Neutral Citation Number: [2022] EAT 26

Case No: EA-2019-000698-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 September 2021

Before :

MICHAEL FORD QC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MR ADRIAN ARVUNESCU **Appellant**

- and -

QUICK RELEASE (AUTOMOTIVE) LTD **Respondent**

- -

- -

MR W YOUNG for the **Appellant**
MR J MCCRACKEN for the **Respondent**

Hearing date: 23 September 2021

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant, who was formerly employed by the respondent, brought proceedings against them for race discrimination after his employment was terminated. The proceedings were compromised by a "COT3" agreement signed in March 2018. Soon afterwards, in May 2018, the claimant brought a new claim against the respondent. He alleged, among other matters, that in early 2018 he had been rejected when he applied for a post with a wholly-owned subsidiary of the respondent in Germany. He complained that this was victimisation contrary to the **Equality Act 2010** for which the respondent was liable. At a preliminary hearing the Employment Tribunal (i) decided that the new claim fell within the scope of claims which were compromised by the COT3 and (ii) struck out his claim on the basis that there was no reasonable prospect that the respondent was liable for his rejection from the post.

Held (allowing the appeal on (ii) but dismissing it on (i)). The claimant's pleaded claim was in substance complaining that the respondent had engineered his rejection from the post with the Germany company, a claim which could potentially fall within the scope of section 112 of the **Equality Act 2010,** which applies where one person "knowingly helps" another to do an act of discrimination. The tribunal was wrong to consider that claim had no reasonable prospects of success. There was no dispute the claimant did a protected act for the purpose of section 27 of the **Equality Act** and the respondent knew he was applying for a post in Germany. Given the close relationship between the respondent and the Germany company, it could not be said that there was no reasonable prospect of the claimant showing that the respondent was involved in the decision to reject him and so liable under section 112.

The COT3 agreement was worded in very wide terms, and applied to any claims arising directly or

indirectly out of or in connection with the claimant's employment with the respondent. Although a claim under section 112 of the **Equality Act** did not necessarily require a link with employment, on the alleged facts here the complaint had a sufficient link with the claimant's past employment with the respondent to fall within the terms of the COT3.

Michael Ford QC, Deputy Judge of the High Court

Introduction

1. This is an appeal by Mr Adrian Arvunescu against a judgment of the employment tribunal (the "Tribunal") sent to the parties on 8 October 2019 and heard by Employment Judge Wyeth (the "EJ"), sitting alone at Watford employment tribunal. The claim was heard on 15 and 16 July and was dealt with at a preliminary hearing. In striking out the claimant's claim, the Tribunal decided among other matters that firstly, the claimant's claims were compromised by a COT3 agreement, and, secondly, his claim for victimisation, contrary to sections 27 and 39 of the **Equality Act** ("EqA"), had no reasonable prospects of success. On either basis, the claims were dismissed. I shall refer to the parties as claimant and respondent as they were before the tribunal.

2. The claimant was given permission to pursue two grounds of appeal at a rule 3(10) hearing before HHJ Auerbach on 17 February 2021. They were the following:

> i) "The Employment Tribunal erred in striking out the victimisation claim as having no reasonable prospect of success because (a) it erred in not identifying that the pleaded claim was, in substance, that the Respondent had instructed, caused or induced the decision of the German company; and/or (b) it erred in concluding that such a claim was wholly fanciful;
>
> ii) The Employment Tribunal erred in concluding that the form COT3 precluded the victimisation claim from being pursued, because (a) it erred in concluding that it could embrace a claim about rejection of an application for

> employment with a different company; and/or (b) it erred in concluding that the victimisation complaint was confined to conduct which had already taken place by the time the COT3 was concluded."

3. Before me, the claimant was represented by Mr Young of counsel, appearing *pro bono* through Advocate, and the respondent was represented by Mr McCracken. I am very grateful to both counsel for their clear and focused submissions and especially grateful to Mr l Young for appearing *pro bono*.

The Tribunal Decision and Background

4. The background to the matter is set out in the judgment of EJ Wyeth. As would be expected at a strikeout, the EJ did not hear from any witnesses but did consider some of the documents which had been obtained on disclosure. I amplify the background summarised by the tribunal, by reference to some of the documents.

5. In summary, taking it from paragraph 1 of the tribunal decision:

> 1. "The claimant was employed by the first respondent from 6 May 2014 until 6 June 2014 as an engineering release coordinator. He was based in Woking at the site of a contractor ("the Contractor") of the first respondent."
>
> 3. Following the termination of the claimant's employment in 2014 by the first respondent, the claimant brought proceedings against the first respondent for race discrimination under the claim number 2700958/2014. Notably, that claim was compromised by way of a COT3 settlement agreement entered into on 1 March 2018 with the assistance of an ACAS conciliator. Shortly afterwards, the claimant commenced ACAS early conciliation ("EC") on 10 April 2018 against the first respondent. An ACAS EC certificate was issued on 10 May 2018."

The claimant describes himself as a Romanian national, so that was the basis of his earlier race discrimination complaint against the respondent (Tribunal, paragraph 2).

6. As the Tribunal explained at paragraph 4, following ACAS conciliation, the claimant

presented the claim which led to this appeal on 10 May 2018. Full details of that claim were set out in an annex to the claim form with the title "ET1 Particulars of Claim" (the "Particulars").

7. The Particulars contained allegations of discrimination, victimisation and other complaints. In relation to the victimisation complaint, the claimant referred to his being employed by the respondent in 2014, following which he brought a complaint of unfair dismissal and race discrimination that was settled in 2018.

8. The claimant alleged that in early 2018 he had applied for the same or very similar role he had held in 2014 with the respondent. He said the job was with a company in Germany, which was a wholly-owned subsidiary of the respondent, working in Köln. The claimant alleged that when he contacted an employee in human resources of the respondent, Emma Lloyd, she "declined to volunteer a reference" and advised him to contact Rojda Kaglayan in the human resources department of German company. After he contacted Ms Kaglayan in connection with his post, he said he was not considered for the role. He went on in his Particulars to explain how the respondent was under a duty to provide a reference. He alleged that he was not considered for the role in Köln because of "animosity" owing to his earlier tribunal case..

9. In relation to how the respondent was responsible for this victimisation , his case was probably best summarised at page 2 of the Particulars, where he said:

> " It is therefore obvious that R [the respondent], by means of their German subsidiary/JV (meaning joint venture) decided not to consider C's application for any of their roles in Köln or elsewhere."

His case was therefore that there were close connections between the respondent and the German company which had rejected him, and the respondent was somehow responsible for his not obtaining the job. He summarised his victimisation case in this way:

> As there appears no alternative explanation, I think therefore I have suffered victimisation with regard to my applying for a role in Köln earlier 2018, and the respondent's subsequent attitude/lack of towards my application.

10. A preliminary hearing was held on 14 December 2018 at which EJ George clarified the issues in the case and directed the listing of the preliminary hearing which is the subject of this appeal. EJ George referred to the claimant's application for a role of Engineering Release Co-ordinator in Köln at paragraph 5. At paragraphs 6 and 7 EJ George summarised the claimant's claims, which included that the failure to advance his application for the post in Köln was an act of victimisation (his primary complaint) as well as race discrimination, age discrimination and disability discrimination, for which the respondent was responsible.

11. The issues in relation to the acts of victimisation were summarised at paragraphs 13.14 and 13.15 of EJ George's decision as follows:

> " *Equality Act, section 27: victimisation*
>
> 13.14. Did the claimant do a protected act? The claimant relies upon his complaint of race discrimination against the first respondent which was presented to the employment tribunal in 2014 under Case No: 2700958-2014.
>
> 13.15. Did the first respondent subject the claimant to any detriments as follows:
>
> 13.15.1. Did the first respondent refuse or fail to provide the claimant with a reference? The last communication which the claimant had with the first respondent about a reference was on 23 January 2018.
>
> 13.15.2. Did the first respondent fail to progress or reject the claimant's application for the role of Engineering Releasing Co-ordinator in about January 2018?
>
> 13.16. If so, was this because the claimant did a protected act and/or because the first respondent believed the claimant had done, or might do, a protected act?"

12. Returning to the decision of EJ Wyeth, after referring to the claimant's case that he had applied for the role of Engineering Releasing Co-ordinator in Köln, at paragraph 31 the EJ recorded a

debate about the relationship between the German company with which the claimant had sought employment and the respondent. The claimant was unclear if it was with KCIG GmbH ("KCIG") or Quick Release GmbH ("QRG"). The respondent said the post was with QRG, which was a joint venture it had entered into with KCIG. In either case, the EJ recorded the claimant's case that the respondent was somehow responsible for him not getting the job with the German company which "he described as a wholly-owned subsidiary".

13. The EJ continued to set out the background at paragraphs 33 to 34:

> 33. "As recorded in EJ George's Summary, in addition, the claimant says that he requested a reference via Ms EL [Emma Lloyd] of the first respondent in or around January 2018 and she failed or refused to provide one. He accepts that his last communication with EL was on 23 January 2018. He says that without such a reference from a previous employer, he was effectively unable to progress his application with the German company.
>
> 34. His primary claim in relation to the failure or refusal to progress his application to the German company is that it is victimisation."

14. The EJ then went on to set out the documents which had been disclosed which were relevant to the claimant's rejection of his application for the post in QRG/KCIG. These included e-mails passing between the claimant and Emma Lloyd, in which she told him he would need to contact Ms Kaglayan.

15. I was shown the application the claimant made for the job in Germany, which was sent by the claimant to Rojda Kaglayan by email dated Tuesday, 23 January 2018 at 8:46.04. It was headed "Application for Engineering Release Roles in Köln (Data Analyst/Project Analyst)" and informed Ms Kaglayan in the body of the text that the claimant was near Köln and was therefore immediately available for an interview and asked her to consider his application.

16. The EJ set out the history of the subsequent e-mail exchanges at paragraphs 38 to 39:

38. "In reply to that email, EL sent a further message at 11:00:

> 'Hi Adrian -- Unfortunately, I have no influence over the recruitment process. Regards E [….]'

39. On 19 February 2018, the claimant received an email from KCIG, which can be found at tab 2 of the Bundle. Again, the content of that email is significant for the purposes of what I have to determine:

> 'Dear Mr Arvunescu
> Thank you once again for your application and the interest shown in our company. Unfortunately, we are currently unable to offer you a position that matches your qualifications and expectations. We are very sorry to say that we therefore can no longer proceed further with your application. Please accept our best wishes for your career. Sincerely, Career Team, KCIG GmbH.'"

17. The EJ then referred to the COT3 agreement signed on 1 March 2018:

41. "As is usual, the COT3 sets out terms of a settlement whereby the respondent agreed without admission of liability to pay the claimant a specified sum of money on 1 April 2018, subject to the agreement being entered and compliance with its terms.

42. The second bullet of clause 2 of that agreement states that:

> 'The claimant agrees that the payment set out in paragraph 1 [for these purposes I accept that this was referring to the first bullet paragraph in clause 2] is accepted in full and final settlement of all or any costs, claims, expenses or rights of action of any kind whatsoever, wheresoever and howsoever arising under common law, statue or otherwise (whether or not within the jurisdiction of the employment tribunal) which the claimant has or may have against the respondent or against any employee, agent or officer of the respondent arising directly or indirectly out of or in connection with the claimant's employment with the respondent, its termination or otherwise. *This paragraph applies to a claim even though the claimant may be unaware at the date of this agreement of the circumstances which might give rise to it or the legal basis for such a claim* [my emphasis].'
>
> The last sentence is of some potential significance.

43. The third bullet states:

> For the avoidance of doubt, the settlement in paragraph 2 [which I accept is referring to the second bullet paragraph] includes but is not limited to:

- the claimant's claim presently before the employment tribunal case number 2700958/2014;
- any other statutory claims whether under the Employment Rights Act 1996, the Working Time Regulations 1999, the Equality Act 2010, the Employment Relations Act 1999, the Employment Relations Act 1999 [*sic*] or otherwise;
- any claims arising under any EU directive or any other legislation (whether originating in the UK, EU or elsewhere) applicable in the UK; and
- any claim for any payment in lieu of notice, expenses, holiday pay or any other employee benefits or remuneration accrued during the period of the claimant's employment by the respondent."

18. That forms the background. As for the relevant law, the Tribunal referred to section 144 of the **EqA**, which establishes that COT3 agreements are an exception to the rule against contracting out of rights conferred by that Act. The EJ noted that agreements made with the assistance of a conciliation officer - COT3s - did not need to relate to particular proceedings, referring to **Hinton v University of East London** [2005] ICR 126, and he summarised the guidance in **Royal National Orthopaedic Hospital Trust v Howard** [2002] IRLR 849 on when a COT3 agreement can be effective to bar claims which were unknown at the time. The EJ went on to direct himself in accordance with the power to strike out claims of discrimination at paragraphs 61 and 62, referring to the leading authorities of **Anyanwu v South Bank Student Union** [2001] ICR 391 and **Ezsias v North Glamorgan** [2007] ICR 1126. He also referred to the he recent judgment of Underhill LJ in **Ahir v British Airways plc** [2017] EWCA Civ 1392. The EJ reminded himself that that discrimination cases should only be struck in exceptional cases where the facts are in dispute, such as where the facts alleged by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documents. The hurdle for a strike out remains high, as Underhill LJ explained in **Ahir** at [16], cited by the EJ at paragraph 62. There is no objection by Mr Young to the EJ's legal direction as to the relevant law. His case is about whether or not the EJ properly applied the principles.

19. The EJ's conclusions begin at paragraph 63. In relation to the COT3 agreement, he said this:

> 64. "I find that the COT3 agreement does indeed compromise the claims that the claimant seeks to bring for the following reasons.
>
> 65. On any objective reading of the COT3, and taking the normal meaning of its wording, that wording is unequivocal. It specifies quite clearly that it is *'in full and final settlement of all or any costs, claims, expenses or rights of action of any kind whatsoever, wheresoever, howsoever arising under common law, statute or otherwise … which the claimant has or may have against the respondent, or against any employee, agent or officer of the respondent arising directly or indirectly out of or in connection with the claimant's employment with the respondent, its termination or otherwise.'* Further on in that same paragraph it unequivocally states, *'This paragraph applies to a claim even though the Claimant may be unaware at the date of this agreement of the circumstances which might give rise to it, or the legal basis for such a claim.'*
>
> 66. In the following paragraph it states again unequivocally, *'for the avoidance of doubt, settlement in paragraph 2 includes but is not limited to …*' and then in addition to the claimant's original claim (No. 2700958/14) lists other matters that are being compromised, one of which is any other statutory claims whether under the Employment Rights Act 1996, the Working Time Regulations 1990 [*sic*] or the Equality Act 2010.
>
> 67. The claimant struck me as a highly intelligent individual who has given a tremendous amount of thought to his claim and has prepared lengthy submissions that contain references to particular cases and law that only with real effort and diligence could an unqualified and untrained individual find and identify to be relevant. That provides some context when determining what the parties intended when they signed this agreement. The agreement was entirely clear in the wording used. Even if it could be said the claimant was unaware at the date of entering the COT3 agreement of circumstances which might give rise to the claims that he is now seeking to bring, which I reject on the basis of what is before me, such unknown claims are nevertheless covered under the terms of the COT3.
>
> 68. Notwithstanding the above, even if I am wrong on that, this is not, in my view, a case that engages authorities such as **Hinton** or **Royal Orthopaedic Hospital Trust**, because as a matter of chronology I am satisfied that the claimant knew before he signed this agreement of the potential claims he is now seeking to bring That is apparent from the contemporaneous documentation that is before me. It cannot be said that he was unaware of the fact that he was going to be provided with a reference by EL before entering the COT3 Agreement because in response to his suggestion that she might be able to provide a reference she told him by email on 23 January 2018 that she "had no influence over the recruitment process". Taking the claimant's case at its best,

he certainly must have known the position at the point at which he received a rejection of his application on 19 February 2019.

69. Furthermore, notably, he records in his email of 23 January 2018 that *'it should definitely appear problematic to seek employment given the dispute'*. Whether or not he had real cause to believe that, prior to entering the COT3 Agreement the claimant was alive or at least should have been alive to the allegation that he now says gives rise to the claim that he is seeking to bring. All of these matters would have been in his mind at the point at which he signed the COT3 Agreement: an agreement that is clearly worded and specifies without any ambiguity or doubt that such claims will be compromised.

70. It was open to the claimant to inform the ACAS conciliation officer that he wanted an exception applied to the terms of the agreement. That did not happen. This is not a case of excluding claims that were not know about at the time or, indeed, future claims. As is entirely apparent from the documentation, the claimant would have known as at 18 February 2018 that his application was not being progressed. Further, he would have known that nothing had changed with regard to the position between the email communications he had with EL, the rejection of his application and the time at which he entered the COT3 Agreement. More importantly, absolutely nothing had changed between the date of entering the COT3 Agreement and the claimant commencing ACAS Early Conciliation on 10 April 2018 and subsequently issuing his present claim on 10 May 2018 for allegations of victimisation, discrimination because of race, age or discrimination arising from disability. For that reason I consider that the claimant's claims are compromised as part of the settlement and are not matters upon which a tribunal can or should adjudicate."

20. In relation to striking out the victimisation claim, the EJ dealt with this at paragraphs 79 and 80:

79. "With regard to all of the discrimination claims (of direct age and/or race discrimination and discrimination arising from disability) it is difficult if not impossible to see how the claimant can have a claim (even if there are disputes of fact about who owns or controls the German company to which he applied to work) against the first respondent in these circumstances. There is no evidence to suggest that the first respondent had any involvement in the decision by the German company, KCIG GmbH (or Quick Release GmbH), to refuse to progress his application for employment. Even if it did, it is difficult, if not impossible, to see how the claimant can have a claim against the first respondent because an alleged subsidiary company refused him employment allegedly because of his age and/or race or for a reason arising in consequence of his disability. Even taking account of the possibility of any arguments about individuals aiding, instructing or inducing discrimination (which were not advanced before me and of which there was no evidence) it is fanciful to suggest that liability for any of the claimant's complaints would not rest

> exclusively with the company that determined not to progress his application for employment which, in this case, was not the first respondent.
>
> 80. Indeed, not only is there an absence of any evidence to support such an assertion, there is positive evidence before me suggesting entirely the contrary. EL specified in the email already referred to above, that she had no influence over the recruitment process. Of course, that should be treated with a degree of scepticism because it could be argued that EL might be inclined to make that out to be the position regardless and because that of itself does not conclusively indicate that no one at the first respondent had such influence. Nevertheless, on the basis of what has been provided there is nothing before me to suggest that the first respondent had any influence over what should happen in relation to the claimant's attempts to secure employment with the company outside of the English and Welsh jurisdiction"

21. Although those paragraphs were dealing with the discrimination claims, the EJ reached the same conclusion for the same reasons in relation to the complaint of victimisation at paragraph 81, saying that claim was "based on mere assertion. The claimant relies on nothing more than the documentation to which I have referred above."

22. In essence, therefore, the EJ was deciding that it was "fanciful" to suggest that any liability could attach to the respondent, because all liability would be solely with the German company, KCIG or QRG.

The Grounds of Appeal

23. Against that background, I turn to the grounds of appeal. In relation to both grounds, and especially the first, it is important at the outset to clarify the correct legal categorisation of the claim that Mr Young says was in fact being advanced by the claimant and which he says, if properly analysed by the Tribunal, should not have been struck out.

24. According to Mr Young, the claimant's case, if properly analysed, was not that the respondent's acts which led to the claimant not obtaining work in Köln was victimisation by the respondent

for the purpose of a claim against it under section 39 **EqA**. Rather it takes this form. First, QRG (or whichever entity was the German company) victimised the claimant for the purpose of section 39(3)(c) by not offering him employment. Second, the relevant "protected act" for the purpose of section 27 was that the claimant had earlier brought proceedings under the **EqA**: see section 27(2)(a). This was agreed to be when he brought proceedings based on race discrimination against the respondent in 2014 in respect of his treatment while employed there.

25. Thirdly, though it was originally argued for the purposes of this appeal that the respondent instructed or induced QRG to do an act which contravened Part 5 – that is, not offering the claimant employment because of victimisation - and so was itself liable under section 111 of the **EqA**, Mr Young candidly and rightly accepted that subsection 111(7) could cause an insuperable problem for such a claim. This is because of section 111(7), which states that section 111 only applies where the relationship between the respondent and QRG was such that the respondent was "in a position to commit a basic contravention in relation to" QRG (for this purpose a "basic contravention" means a breach of Part 5 of the **EqA**). It appeared no such relationship existed between the respondent and QRG because QRG was not, for example, an employee of the respondent. In that light, and without objection from Mr McCracken, Mr Young applied to amend his grounds of appeal to argue that, properly interpreted, the claim could and should have been brought and understood as one under section 112 of the **EqA**. That provision states "(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) (a basic contravention)". For the purpose of enforcement, a contravention is "to be treated as relating to the provisions of this Act to which the basic contravention relates" – here Part 5. The claim may therefore be brought in the employment tribunal under section 120.

26. I granted Mr Young permission to amend ground (1) of the Notice of Appeal in that way: it

amounted to a change in how the facts should have been legally classified by the Tribunal and no more.

27. On that basis, Mr Young's argument as reformulated is that the alleged facts put forward by the claimant to the Tribunal potentially amounted to a claim that the respondent knowingly helped QRG to do an act of victimisation contrary to Part 5 and so fell within section 112. That was, he argues, the appropriate legal category for the claim. The meaning of "knowingly help" for this purpose is presumably similar to the meaning of "knowingly aid" in the predecessor legislation such as the **Race Relations Act 1976**, considered in **Anyanwu** among other cases. It may capture, for example, knowing encouragement of discrimination.

28. **Ground (1)**. Against that background, I turn to the first ground of appeal. As amended, the ground of appeal should now be read as referring to the Tribunal having erred in not identifying that the pleaded claim was, in substance, that the "respondent knowingly helped the decision of the German company", implicitly referring to section 112 **EqA** instead of section 111. There are two issues here. First of all, should the EJ have identified the claim in substance as one being under section 112, and secondly, did he err in striking this claim out on the basis it was wholly fanciful?

29. As to the first issue, it is right to say nowhere in his claim form or Particulars, so far as I can tell, did the claimant expressly mention section 112 or section 111, nor any other substantive provisions of the **EqA**, though he did refer in general terms to victimisation. But I think the following is relevant. First, in his Particulars the claimant was saying that in essence the respondent was somehow responsible for the acts of QRG, said to be its subsidiary. That emerges from the quote to which I have referred at paragraph 9 above, that the respondent by means of their German subsidiary decided not to consider his application for the role. Even if

the claim did not state that the respondent "helped" the German company to victimise him, the thrust of it is nevertheless clear: that the respondent was somehow legally responsible for his not obtaining the role in Köln with a company which was closely connected to it.

30. Reinforcing that point is that, secondly, the list of issues framed by EJ George referred to relevant detriments but also referred to the respondent "failing" to progress or reject the claimant's application for the role of Engineering Releasing Coordinator in about January 2018, implying that the essence of the factual claim here was that the respondent was somehow responsible for the rejection by QRG.

31. Thirdly, it is clear EJ Wyeth was aware of the possibility of a claim framed by reference at least to section 111, because at paragraph 79 of his judgment he referred to possible arguments about "individuals aiding, instructing or inducing discrimination", though he said such claims were not advanced before him. Thus he was aware of possible homes in the **EqA**, other than the "ordinary" claim under section 39, for a claim against the respondent.

32. In the circumstances, to echo the recent words of Bean LJ in **Mervyn v BW Controls** [2020] ICR 1364 at [42], I consider it "shouted out" from the claim form that, on the factual allegations made by the claimant, there was a potentially good claim under sections 112 of the **EqA.** I have sympathy for the EJ because that provision may not be the best-known to even experienced practitioners in the field; but I consider that a proper and careful analysis of the appropriate legal peg on which to hand the claim should have taken place before taking the draconian step of striking out the claim.

33. As the EAT put it in **Cox v Adecco** UKEAT 0339/19/18 in the context of a strikeout application against a litigant in person, when it summarised the relevant principles at [28]:

> "(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;
> ……
>
> (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;
>
> (9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances."

34. Here, if the allegations in the claim had been carefully analysed, I consider Tribunal should have determined that section 112 provided the appropriate legal vehicle for the facts pleaded by the claimant. I consider there was no need for an amendment application because this would merely identify the appropriate legal provision in the **EqA** which applied to the claimant's complaint.

35. On that premise, the issue on appeal whether the Tribunal was right to strike out the claim on the basis it was "fanciful", as the Tribunal said at paragraph 79, or because it was based on "mere assertion" as the EJ said at paragraph 81. In asking myself whether the EJ misapplied the law on strike-out to which he correctly directed himself earlier at paragraph 61-62, I bear in mind the following. Firstly, there was no dispute there that the claimant had done a "protected act", and the protected act was known to the respondent, including Emma Lloyd within the respondent's human resources department. Secondly, on any view it is clear there was some connection between the respondent and the German company which refused him the post.

36. Thirdly, the documents showed the respondent knew that the claimant was applying to the

German company for a new role in Köln, because the claimant had told Ms Lloyd in his communications with her, to which EJ Wyeth referred to at paragraphs 35 and following. Fourthly, Ms Lloyd clearly knew the German company reasonably well, because she was able to direct the claimant to the person who dealt with recruitment by her first name, Rojda (see paragraph 36 of the Tribunal Reasons). She knew, too, that following that email, the claimant had made an application or was intending to make an application for a post in Köln, because the claimant mentioned this to her and she replied to him in a subsequent e-mail, saying she had no influence over the recruitment process.

37. Fifthly, and taking the claimant's case at its highest, his pleaded case was that there were very close links between the respondent and QRG, including in relation to his recruitment, and discussions had taken place between individuals from the two companies about him. For example, in his Particulars he referred to discussions taking place between Emma Lloyd, Rob Ferrone, the director of the respondent, and Rojda Kaglayan in relation to his successful application to work for the respondent in 2014. He also referred to disclosure showing a conversation between all three of them in 2017, after he had been dismissed and brought the claim for discrimination, where he said their attitude to him had "drastically changed" and they had referred to him as "weird" and "lying", contending this change in attitude could "only be explained by animosity in respect of the earlier Tribunal case". Later in his Particulars he said, I think in relation to 2014, that "Clearly, Emma, the respondent's HR manager, was in a position to enquire into the German recruitment process as Mr Ferrone was overseeing it". He also referred to a November 2017 email, in which Ms Kaglayan apparently mentioned Mr Ferrone having told her that he had fired the claimant in July 2014 because he was "crazy". Stepping back, it seems to me the claimant was alleging that there were very close links, including in the recruitment processes, between those in the respondent and Ms Kaglayan in QRG, and that the previous tribunal claim he had brought had led to animosity towards him by all three.

38. Finally, according to the Tribunal, the claimant received the reply rejecting him on 19 February 2018 which gave only the barest reasons for why he was considered unsuitable for the vacancies for which he had applied. The email, which was quoted by the Tribunal at paragraph 39, simply said, "We are currently unable to offer you a position that matches your qualifications or expectations". The claimant makes two points in relation to that. He says the role he was applying for in 2018 was the same or was remarkably similar to the role he had applied for in 2014. Therefore, he poses the question, "Why was I not offered this job when I was considered suitable for the same or a very similar job in 2014?" Secondly, at least in his submissions to the Tribunal, the claimant presented some evidence to show there were other jobs within QRG for which he might have been suitable, seeking to undermine the explanation given in that email.

39. Against that background, I think the Tribunal erred in its approach, principally in paragraph 79 which it then adopted in striking at the victimisation claim at paragraph 81, by saying there was no evidence to suggest the respondent was involved in the decision by QRG or that, even if it the respondent was involved, it was “fanciful” to suggest that liability did not rest solely with QRG.

40. Assuming the claimant’s claim was properly classified as one brought under section 112, it was very unlikely the claimant would have direct evidence of victimisation because, as many authorities have explained, people do not generally disclose or admit to discrimination. If the respondent did help or induce the QRG not to engage the claimant because of the claim he brought in 2014, it was unlikely there would be documented evidence showing that. But there was some evidence to support the claimant’s case that there were close links between the companies and there were communications between individuals within them about him,

including Ms Kaglayan, indicating a change in attitude for the worse after he brought his discrimination complaint. Some of that evidence, it appears, was supported by documents obtained on disclosure. In addition, the claimant also had provided some grounds to suggest why things might not be as they seemed, to echo the words of LJ Underhill in **Ahir v British Airways** at paragraph 19, because he had provided some reasonable basis for explaining why his rejection by QRG was not based on sufficient reasons – including the curiosity that he had been rejected in 2018 from a similar post for which he had been considered suitable in 2014.

41. In that light, I consider the EJ erred in saying it was "fanciful" to say there was no reasonable prospect of the claimant showing that the respondent helped the German company not to engage him and that decision was taken because of his previous race discrimination complaint. Mr McCracken accepted that if the comments about the claimant, such as his being "weird" and the like were made because of the claimant's previous claim - the protected act - and that this led to his rejection from the post with QRG, that could amount to victimisation. When one adds to that the allegations and evidence of close connections between the respondent and QR and discussions about the claimant, I consider that if the facts were properly explored at trial it might transpire that the respondent did in fact knowingly help the German company to victimise the claimant by not offering him employment for the purpose of section 112.

42. In summary, I do not consider that the EJ was entitled to say that the high hurdle for striking out a discrimination case was met. The facts asserted by the claimant were not totally and inexplicably inconsistent with the contemporary documents, even if it would require the drawing inferences to establish that QR victimised him and the respondent "helped" it do so. The circumstances of his case were very different from the much more extreme facts in **Ahir v British Airways**, where the explanation being put forward by the claimant was inherently implausible. Once it was appreciated that the claim could have fallen within section

112 **EqA**, I consider everything else would have fallen into place. The allegations in the Particulars, supported in some cases by disclosed documents, provided a sufficient basis for showing the claimant had reasonable prospects of demonstrating at trial that the respondent could have been involved in the decision not to appoint him by the German company and in doing so could have helped the German company to victimise him within the meaning of the **EqA**. It follows ground (1) of the appeal is allowed.

43. **Ground (2)**. I therefore turn to ground 2. This is whether or not the ET erred, first, in concluding that the COT3 embraced claims against the respondent relating to employment with a different company; and, secondly, in deciding or assuming that the claim was confined to events which had already taken place by the date of the COT3. It is convenient to deal with them in reverse order.

44. The first issue is whether in the claim brought before the Tribunal the claimant was in fact making complaints about events after the date of the COT3 signed on 5 March 2018. Mr Young said that in the claim form itself the claimant was clearly complaining about acts of victimisation in relation to other posts and not simply the post(s) from which, according to the Tribunal, he was rejected in Köln in February 2018. Mr Young also relied upon the claimant's written submission presented at the preliminary hearing before EJ Wyeth.

45. Mr Young drew attention in particular to two comments in the Particulars attached to the claim form. One is on the first page of the Particulars, where the claimant said:

> "The claimant had recently left for employment in France for Germany and applied once more for the very same role as in 2014, as well as for other similar opportunities within QR's other projects (ex. UK). C asked Emma Lloyd whether she would agree to provide a favourable reference for the said application."

46. The second one is the reference in the Particulars, where the claimant said, "It is therefore

obvious that the respondent by means of their German subsidiary/JV decided not to consider C's application for any of their roles in Köln or elsewhere" (emphasis added).

47. I do not consider that this interpretation is a fair reading of the claim form as a whole: see **Ali v Office for National Statistics** [2005] IRLR 2001 per LJ Waller at [39]. It is clear from the first paragraph in the claim form that the claimant's claim was about the failure to progress a particular application because he said, "I am seeking to lodge a victimisation claim against [the respondent] for their failure to consider my application for a role in the company as well as a breach of contract claim ---". He returned to that, having referred to the passages to which Mr Young referred me, at the end of the relevant section in the Particulars on victimisation, where he said:

> "As there appears no alternative explanation, I think therefore I have suffered victimisation with regard to applying for a role in Köln earlier 2018 [*sic*] and the respondent's subsequent attitude/ lack towards my application."

48. I consider, read fairly, in the Particulars the claimant was not saying he had suffered continuing victimisation by not being considered for other unspecified posts but, rather, that he had suffered victimisation in relation to the post in Köln for which he had applied on 21 January 2018 and for which, as the EJ held, he had been rejected.

49. That conclusion is supported by the list of issues of EJ George, to which I have already referred. At paragraph 13.15, after referring to the respondent's failure to provide a reference (which is not part of any complaint under section 112), EJ George referred to the failure to progress or reject the application for a specific role, Engineering Release Co-ordinator. As EJ Wyeth recorded at paragraph 4 of his Reasons, the summary of EJ George was sent to the parties with a specific direction that if they considered it was inaccurate they should contact the tribunal.

The claimant did in fact make one small correction, but no change was made to paragraph 13.15. As a result, the hearing before EJ Wyett proceeded on the premise that the victimisation claim was about a single application. This interpretation also fits with the way that the claimant's application was framed when he applied for the job on 23 January 2018, because the subject heading to the e-mail said "Application for Engineering Release roles in Köln (data analyst and project analyst)" and I do not consider that, read fairly, the email was asking to be considered for any roles they might happen to have in the future. If such a claim were to be advanced, one would have expected the claimant to have specified in greater detail in his Particulars (for example) when he was victimised in relation to those roles.

50. Turning to what the claimant said in his written submissions to the Tribunal, it is right to say he set out a number of other similar positions that were available at around the time when he was rejected from the post in Köln. But this was in a section in which the claimant was really seeking to rely on it to undermine the respondent's reason in the e-mail of 19 February 2018, rejecting him from the specific post in Köln. He was saying, in other words, that the explanation did not bear scrutiny, because while KCIG/QR had said in his rejection e-mail they did not have any role which matched his qualifications or expectations, in fact there were such roles available.

51. In any event, I do not consider the statements in those submissions can be treated as somehow adding to his claim and therefore as amounting to a pleaded claim to the effect that the claimant was complaining about a continuing failure and victimisation on the part of QRG to consider him for roles for which he might be suited other than the Engineering Release roles for which he applied in January 2018.

52. In summary, I consider the correct reading of the claim brought before the tribunal is that the

claimant was claiming victimisation in relation to Engineering Release roles for which he applied on 23 January. It follows, on the Tribunal's finding that he received the e-mail of rejection on 19 February (paragraph 39), that any act of victimisation by the German company, and any help given by the respondent for the purpose of section 112 **EqA**, took place before the COT3 was signed.

53. The second and most difficult question is, on that premise, was the claim caught by the COT3 agreement? The parties do not disagree about the relevant legal test which I have to apply. It is summarised in **Royal Orthopaedic Hospital v Howard** [2002] IRLR 849 at [6], even if the EAT was there recording a submission from counsel for the respondent. The EAT cited the familiar approach to construction from **Investors Compensation Scheme Ltd v West Bromwich** [1998] 1 WLR 896 in which a court must ascertain:

> "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."

That is the ordinary rule for construing a contract. It is common ground that that same rule of construction applied to COT 3 settlement agreements: see **BCCI SA v Ali** [2001] ICR 337.

54. As it was put by the EAT in **Howard** at [9]:

> "The law does not decline to allow parties to contract that all or an 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."

55. I have already set out the passages in the Tribunal judgment where the EJ quoted the terms of the COT3 agreement The central question here is whether the claim, as properly analysed under section 112 of the **EqA**, was one "arising directly or indirectly out of or in connection with the

claimant's employment with the respondent, its termination or otherwise". The clause is explicit that that it applies to a claims “even though the claimant may be unaware at the date of this agreement of the circumstances which might give rise to it, or the legal basis for such a claim."

56. The submissions divided along the following lines. Mr Young for the claimant submitted that clause, while it might cover direct post-employment victimisation by the respondent, did not cover the circumstances of a claim under section 112, where the respondent helped victimisation by a third party. He contended that such a claim did not rise directly or indirectly out of the claimant’s employment with the respondent but, rather, with prospective employment with another company, QR or KCIG. Mr McCracken for the respondent submitted, against this, that the clause was intended to be very wide and was meant to achieve what he calls a "clean break" between the respondent and the claimant, meaning it settled all potential claims once and for all.

57. It has to be said the clause is not the best drafted. The reference in the first sentence of the second bullet point to paragraph 2 wrongly refers to a “payment set out in paragraph 1”, as the EJ noted at paragraph 42 of his Reasons. The meaning of the phrase "or otherwise" in the sentence “arising directly out of or in connection with the Claimant’s employment with the Respondent, its termination or otherwise” is also a little opaque. Those words do not fit easily as a matter of syntax with the preceding clause, though they do perhaps serve to emphasise the width of the clause.

58. There is also some doubt about what is meant by a claim "arising…indirectly out of employment". Mr Young gave the example of providing a bad reference after employment, which he said would be a potential claim of post-employment victimisation under section 108 EqA. It would not, he submitted, arise directly out of employment but might be said to arise

indirectly in the sense that the reference was a consequence of or somehow related to the previous employment.

59. The COT3 goes on, in the third bullet, to give a list of potential claims "for the avoidance of doubt" which it includes but is not limited to, referring to statutory claims under the EqA. I do not consider the wording of that clause can be read as extending the meaning of the preceding clause, but once again the extensive list is a further indication that the clause is meant to have a wide application.

60. For the claimant, Mr Young accepted that if the respondent itself directly victimised the claimant after his employment had ended but before the COT3 agreement was entered into, an argument that the claim was not covered by the COT3 would face a potential difficulty. This is because of the wording of section 108 of the **EqA**, which prohibits post-employment discrimination where it "arises out of and is closely connected to a relationship which used to exist" between the employer and employee. I consider he was right on this point: the relevant exclusion in the COT3 – "arising directly or indirectly out of or in connection with the Claimant's employment" – echoes the wording of section 108. It follows that if the pleaded claim was that the victimisation here was done directly by the respondent under section 39, the COT3 would have covered it.

61. However, Mr Young submitted that whereas under section 108 a claim must be connected with employment with the respondent, because it presupposes the existence of a previous employment relationship with which a claim is connected, there need not necessarily be such a connection in the case of a claim brought under section112 of the **EqA**. Using the language of section 112, the helper, A, could knowingly help another, B, to discriminate where A never employed the person at all. Mr Young submitted that, for example, someone who never

employed the claimant could nonetheless have "helped" QR to victimise the claimant. To that extent, I accept that section 112 does not have the same necessary connection with previous employment that section 108 requires. Nonetheless, the circumstances here are different from his examples because in fact, on the pleaded case, it was his previous employer, the respondent, who it is said helped the victimisation was by a third party.

62. I have not found this point easy, but I consider the better interpretation is that the clause in the COT3 does embrace the actual discrimination under section 112 which is alleged to have occurred in this claim. In construing the clause, I consider it is relevant to bear in mind that its wording and intended reach appears to be very wide: hence the references to claims "of any kind whatsoever, wheresoever and howsoever arising", he phrase "arising directly or indirectly out of or in connection with his employment its termination or otherwise", and the wide list of claims specifically listed "for the avoidance of doubt", which includes claims under the **EqA**.

63. In my judgment, as a matter of fact the claimant's specific claim under section 112 did involve an indirect link or connection with the claimant's employment. The claim he brought was connected with his previous complaint of race discrimination, which was about his treatment while an employee of the respondent, and which gave rise to the protected act necessary for such a claim to be brought at all. I do not consider it is very far from Mr Young's example of the failure of an employer to provide a reference to a former employee because of a protected act, even if such a claim would be brought under section 108 rather than section 112. Such a claim would be said to arise "directly or indirectly out of or in connection with" employment for the purpose of the COT3. I consider a similar analysis applies here because, on the claimant's case, the respondent helped QRG to victimise him because of his complaint that he had been discriminated against while employed by the respondent.

64. I do not consider the fact that QRG is a separate legal person, and no cause of action arose until it refused to offer the claimant employment, is sufficient to detract from the width of the wording of the clause. In my judgment, the actual claim arose indirectly out of and in connection with the claimant's employment because one of the necessary factual ingredients of his succeeding in a claim under section 112 was the protected act based on his treatment while he was employed by the respondent. Such a connection with previous employment may not be a necessary legal ingredient of all claims under section 112; but it was an essential factual element of the particular claim under section 112 advanced here.

65. For completeness, nor do I consider that paragraph 11 of the EAT ruling in **Howard** assists the claimant. The issue in **Howard** was whether a COT3 agreement, signed in 1998 when Mrs Howard's employment terminated, covered a claim based on victimisation when she asked to work for the respondent in 2000. I do not consider at paragraph 11 the EAT was making any general statement about whether her later claim arose out of her employment. It was addressing a different issue of whether the clause in that case, which applied to claims which the claimant "has or may have against the respondent", was apt to embrace claims made after the date of the COT3 form. The EAT held that the wording of that expression only covered existing, and not future, claims (see paragraph 9). Its analysis at paragraph 11 was, in my view, only directed to addressing whether or not the later claim she brought did exist at the date of the agreement, which the EAT concluded it did not because the cause of action was not completed until after the date of the COT3 agreement.

66. In contrast to **Howard**, in this case I consider the better interpretation of the clause in the COT3 is that it did cover the type of claim which was being advanced. I am reinforced in that view by the phrase at the end of the clause, by which the clause was meant to apply even if the claimant was unaware of "the legal basis for such a claim". After all, the essence of the

claimant's complaint was that the respondent had engineered his non-engagement with its German subsidiary because of the previous claim he had brought against the respondent about his treatment during his employment by it. If one were to analyse such a complaint without reference to section 112, it would appear to fall within the wording of the COT3: it was connected with or indirectly arose out of his previous employment. That is should have been properly categorised as a claim of helping under section 112 is not, in my judgment, sufficient to displace the width of the clause.

67. Finally, I do not consider that the background to the COT3 helps to resolve the issue. Even assuming the parties knew at the date it was signed that the claimant might be considering bringing another claim, I consider the background does not assist in resolving the issue on this appeal. On the one hand, it might be said that if the respondent wanted to exempt such a claim, they should have said so clearly; but, on the other, if the parties had such knowledge, it would also be a factor suggesting that the clause was intended to wrap up everything once and for all. My conclusion is based on the construction of the clause itself.

68. In the circumstances, I allow the appeal on ground 1 but dismiss it on ground 2. The consequence of that is that the employment decision stands.