EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107907/2024

Held on 13 March 2025 by CVP

Employment Judge N M Hosie

Mrs J Cruickshank	**Claimant** **Represented by:** **Mr J Robertson, International Fraud & Investigation Services Ltd**
Construction Industry Training Board	**Respondent** **Represented by:** **Mr E Strelitz, Counsel** **Instructed by CITB Legal Team**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claim has "no reasonable prospect of success" and it is struck out, in terms of Rule 38(1)(a) in Part 6 of The Employment Tribunal Procedure Rules 2024.

REASONS

Introduction

1. The claimant submitted an ET1 claim form on 29 December 2024 ("the New Case"), in which she intimated a "whistleblowing" complaint; she also sought to set aside a COT3 Agreement, dated 22 October 2018 and a consequent Dismissal Judgment, due to, "misrepresentation, undue pressure, and procedural unfairness", and to "allow the original claims to proceed". Her claim was denied by the respondent. This case called before me by way of a Preliminary Hearing to consider an application for strike out by the respondent and, if refused, case management.

2. I heard submissions on behalf of the parties and a Bundle of documentary productions was submitted by the respondent ("P").

Background

3. The claimant was employed by the respondent as an Apprenticeship Officer from 18 September 2011 to 4 May 2016.

4. On 6 September 2016, as a consequence of a referral by the claimant's Trade Union, the claimant's solicitor, at the time, submitted an Employment Tribunal claim on her behalf (P35 - 56) against the respondent in the Aberdeen Employment Tribunal (Case Number S/4104567/16) ("the 2016 Case"). She brought complaints of unfair dismissal; direct sex discrimination in terms of s.13 of the Equality Act 2010; harassment related to the protected characteristic of sex, in terms of s.26; and victimisation in terms of s.27. The respondent admitted the dismissal but claimed that the reason was gross misconduct and that it was fair. Otherwise, the claim was denied in its entirety. The respondent submitted an ET3 response form on 6 October 2016 (P57 - 78).

5. After various case management procedures, at which the claimant was represented by her solicitor, a Notice of Final Hearing was issued on 25 June 2018, listing the case for a 10-day Final Hearing, in Aberdeen, commencing on 5 November 2018.

6. However, the Hearing did not proceed as the parties, with the involvement of ACAS, were able to reach a settlement agreement, the terms of which were recorded in an ACAS COT3 Form which was signed by the claimant on 29 October 2018 and on behalf of the respondent on 7 November 2018 (P107 – 112).

7. In consequence of the COT3:

- The claimant received the sum of £60,090.50 as the "*Settlement Payment"* with a proportion of that *Settlement Payment* being allocated to *"the Personal Injury Claim"*

- The claimant received a written apology, in terms set out at Appendix 3 to the Agreement

- The Employment Tribunal was notified by the claimant that the claimant's claims were withdrawn

- A Judgment dated 12 November 2018 (entered in the Register on 14 November 2018) was issued by Employment Judge Nicol M Hosie, dismissing the claim under Rule 52 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. This was recorded as being made upon hearing from Ms Merchant, solicitor for the Claimant and Mr M Newnham, solicitor for the respondent, (P113 – 115).

8. As I recorded above, the New Case seeks to set aside the COT3 and to relitigate the original claims in the 2016 Case and to advance a new "whistleblowing" complaint (P.7).

Claimant's Submissions

9. The following is a brief summary of Counsel's oral submissions.

10. He sought a strike out of the New Case on 2 bases:

- That the claim has "no reasonable prospect of success", in terms of Rule 38(1)(a) in the Employment Tribunal Procedure Rules 2024

- That it is no longer possible to have a fair Hearing, in terms of Rule 38(1)(e)

11. So far as the New Case was concerned, Counsel referred to an additional document, namely an email which the claimant's representative had sent to the Tribunal on 30 May 2024 in which he wrote to request the "*Reopening*" of the 2016 Case. However, ACAS was not notified of the New Case until 10 December 2024, several months later and the claim form was not presented until 29 December 2024.

12. So far as the 2016 Case was concerned, Counsel stressed the importance of the claimant having legal representation throughout. She also had the benefit of Counsel's Opinion. The claimant's representative had submitted additional documents for the Preliminary Hearing ("C"). These included correspondence between the claimant and her solicitor in 2018 in which her solicitor advised that she had been authorised by the claimant's Trade Union to "*seek the written opinion of Counsel*" (C2). The correspondence also included the solicitor's Attendance Note with the claimant on 11 October 2018 which revealed that an offer of £50,000 had been made at that time; the claimant settled at a sum in excess of £60,000.

"Relevant Law"

13. Counsel accepted the submission by the claimant's representative that a contract such as a COT3 Agreement can be set aside if there is misrepresentation.

14. Counsel referred to the definition of misrepresentation in, Practical Law UK Practice Note 4 – 107 – 4724 :-

> "*A misrepresentation is an untrue statement of fact or law made by party A (or their agent for the purposes of passing on the representation, acting within the scope of their authority) to party B which induces party B to enter the contract thereby causing party B loss …. a mere statement of opinion, rather than fact or law, which proves to be unfounded, will not be treated as misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it."*

15. The claimant's representative maintained that the misrepresentation alleged was that the claimant was, *"coerced into signing a settlement agreement against her will".* Counsel submitted that that is not a statement of fact that induced her to sign the COT3 Agreement. There is no misrepresentation alleged which is actionable. The claim, therefore, to set aside the COT3 Settlement Agreement, has no reasonable prospect of success and should be struck out, in terms of Rule 38(1)(a) of the 2024 Tribunal Procedure Rules.

16. In any event, the Tribunal has not heard any evidence from the professionals who allegedly made the misrepresentation; they are unnamed and no dates are given of when they made the alleged misrepresentation. These are matters of considerable significance so far as the individuals are concerned and it would be quite wrong therefore to make any finding that the claimant was a victim of misrepresentation without hearing from them.

17. Also, even if the COT3 Form is set aside, there is still the matter of the Judgment which was issued dismissing the claim. No application has been made as to how that should be dealt with.

18. Nor was any explanation given as to why the application to set aside the COT3 form is only being made now, several years later.

"No longer possible to have a fair hearing"

19. Even if the COT3 Agreement and the Judgment were to be set aside, Counsel submitted that the New Case should still be struck out, in terms of Rule 38(1)(e), as it is no longer possible to have a fair hearing. The last act relied upon by the claimant was in 2015 and the New Claim which was presented on 29 December 2024 is several years out of time.

20. If the claimant is allowed to revive the original claim and advance a new claim of whistleblowing and re-litigate the previous claims, it was submitted that there will be *"inordinate prejudice"* to the respondent locating witnesses and asking them to recall evidence about matters which occurred so long ago.

21. Also, it may prove impossible to trace witnesses some of whom at least will no longer be employed by the respondent.

22. The fact that the claimant is represented now is also a relevant factor. The New Case was identified and intimated in May 2024 (at the latest) when her representative wrote to the Tribunal. However, he did not notify ACAS until 10 December 2024 outwith the 3 month time limit. It was submitted that he waited too long to make the application to set aside the COT3 Form and to also bring a new whistleblowing claim. Counsel submitted that that *"compounds the case against her*".

23. Finally, Counsel submitted that if the claimant wished to take the matter up with "other bodies" that was her right. She alleges that her solicitor "let her

down" and acted improperly. That is a matter for the Law Society and or the Civil Court. It is not a matter for the CITB.

Claimant's Submissions

24. The claimant's representative spoke to a "Skeleton Argument" which he had submitted by email on 11 March 2025 and which is referred to for its terms. The following is a brief summary.

25. With reference to ***Cole v Elders' Voice*** UKEAT/0251/19/VP he submitted that "*a Tribunal must look behind a COT3 if credible allegations of misrepresentation or undue influence arise … a COT3 can be challenged on the same basis as any other agreement*". This was not disputed by Counsel.

26. The claimant's representative submitted that:-

> "*The claimant's evidence suggests that the respondent:*
> *(a) overstated the hopelessness of her claim;*
> *(b) threatened severe cost liability; and*
> *(c) withheld or downplayed key documents or statements and that this constituted "misrepresentation, undue pressure and economic duress"*

27. The claimant's representative submitted that the claimant wrongly believed "*she was getting the best advice available as she was represented by her Trade Union solicitors".*

28. He submitted that she was, *"coerced into signing the COT3 Agreement against her own best interests".*

29. He referred, in particular, to the claimant's email of 18 December to her solicitor (C2, page 5) in which she said: "*I feel bullied into silence*".

30. She also said in her email of 19 December 2017 to her solicitor she felt bullied by the CITB (C2, page 4).

31. Further, she also felt pressure as the respondent had advised her that if she proceeded with the case they would make an application for expenses. Her solicitor also advised her that if she wished to proceed with the case she would need to do so *"herself".*

32. The claimant's representative advised that the claimant had been, *"tirelessly writing letters to MPs and others"* and that she felt, *"so bullied and harassed that it took her years to recover*".

33. He submitted that "*her arguments need to be tested by the courts and the COT3 is a barrier to prevent her moving on … she was led into a dead end and the only way out was to sign the Agreement … she was coerced into signing the Agreement*".

34. He submitted, therefore, that the COT3 Agreement should be "set aside".

35. So far as the Dismissal Judgment was concerned, he submitted that, were I to set aside the COT3 Agreement, I should reconsider the Judgment, in terms of Rule 70(4) in the Employment Tribunal Procedure Rules 2024.

Discussion and Conclusions

36. If a contract has been induced by misrepresentation it is at least voidable (***Cole v Elders' Voice***). That was common ground between the parties.

37. The claimant's representative submitted that the COT3 Agreement should be set aside on the ground of misrepresentation. He submitted that the misrepresentation was that: "*The claimant was put under pressure by her legal team and with the threat of legal costs to sign the COT3 Agreement. She wanted her day in court in the public domain.*" He also said, "*She was coerced into signing an Agreement she didn't want to sign.*"

38. As Counsel submitted, misrepresentation is defined as, "*An untrue statement of fact or law made by Party A (or their agent for the purposes of passing on the representation, acting within the scope of their authority), to Party B which induces Party B to enter the contract thereby causing Party B loss. A mere statement of opinion, rather than fact or law, which proves to be unfounded, will not be treated as misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it.*"

39. According to the Textbook, Walker on the Law of Contracts and Related Obligations in Scotland, "*a misrepresentation is an inaccurate statement of past or present fact made by or on behalf of one party to, or to an agent for, the other in the course of negotiations leading up to the contract. To rank as a misrepresentation the statement communicated must be inaccurate to an extent which is, if not material, at least so substantial that it cannot be ignored under the de minimis principle*".

40. What the claimant alleges is not misrepresentation. It is an allegation, and a serious one at that, that her legal advisers coerced her into signing the COT3 Agreement. The claimant's representative alleged, "*they were not acting in her best interests*".

41. That does not satisfy the definition of misrepresentation.

42. It was significant that the claimant had the benefit of legal advice throughout the 2016 Case. Her solicitor even went to the extent of obtaining Counsel's Opinion, presumably on the merits of her claim and the respondent's settlement proposals. She was also supported by her Trade Union.

43. I also noted that at one stage, leading up to the signing of the COT3 Agreement, a settlement offer of £50,000 had been made but that the eventual settlement was in excess of £60,000, along with an apology and an undertaking by the respondent to provide a reference, on agreed terms, if requested from any third party.

44. It was also significant that the agreement between the parties was reduced to writing and that the claimant signed a detailed COT3 Agreement on 29 October 2018 (P.108).

45. Further, at para 6 of the Agreement (P.108) there is a very detailed discharge of all and any claims by the claimant against the respondent, *"at the date of this agreement or which may arise in the future",* under the Acts listed in Appendix 1 which included the Employment Rights Act 1996 and the Equality Act 2010 (P.110).

46. I was not persuaded, therefore, that there was any basis for setting aside the COT3 Agreement.

47. So far as the Tribunal Judgment dismissing the claim was concerned, an application for reconsideration must be made within 14 days in terms of Rule 69. The Judgment was entered in the Register and sent to the parties on 14 November 2018. There has been no written application for a reconsideration thus far. The only application was an oral one, first made by the claimant's representative at the Hearing on 13 March 2025, over 6 years later. There is no application in the claim form to reconsider the Judgment.

48. Should I be minded to set aside the COT3 Agreement and the dismissal Judgment and allow the New Case to proceed there would be a time-bar issue to be addressed. The Tribunal does have a discretion to allow out of time claims to proceed but no satisfactory explanation was given as to why it had taken the claimant several years to bring the New Case. Further, as Counsel submitted, having intimated an intention to bring the New Case on 30 May 2024 the claimant's representative waited too long. He did not notify ACAS until 10 December 2024. This compounded the time-bar issue.

49. I was satisfied that Counsel's submissions were well- founded.

50. While strike-out is a draconian sanction, only to be exercised in exceptional circumstances, this is one of these cases.

51. For all these reasons, therefore, I arrived at the view that the New Case has "no reasonable prospects of success" and that it should be struck out in terms of Rule 38(1)(a), in Part 6, of The Employment Tribunal Procedure Rules 2024.

"Fair Hearing"?

52. For the sake of completeness, I also wish to record that, that I also found favour with Counsel's submissions that, in all the circumstances, it would no longer be possible to have a fair hearing in respect of the New Case. Had I been required to do so, therefore, I would have struck it out, in terms of Rule 38(1)(e).

53. This is a truly extraordinary case. The last allegation founded upon in the 2016 Case was in 2015. The passage of time is bound to adversely affect the cogency of the evidence. If the New Case were allowed to proceed there would be a number of issues to address first, including time-bar and reconsideration of the dismissal Judgment. Case management would also be required. That is likely to take a number of months. Should the case proceed to a Final Hearing, when evidence will be heard from witnesses, several days will require to be allocated. It is unlikely that any such Hearing could be fixed until 2026, at the earliest, some 11 years after the last allegation.

54. Further, as Counsel submitted, it is likely that the respondent would experience *" inordinate prejudice*". It is likely they would have difficulty tracing witnesses who may no longer be in their employment; they may be reluctant to become involved after all this time; they may have little recall of the relevant events; there is also likely to be difficulty locating the relevant documents.

55. Also, were I to set aside the COT3 Agreement and allow the New Case to proceed to a hearing, the claimant's representative was unable to explain what would happen with the £60,000 which the respondent paid to the claimant. He could not give an undertaking that it would be repaid even if the New Claim did not succeed.

56. Clearly, the balance of prejudice would lie in favour of the respondent.

Employment Judge: N M Hosie
Date of Judgment: 21 March 2025
Date Sent to Parties: 21 March 2025