Director. Following Mr Aram's appointment, he quickly raised concerns about the Claimant and the previous Finance Director. The core issue was that the Respondent's aged debt had, or at least appeared to have, grown to a very high level and this created some serious financial problems for the Respondent.

9. Shortly after joining, Mr Aram made some comments at a work lunch that the Claimant found very offensive and considered to be discriminatory in relation to religion.

10. On 25 April 2023, the Claimant was invited to a meeting to discuss the financial situation. This was styled as a fact-find. The meeting was attended by Mr Cheeseman, MD, Mr Mason (the business proprietor) and Mr Aram.

11. The Claimant later spoke with Mr Cheeseman who told him that he would not lose his job unless the Respondent found anything more in which case it could be more than a 'slap on wrist'.

12. Relations had quickly deteriorated after Mr Aram had joined. On 26 April 2023, the Claimant sent Mr Aram, Mr Cheeseman and Mr Mason an email in which he said he had been sworn at and shouted at by Mr Aram. Mr Aram disputed the Claimant's account. This matter was never taken up formally.

13. On 27 April 2023 the Claimant was invited to a formal disciplinary hearing to take place on 2 May 2023 to consider possible disciplinary action in relation to alleged breaches of his duties. In very short, it was alleged that he was responsible for credit control and he had lost control of credit. The possible consequences arising from this meeting were said to be an initial or final written warning.

14. The hearing of 2 May 2023 took place, but the process was adjourned for further inquiries and for the Claimant to respond further.

15. On 5 May 2023, the Claimant was invited to a reconvened disciplinary meeting to take place on 12 May 2023. The Claimant was then signed off sick by his GP for 3 weeks, with a Fitnote that stated 'depressive episode'.

16. On 10 May 2023, the Respondent suspended the Claimant's email account.

17. On 10 and 11 May 2023, the Claimant and Mr Cheeseman exchanged a number of text messages. The Claimant complained his emails had been cut off and it

was clear that he was quite upset and was struggling with his mental health. Mr Cheeseman said cutting off the emails was a welfare measure as the Claimant was on sick leave. The Claimant referred to seeing a counsellor and said his health was going backwards. The Claimant was also told that the Respondent had hired another credit controller.

18. On 12 May 2023, Mr Cheeseman wrote to the Respondent's solicitor. He stated that, and briefly how, in his view the Claimant had neglected his core duties. That the claimant was on sick leave and he was concerned about the potential for a long and drawn out disciplinary process. That he and Mr Mason had come to the shared view they did not want the Claimant in the business going forward. It asked for advice on how to execute such a course.

19. On 25 May the Claimant was signed off by his GP for a further 5 weeks. The illness was again stated to be 'depressive episode'.

20. The Claimant had a conversation with Mr Cheeseman on 30 May 2023 in which he said that he was off work due to bullying, swearing and intimidation as well as adverse comments about his religion.

21. On 2 June 2023, Mr Cheeseman wrote to the Claimant inviting him to a reconvened disciplinary hearing to take place on 6 July 2023. He said that if the Claimant did not attend whether because of ill-health or otherwise he would consider how to proceed. If the hearing were to proceed in the Claimant's absence he would be given the opportunity to set out his case by way of written submissions. He also stated that in light of further investigation the disciplinary allegations would be treated as potential gross misconduct for falsification of records and/or gross negligence. Three specific charges were laid and the basic evidence in relation to them was attached. I am not in a position to adjudicate on these charges but I am satisfied that there were laid in good faith and that there was a case that needed to be answered. The allegations became more serious than they first had appeared in light of further investigation.

22. Also on 2 June 2023, Mr Cheeseman wrote to the Claimant on a without prejudice basis. He offered the Claimant a settlement and outlined the broad gist of it. It would involve terminating the Claimant's employment and compromising various tribunal complaints in exchange for various payments. It was expressed to be subject to terms and to be open until 28 June 2023.

23. The Claimant then instructed a lawyer. On 22 June 2023, Mr Barnes, a Barrister working for Premier Legal LLP, contacted the Respondent on the Claimant's behalf. His email indicated that the Claimant was minded to settle his employment issues in an "agreeable manner" and wanted to talk about the level of settlement. On 23 June 2023, Mr Barnes added that the Claimant did not understand why the Respondent was suddenly being so unrelenting and had

previously implied it wanted him to 'take the hit for them' and get a stage one warning.

24. The Claimant's second fitnote covered him until 28 June. When he did not return on 29 June Mr Cheesman sent the Claimant a further letter stating that there would be a discinplinary hearing in relation to this on 4 July 2023. In my view this was on the high-handed side.

25. In the meantime, the Claimant's counsel sent the Respondent's solicitor an email that included an email chain which the Claimant's counsel said had been sent by the Claimant to the Respondent on 27 June 2023 enclosing a further fit note dated 26 June and signing the Claimant off for 3 months with 'depressive episode'.

26. I find that the Respondent did not receive the email from the Claimant when sent on 27 June, though I also find it was sent. For some reason it was not received. Because it was not received, the Respondent had a concern that the email was forged. I accept the Respondent had that concern, but that in fact there was no forgery.

27. On 3 July 2023, Mr Cheeseman invited the Claimant's comment on this matter and said that the disciplinary hearings of 4 and 6 July had been postponed whilst the Respondent investigated the Claimant's health. He sought the Claimant's consent to an Occupational Health referral which it said needed to be given by 7 July 2023, failing which it would need to make decisions without the benefit of the same.

28. On 3 July 2023, the Respondent's solicitor wrote to the Claimant's counsel and enclosed a proposed settlement agreement that was stated to be open for acceptance until 4pm on 7 July 2023. This gave almost exactly 4 days.

29. On 6 July 2023, Mr Barnes responded seeking to negotiate:

> *1. 2.2 [thus numbers are references to clauses in the draft settlement agreement] Can payment be in 10 days or at least by the end of the month.*
>
> *2. 6.1 Can we remove the amendments part of the clause so as to create a clean break*
>
> *3. 10.1.5. Please remove this, Mr Bebbington has several irons in the fire and would not want any come back on this later.*
>
> *4. Can we check the holiday entitlement this is what he has - Holidays should be between 2/4 extra days not one hundred percent sure if i got 2 extra days in 2023 so 2022 would be 25 days, meaning 3.5 carried over.*
>
> *5. SSP for May also needs to be included as back pay.*
>
> *6. He has been saving towards a Christmas do - which he will not get to attend, so he would like this money back.*

7. He would like a larger proportion towards his legal fees and he has suggested 4 hours at our rate of £275 per hour + VAT, to cover his costs.

30. On 7 July 2023, the Respondent's solicitor responded to the counsel answering each point. Concessions were made on some but not others. In relation to point 4 the solicitor said "*there is an additional 1.5 days accrued but untaken holiday carried over from last year".*

31. Counsel for the Claimant further responded later that day indicating that the terms were agreed and that a signed document would follow. It did so. Thus on 7 July 2023 the parties entered a settlement agreement. The terms of the agreement included:

    a. Termination of the Claimant's employment on that date;
    b. A payment in respect of 9.5 days of accrued but untaken holiday;
    c. A payment in lieu of notice and contractual benefits;
    d. Compensation for termination of employment;
    e. Contributions to the pension scheme up to the date of termination;
    f. Settlement of a wide variety of complaints.

32. The agreement was signed by the Claimant. It included also an advisor's certificate from counsel in the usual terms including that advice had been given on the terms and effect of the agreement, in particular the Claimant's ability to pursue his rights before an employment tribunal, that counsel was a qualified lawyer as defined at s.203(4) ERA, that a contract of insurance or indemnity was in place, and that neither counsel nor Premier Legal were acting for the Respondent or any associated employer.

33. The negotiations and the settlement proceeded on the basis that the Claimant was entitled to 9.5 days of accrued but untaken annual leave. The Claimant now asserts says that his true entitlement was 14 days although it has been hard to follow the basis of this and it is not clearly evidenced.

34. The Respondent's position in relation to annual leave entitlement came from Ms Rutherford. I accept that whether she was correct in her assessment or not the representations the Respondent made reflected Ms Rutherford's true and honest understanding of the Claimant's entitlement. Her understanding, which is admittedly convoluted (though I note that is quite typical when it comes to annual leave entitlement because it is a complex matter), was as follows:

    a. The Claimant's contractual entitlement was to 20 days annual leave (plus bank holidays). That reflects the wording of his contract;
    b. In 2021, because he had 5 years or more service, he had been gifted an additional 2 days;
    c. In 2022, he was again gifted an additional 2 days on top of the basic contractual entitlement (not on top of 2021's allowance). There is an

email from Mr Linford-Smith, which could very easily be read as meaning that two additional days entitlement on top of 2021 were being granted, but I accept that this is not what Ms Rutherford understood by that email. She was cross-examined about this extensively and I accept her oral evidence;

d. In mid-2022, the Respondent decided to add 5 days per annum to the basic holiday entitlement. This meant an additional 2.5 days in that holiday year (because it was halfway through) bringing the amount as Ms Rutherford understood it to 24.5 for 2022;
e. In 2023, the entitlement was increased to 27 days (the 20 referred to in the contract, plus the additional 2 that had been given from 2021 onwards plus the additional 5);
f. The Respondent's general policy was that annual leave could not be carried over from one year to another but it could at management discretion;
g. In 2022, the Claimant had only used 20.5 days of his entitlement, meaning an unused 4 days. The Respondent allowed him to carry over 1.5 days of that entitlement to 2023. The rationale is especially convoluted. In 2020, the Claimant had carried over 1.5 days of leave during the pandemic in to 2021. In 2021, he had taken all his leave including the 1.5 days carried over. However, as a matter of good will he was allowed to carry over a like sum of 1.5 days from 2022 into 2023. This meant he lost 2.5 days of his 2022 entitlement because he had not used 4 days and could only carry forward 1.5.
h. This brought the entitlement in 2023 up to 28.5.
i. By the date of termination in 2023 the Claimant had accrued 15 days of leave and taken 6 days of leave. This left a balance of 9 days. However, Ms Rutherford miscalculated the number of accrued days as 14. This was because she did not correctly update her calculations when the negotiations over the settlement agreement protracted. She therefore believed there was a balance of 8 days.
j. She added to that the 1.5 days that had been carried over from 2022.
k. Strictly this was slightly over-generous calculation to the Claimant in that it would have been more accurate to calculate accrued leave based on 27 days per annum plus 1.5 days rather than 28.5 days per annum.

35. The Claimant's evidence is that whilst he was in the period of sick-leave he was earning about £400 per month compared to a normal salary of about £2,200. I accept that evidence and his evidence that he was therefore financially struggling with his commitments.

36. The Claimant was asked whether the representations about holiday entitlement induced him to enter the settlement agreement and whether he would have done so had it not been for those representations. He was not sure what difference

those representations made as there had been a lot of things going on at the time and a lot of other elements to the settlement agreement.

Medical evidence

37. There is the following further medical evidence before me, that was not before the Respondent contemporaneously:

    a. Notes of GP consultation of 9 May 2023: the Claimant was on anti-depressants and tearful at the thought of returning to work. He described being shouted at and sworn at in the office. The diagnosis was depressive episode.
    b. Notes of GP consultation of 25 May 2023: the Claimant felt unable to return to work, that there had been unfair treatment with his manager shouting/intimidation. The diagnosis was depressive episode.
    c. Notes of GP consultation of 26 June 2023: depressive episode, felt completely unable to return to work and tearful at the very prospect. Sick note for a prolonged period agreed.

38. On 25 May 2023, Ms Julie Payler wrote to the Claimant's GP materially as follows: p439

    Mr Bebbington is due to meet with you tomorrow morning (Friday 25th May at 7.30am via telephone) and I would like to raise with you that the client is experiencing extreme anxiety in anticipation of your forthcoming consultation due to his concerns about having to return to work upon cessation of his sick note. He feels that he may have to return to work before he is ready due to pressure placed on him from the organisation, which is having a detrimental effect on him and the progress he has started to make so far.

    I would like to ask on behalf of the client that you consider extending his sick leave period to enable him to build upon the progress that he is making in his therapy sessions without the added pressure placed on him to return to work until he is ready.

39. The Claimant had 8 sessions with the counsellor.

40. In his evidence Mr Cheeseman said words to the effect that he was not convinced the Claimant had been suffering from depression and that the GP may simply have been repeating what the Claimant had asked him to say. In cross-examination Mr Wayman put to the Claimant that the GP had not given him a diagnosis of depression but merely said 'depressive episode' and that this was materially different. I reject both of those points. It is obvious on the evidence that the Claimant was suffering from depression and that this was his GP's diagnosis. The Claimant was prescribed anti-depressants and talking therapy and the GP characterised the illness as 'depressive episode' (i.e., someone going through a period of depression). The Respondent's position as described in this paragraph is without merit.

Law

41. It is possible to compromise complaints of the kind presented in this claim. Breach of contract claims can be compromised by a simple agreement. The statutory claims can only be compromised, so far as relevant in this case, if the requirements of section.203(3) Employment Rights Act 1996 and the equivalent provisions of the other statutes/statutory instruments engaged are complied with.

42. The validity of a settlement agreement may be challenged on the basis that it was made in circumstances which would have rendered it voidable at common law (*Hennessy v Craigmyle & Co Ltd* [1986] ICR 461 CA). Those circumstances may include misrepresentation (*Industrious Ltd v Horizon Recruitment Ltd (in liquidation) and Vincent* [2010] IRLR 204 EAT), lack of mental capacity on the part of one party to the agreement or duress.

Mental incapacity

43. In *Imperial Loan Co Ltd v Stone* [1892] 1 Q.B. 599, 601 where Lord Esher MR said (in antiquated language that I would not myself chose but quote because it is a passage that continues to reflect the law):

> *"When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about."*

44. *Chitty 12.076* says this:

> *"The Court of Appeal in Imperial Loan Co Ltd therefore held that in general a contract made by a mentally incapable person is valid unless he or she establishes both that he was mentally incapable at the time and that the other party was aware of this, the burden of proof on both issues lying on the person so claiming…*
>
> *In Dunhill v Burgin [2014] UKSC 18, [2014] 1 W.L.R. 933, Baroness Hale interpreted Stone as meaning where the other party to the contract knew or ought to known of the incapacity. This was obiter but considered to be a correct statement of the law in Josife v Summertrot Holdings Ltd [2014] EWHC 996 (Ch), (2014) B.P.I.R. 1250 at [19] and [20] (Norris J) (holding that the correct test was to consider whether it would have been obvious to the other party that the person lacked capacity and holding that there was no real prospect of showing that that it would have been).*

45. Chitty 12.089 says this:

> *"Nature of understanding required at common law: the understanding and competence required to uphold the validity of a transaction depend on the nature*

of the transaction. There is no fixed standard of mental capacity which is requisite for all transactions. What is required in relation to each particular matter or piece of business transacted, is that the party in question should have the capacity to understand the general nature of what he is doing. So, as was observed in Re Beaney in the context of the capacity to make a will:

> *"The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction."*

46. Chitty 12.093 says this:

> *"Relationship of common law and statutory tests of mental capacity: While the test for mental capacity provided by the Mental Capacity Act 2005 does not apply on its terms to the question of capacity to contract458 (which is still determined by the common law), the Code of Practice made under the 2005 Act states that:*
>
> > *"…the Act's new definition of capacity is in line with the existing common law tests … When cases come before the court [involving the issue of contractual capacity], judges can adopt the new definition if they think it appropriate."*
>
> *Similarly, in Dunhill v Burgin Baroness Hale explained that:*
>
> > *"The general approach of the common law, now confirmed in the Mental Capacity Act 2005, is that capacity is to be judged in relation to the decision or activity in question and not globally."*
>
> *However, this does not mean that judges are free to adopt the new statutory test in contexts governed by the common law, not least as the test of capacity in the Act is expressed as being "for the purposes of the Act" and its purposes do not include the conclusion of contracts.4 Rather, according to Munby J:*
>
> > *"…[w]hat is being said [in the Code of Practice] is that judges sitting elsewhere than in the Court of Protection and deciding cases where what is in issue is, for example, capacity to make a will, capacity to make a gift, capacity to enter into a contract, capacity to litigate or capacity to enter into marriage, can adopt the new definition if it is appropriate-appropriate, that is, having regard to the existing principles of the common law."*

47. The proper approach to s.2(1) MCA is set out in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889; [2003] 1 W.L.R. 1511 CA:

> *"the test to be applied was whether the party to legal proceedings was capable of understanding, with the assistance of such proper explanation from*

> *legal advisers and experts in other disciplines as the case might require, the issues on which his consent or decision was likely to be necessary in the course of those proceedings; that although the decisions actually made were likely to be important indicators of the existence or lack of understanding, a person was not to be regarded as unable to make a rational decision merely because a decision he had made would not have been made by a person of ordinary prudence, or conversely as having mental capacity merely because his decision appeared rational; that a person was not to be regarded as incapable of pursuing or compromising a claim merely because he would not be capable of taking investment decisions in relation to any large sum ultimately received in compensation.*

Duress

48. A contract may be voidable for duress where a party enters an agreement because of a wrongful or illegitimate threat or other form of pressure exerted by the other party, normally because the threat or pressure left the complainant with no practical alternative. There are different kinds of duress: threats to the victim's person, to their property and to their economic interests. This case does not raise any issue as to the former two types of duress.

49. Chitty 11.035/11.041s says this:

> *the illegitimate threat or pressure must have caused the victim to enter the contract. The test of causation here is the but for test. It is not necessary to show that the threat/pressure was the only or predominant reason but showing it was 'a reasons' is not enough.*

50. It is probably the case that the claimant must show, as a separate and independent requirement to void a contract on grounds of economic duress, that in an objective sense they had no reasonable alternative to giving in to the demand—in other words, that any reasonable person in the same predicament would have acted in the same way. There is some debate as to whether this is an independent additional requirement or merely an aspect of causation. The better view, in my opinion, and in agreement with the editors of *Chitty* and for the reasons they give, is the former (see *Chitty* 11-029/11-045/11-047).

51. In *Hennessy,* Donaldson MR said this:

> *For my part I can see nothing wrong with the observation of the industrial tribunal that if the applicant was entitled to avoid the settlement in the circumstances of this case, so would many other claimants. This was characterised by Mr. Tyrrell as a "floodgates" argument. I do not so understand it. It is entirely sensible to observe that in real life it must be very rare to encounter economic duress of an order which renders actions involuntary. It follows that if the applicant's situation was not uncommon, it is*

highly unlikely that he was subject to the necessary degree of economic duress.

Again I would not accept the criticism of the observation by the industrial tribunal that the applicant was well aware of the consequences of his action. This was true, and all that the tribunal was doing was to point out that the duress was not of such an order as to deprive the applicant of his understanding of the situation. It did not say that his awareness was, of itself, fatal to his claim to be entitled to avoid the settlement. It was merely one of many factors to be taken into account.

Mr. Tyrrell's criticism of the judgment of the appeal tribunal is no better founded. All that they were doing was to draw attention to evidence from which the industrial tribunal was entitled to conclude that there was no sufficient economic duress. But, even if it had been well-founded, it would not have formed a basis for allowing the appeal. It is too often forgotten that, in the context of appeals from the Employment Appeal Tribunal, this court is a second-tier appellate court. It may, and usually does, obtain considerable assistance from the judgment of the Employment Appeal Tribunal, but its concern is with whether the decision of the industrial tribunal was right, not with whether the Employment Appeal Tribunal was right. If this is thought disrespectful of the Employment Appeal Tribunal, and I hope that it will not be, may I draw attention to how comparatively rarely the House of Lords adverts in any detail to the reasoning of the judgments of this court. This is not a matter for complaint. It merely illustrates the fact that second-tier appellate courts are primarily concerned with the correctness of the trial court's decision.

52. In *Sphikas and Son v Porter EAT 927/96* the EAT observed not all pressure will amount to duress. It is inevitable that during the course of negotiations one side will seek to exploit the other's apparent weakness. However, in disputes between employer and employee the '*availability of a cheap and quick procedure to employees'* — employment tribunals — '*is an important antidote to the inequality of bargaining power inherent in an employment relationship'*. In the EAT's view, tribunal proceedings had always provided P with a '*practical and effective'* alternative to settling his claim. For that reason, there was no '*absence of practical choice'* in his case and thus he was not entitled to rely on a plea of economic duress.

Misrepresentation

53. The following are the essential elements of misrepresentation:

    a. There must be a statement of fact or law: Chitty at 10-006, 10-009.
    b. A statement of fact is to be distinguished from a contention or opinion (for example a contention or opinion that a particular document is not relevant to the litigation): Chitty at 10-013.

c. The statement must be at least substantially untrue: Chitty at 10-007.
d. It must be reasonable to believe that C was intended to rely on the statement: Chitty 10-040.
e. The statement must have operated on C's mind in deciding to enter into the agreement: Chitty 10-042.
f. C must show either that the representation was material, in the sense that it would influence a reasonable person, or that R should have known that he would be influenced by it. 10-049-10-051.
g. The statement must have induced C to enter the contract. In most cases, C must show that he would not have entered the contract, or would not have entered it on the same terms, "but for" the representation. The exception is where C can prove fraud, in which case the representation would still need materially influence his thinking in the sense that it was "actively present to his mind"; Chitty 10-006, 10-042 – 10-048.
h. If C knows or believes the statement to be untrue he may be unable to show inducement: Chitty at 10-043 and 10-045; Cooper v Tamms [1988] 1 EGLR 257; Hayward v Zurich Insurance Co Plc [2017] AC 142.
i. In order to establish fraud, it is for C to prove the absence of an honest belief in what was stated: Chitty at 10-057.

Voidable contract

54. A contract entered by a person that lacks mental capacity, is entered under duress or through misrepresentation it is voidable (not void). I was not addressed on rescission and given what I decide below there is no need for me to decide whether I would have ordered rescission. I will say not more than that I think there would have been some formidable obstacles to it in this case.

Strike out

55. By rule 37 the tribunal has a power to strike out claims or parts of claims where they have no reasonable prospect of success. Striking out is a draconian power that should be exercised carefully, sparingly and only in clear cases. That is particularly so in discrimination cases where there is a particular public interest in complaints being heard on their merits. However, if the tribunal does properly conclude that a claim has no reasonable prospect of success, absent some other compelling reason, it has the power to strike it out.

Discussion and conclusions

The settlement agreement

56. The agreement is in a typical form that is familiar to all employment lawyers.

57. In the course of closing submissions, I indicated to Mr Wayman, that on reading the settlement agreement my preliminary view was that it did not preclude the Claimant from bringing a breach of contract claim in respect of employer's pension contributions. Mr Wayman conceded that point. He also consented, in the interests of proportionality rather than anything else, to judgment being entered for the tiny amount claimed.

58. Subject to the argument that the settlement agreement is voidable:

    a. on a proper construction it compromises all the other complaints in the claim form; and
    b. complies with the statutory requirements for doing so in s.203(3) ERA and the equivalent provisions of the other statutes/statutory instruments engaged by the claims.

    That is my view and there was no suggestion or argument at this hearing to the contrary so I need not explain it any further.

Mental incapacity

59. I accept that the Claimant was suffering from depression at the time that he negotiated and entered the settlement agreement. I accept that depression was the GP's diagnosis and was *not* simply something the Claimant told the GP to say which the GP regurgitated unthinkingly. The Claimant was on antidepressant medication and referred for 8 sessions of talking therapy. There is no proper basis to think the GP's stated diagnosis was not his/her real view.

60. However, I do not accept that the Claimant lacked mental capacity to understand the situation he was in. He did, *and* he understood the terms *and* effect of the contract he was entering into *and* its implications on his right to litigate his employment disputes.

61. Firstly, and this is important, there is no medical evidence to the contrary and the burden is on the Claimant.

62. Secondly, the balance of evidence is otherwise against a conclusion of incapacity. The documents show that the terms of the settlement agreement were negotiated over in a cogent way over a period of time. It is plain from them that the Claimant was actively involved in the negotiations. I think it is clear from the evidence generally that the Claimant understood all the important essentials of the agreement, including that in exchange for certain sums of money he was giving up the right to make complaint about the employment issues that had by that stage upset him and which now find expression in his tribunal claim.

63. If I am wrong about that, I in any event find that the Respondent did not know and could not reasonably be expected to have known that the Claimant lacked capacity. It knew the Claimant had depression but all the appearances were that this was an ordinary situation in which an employee had become unwell following workplace dispute, had instructed a lawyer and though suffering from depression had capacity to instruct the lawyer and more generally understand and negotiate a settlement agreement with all its implications.

64. I take the Claimant's point that everything must be set in context and that he was under a lot of pressure. I accept that but none of that put the Respondent on

notice, actually or constructively, that the Claimant lacked capacity to contract. It seemed quite the reverse given the negotiations over the settlement agreement. These were not simply generic lawyer's points that were raised; there were matters that obviously must have come from the Claimant's instructions.

65. More generally, the extent of the mental health problems as they appeared at the time (and indeed as still appear), the nature of the workplace issues and the disputes over them were not only in the normal range: they were roughly in the middle of it. There was nothing to put the Respondent on notice actually or constructively that the Claimant lacked capacity to conclude the settlement agreement.

Misrepresentation

66. The misrepresentation relied upon is that the Respondent purported that the Claimant was entitled to 9.5 days of accrued annual leave. Whereas the claimant says it was 14 days.

67. I have found it hard to follow the basis on which he says it was 14 days and the cross-examination of Ms Rutherford, the only person who gave detailed evidence on the matter, did not make this clear in any way. In his own witness evidence the Claimant said almost nothing about this.

68. However, even assuming the Claimant is right and that there was therefore a mistake of fact (or perhaps mixed fact and law) in the description of his holiday entitlement, I am sure this was not a fraudulent or dishonest misrepresentation. It was one that was based on Ms Rutherford's true understanding of the Claimant's entitlement. It is not at all uncommon for errors to be made in the calculation of holiday entitlement; in fact it is notoriously common. Ms Rutherford has given a detailed account of her rationale and I find that she has given a truthful account of what she understood the Claimant's entitlement to be. I also find it vanishingly unlikely that the Respondent deliberately misrepresented the Claimant's entitlement. This would be such a teeny, tiny fraud as to be virtually pointless.

69. I also do not accept that the putative misrepresentation induced the claimant to enter the settlement agreement nor do I accept (if different) that but for the representation he would not have done so. The Claimant's own evidence was that he could not say whether or not he would have entered the settlement agreement absent the putative misrepresentation.

70. My view, which is an inference based upon the combination of the Claimant's evidence and the inherent probabilities given the facts, is that even if it be the case that the Respondent misrepresented the Claimant's accrued holiday by a few days, this was immaterial to the Claimant's decision to enter the settlement agreement. This reflects the reality of the situation that the holiday pay element was a very minor matter in the scheme of a much more significant employment dispute.

Economic duress

71. It has not been entirely clear what the pressure/threat relied upon is. Overtly the Claimant put the case on the basis that while he was on sick leave his pay reduced to £400 p/m from about £2,200 and he was struggling with his commitments. However, he has also put a lot of emphasis on the pressure that he was under with regard to there being incidents of bullying/swearing in the workplace from Mr Aram, two disciplinary procedures, and a requirement to see OH if he did not accept a settlement agreement. He has also referred to the timeframe for accepting the settlement as being short.

72. I do not think these things amount to duress although I do agree they put the Claimant under significant pressure. Pressure is an inevitable feature of professional life and not all pressure amounts to duress. It is a question of fact and degree.

73. The Claimant was on sick pay purely because he was on sick-leave. I do not accept that the Respondent deliberately made the Claimant ill. He did become ill because of the workplace events. That is a very frequent experience of employment disputes. I accept that being on sick pay made things economically difficult for the Claimant, including meeting his commitments. However, there was no entitlement to full pay while on sick leave and reducing the Claimant's pay did not amount to duress.

74. I accept that the Claimant believes that Mr Aram swore and shouted at him in the workplace and that adverse comments were made about his religion. If so that was wrong but it did not amount to duress. These matters pre-dated the Claimant's sick-leave. They contributed to him not wanting to return to work, as did the lack of any initiation of any kind of formal process to resolve his complaints about them, but they are insufficient to amount to duress for the purposes of entering a settlement agreement.

75. I accept that the disciplinary procedures did put the Claimant under significant pressure. However, these were ordinary incidents of employment disputes of a kind that the tribunal sees day in day out. I do not think the allegations or processes were fabricated to pressurise the Claimant. They reflected genuine concerns. I see and note that the Respondent had made an early decision that it did not want the Claimant in the business going forwards (email from Mr Cheeseman to solicitor). That however does not mean that the disciplinary processes were concocted in order to secure the Claimant's exit and I do not think they were. Rather, as noted, they reflected genuinely held concerns.

76. The requirement to see OH was in my view innocuous. This was a situation in which, if the matter did not settle, OH advice was very much indicated and might well have assisted.

77. The time frame for agreeing to the settlement was unremarkable. It must be remembered the negotiations opened around early June 2023 and the terms of the proposed agreement were then on 4 July 2023, the Claimant was given to 7 July 2023 to make up his mind. He also had the benefit of legal advice. This was not very long but it was also not very short.

78. Individually and in the round and even in the context of the Claimant suffering from depression I do not accept that these matters amounted to economic duress.

79. In any event the Claimant did have reasonable/practical alternatives. He could have refused the settlement, seen OH, fought the disciplinary allegations if and when they resumed in light of OH advice and/or engaged in early conciliation and/or presented a tribunal complaint. I do acknowledge that the timeframes for resolution of complaints made in the tribunal have protracted since *Sphikas.* Nonetheless, presenting a tribunal complaint remained a practical alternative.

Conclusion

80. There is no basis to set aside the settlement agreement and it compromises the complaints other than the claim for pension contributions. This is a clear case in which it is right to exercise the power of strike out because the complaints (other than for pension contributions) have no reasonable prospect of success and there is no other good reason for them to proceed to trial.

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Employment Judge Dyal

Date: 16/10/2024